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Cal.Rep. 29–30 P.2d—a

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

29 P.2d – 30 P.2d

TO BE CITED BY VOLUME AND PAGE
OF THE
PACIFIC REPORTER
SECOND SERIES

ST. PAUL, MINN.
WEST PUBLISHING CO.
1941

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Pacific Reporter, Second Series, Vol. 29, Nos. 1-4; Vol. 30, Nos. 1-4.

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CAL.REP.29-30 P.2d
5th Reprint—1974

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IN VOLUME

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SECOND SERIES

220 Cal. 57

GODFREY v. BROWN et al.

S. F. 14635.

Supreme Court of California.

Feb. 1, 1934.

Rehearing Denied March 2, 1934.

1. Automobiles 🔑181(1).
Automobile guest could sue host for ordinary negligence causing personal injuries prior to effective date of Vehicle Act which abrogated such right of guest (St. 1923, p. 517, as added by St. 1929, p. 1580).

2. Appeal and error 🔑1033(5).
Instruction that automobile guest and drivers were only parties interested in case, which modified requested instruction that no insurance company was interested in case, toward conclusion of which juror had asked whether one driver carried liability insurance, *held* not prejudicial to driver.

3. Automobiles 🔑246(9).
Instruction that automobile traveling at lawful speed had right of way over automobile approaching from the left if both drivers approached intersection at approximately same time *held* not ambiguous because not defining boundaries of intersection at which there was short jog into opposite street (St. 1925, p. 412, § 131).

4. Trial 🔑256(10).
Correct instruction relative to right of way had by automobile over another automobile approaching intersection from the left *held* not objectionable because omitting statement of rights of drivers if driver on the left entered intersection first, absent request for such statement (St. 1925, p. 412, § 131).

5. Trial 🔑194(16).
Instruction that motorist must exercise reasonable care to slow up if situation requires, and must stop if reasonably necessary, *held* not erroneous because taking from jury question of what constitutes ordinary care under circumstances.

6. Automobiles 🔑242(2).
Under evidence, doctrine of res ipsa loquitur *held* applicable in action by injured guest against host who had exclusive control of his automobile which collided with another automobile and overturned.

7. Automobiles 🔑242(2).
In action by injured guest against host who had exclusive control of his automobile which collided with another automobile and overturned, evidence *held* insufficient to overcome presumption that host was negligent, raised by doctrine of res ipsa loquitur.

THOMPSON and LANGDON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Ella Godfrey against C. W. Brown and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

Prior opinion, 21 P.(2d) 994.

Rehearing denied; LANGDON and THOMPSON, JJ., dissenting.

Rittenhouse & Snyder, of Santa Cruz, and Charles V. Barfield and Eldon B. Spofford, both of San Francisco, for appellant.

Ford & Johnson, of San Francisco, and Wyckoff, Gardner & Parker, of Watsonville, for respondent.

PER CURIAM.

Appeal from a judgment for the plaintiff in an action to recover damages for personal injuries sustained in a collision between two automobiles.

The plaintiff was riding as a guest in the rear seat of an automobile driven by her brother, the defendant Brown. Brown was driving easterly along Hubbard street in the city of Santa Cruz and approaching the intersection of that street with Market street. Hubbard street enters Market street from the west, but it does not continue across the intersection. Berkeley way forms an intersection with Market street about fourteen feet southerly from the intersection formed almost opposite by Hubbard street; that is, the southerly boundary of Berkeley way entering Market street from the east is about fourteen feet south of the southerly boundary of Hubbard street entering from the west. Thus there is a fourteen-foot jog to the south on Market street for a driver entering Berkeley way from Hubbard street.

On the morning of January 29, 1928, the defendant Brown, on Hubbard street, was approaching its intersection with Market street at practically the same time the defendant Cole on Market street was approaching the southerly boundary of Berkeley way from the south. They saw each other. Cole did not look again at Brown after he first saw him, and slowed down, but picked up his speed and continued across the intersection at a rate between twenty and thirty miles an hour. Brown, still watching Cole, without stopping or slowing down, continued straight ahead into the intersection. He applied no pressure on the brakes until Cole had proceeded so far that the application was insufficient to prevent the hooking of the left front of Brown's car with the left rear of Cole's bumper or fender. As a result, Brown's car was dragged by Cole's and overturned against the curb on the opposite side of Market street. The plaintiff was extricated in an unconscious condition and received serious injuries. She sued the drivers of both cars. The jury awarded a verdict of $7,500 against both defendants. The defendant Brown alone appeals.

[1] The injury occurred prior to the effective date of section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580), and the cause of action based on negligence was therefore maintainable as against the appellant. Callet v. Alioto, 210 Cal. 65, 290 P. 438.

Several alleged errors in the giving of and refusal to give certain instructions and misconduct of counsel claimed to be prejudicial to the rights of the appellant are urged as grounds for reversal.

[2] Toward the conclusion of the trial one of the jurors asked whether the defendant Brown carried liability insurance. The court told the jury that that was not a proper question. Counsel for the defendant Brown made the statement: "I would like to answer that but do not insist on it." The plaintiff's counsel waived any objection to an answer, but no answer was made, and the court instructed counsel to proceed with the conduct of the trial. The defendant Brown asked for an instruction admonishing the jury that no insurance company was a party to or interested in the outcome of the action. The court modified the instruction to the effect that the only parties to or interested in the outcome of the case were the plaintiff on the one hand and Brown and Cole on the other. On this showing we conclude that the defendant Brown was not prejudiced. It is further insisted, however, that, when these proceedings took place, the plaintiff's counsel giggled, chortled, smiled, and glanced knowingly at the jury for the evident purpose of conveying an affirmative answer to the juror's question. These proceedings and conduct were presented to the trial court in affidavits and counter affidavits on a motion for a new trial, which placed the alleged misconduct of counsel in issue. We cannot say on the record presented that the denial of the motion made on that ground was an abuse of discretion.

[3, 4] The court instructed the jury that at the time of the accident the law provided that "Where two vehicles approach an intersection of public highways at approximately the same time the vehicle approaching from the right shall have the right of way provided such vehicle is traveling at a lawful rate of speed" (St. 1923, p. 560, § 131, as amended by St. 1925, p. 412); further, that if Brown and Cole approached the intersection of Hubbard street and Berkeley way with Market street at approximately the same time, and Cole was driving at a lawful rate of speed, Cole had the right of way over Brown approaching from the left, and it was the duty of Brown to yield the right of way. It is urged that this instruction is ambiguous because it does not define the south boundary of the intersection. The theory of counsel is that, if the southerly boundary of the intersection is an extension of the southerly line of Hubbard street, the defendant Brown would have arrived at the intersection first, and the instruction would be erroneous. If the jury understood from the instruction and from the map before it that an extension of the southerly side of Berkeley way constituted the southerly boundary of the intersection of both cross streets with Market street, it was not an incorrect understanding. At this intersection with such a short jog into the opposite street, a driver approaching Market street from Hubbard and intending either to make a left turn or to proceed across into Berkeley way is compelled to consider the traffic flowing northerly on Market street approaching Berkeley way before he executes his intention. There was nothing erroneous, therefore, in the assumed definition of the intersection. Furthermore, there is no showing that the defendant Brown requested an instruction embodying a definition of the boundaries of the intersection. He offered an instruction on the same subject which incorporated the word "reached." That word was changed to "approached" by the trial court and given as asked. No error can be predicated on the modification in view of the provisions of section 131 (a) of the California Vehicle Act then in force. St. 1925, p. 412. The appellant also urges that the instruction is incomplete inasmuch as it does not define

the defendants' respective rights if it be found that the defendant Brown entered the intersection first. The instruction covered the subject of the subdivision as it then existed. The defendant Brown did not request an instruction on the claimed omission, nor did he incorporate any comment thereon in the instruction on the same subject requested by him and given by the court. If he desired such an instruction, he should have made the appropriate request. Furthermore, it must be assumed that the jury understood that, if the facts stated in the instruction were not found, Cole did not have the right of way. This is not inconsistent with the result in the case of Keyes v. Hawley, 100 Cal. App. 53, 279 P. 674, cited by the appellant, where the evidence was that the appellant's car had entered the intersection when his codefendant's car was several car lengths beyond the intersection. In the present case the evidence without substantial conflict is that both cars approached the intersection as defined by the court at approximately the same time.

[5] The appellant questions the correctness of an instruction given which told the jury that an operator of an automobile is not necessarily exempt from liability by simply showing that he complied with the law relating to the rate of speed, but that he still is bound to anticipate the presence of other vehicular traffic, and that he must keep a "proper" lookout and keep his vehicle under such control as will enable him to avoid a collision with another automobile which is operated with reasonable care "and, if the situation requires, he must exercise reasonable care to slow up and if reasonably necessary, stop." It is claimed that such an instruction takes from the jury the question of what constitutes ordinary care under the circumstances. This is not the effect of the instruction. Whether or not slowing up or stopping was necessary or reasonable and what was the proper conduct of both defendants under the circumstances was expressly left with the jury. Similar instructions have heretofore been approved. Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739; Schatte v. Maurice, 116 Cal. App. 161, 2 P.(2d) 489.

[6] The only remaining contention is that the court erred in applying the doctrine of res ipsa loquitur in the case. The court instructed the jury: "Where one is riding in an automobile as an invited guest; and the driver of the car is in the exclusive control thereof; and if it is shown that the car, while being so driven, is overturned, the doctrine of res ipsa loquitur is applicable. That doctrine is stated as follows: Where the thing is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, the fact of the accident affords reasonable evidence, in the absence of explanation by the defendant, that the accident came from want of care."

The appellant cites Keller v. Cushman, 104 Cal. App. 186, 285 P. 399, Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38, Scellars v. Universal Service Co., 68 Cal. App. 252, 228 P. 879, and Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 66 P. 787, 55 L. R. A. 608, to uphold the contention advanced by him that, where the plaintiff's injury results from a collision between two automobiles, the doctrine of res ipsa loquitur is not applicable, and an inference of negligence against the party in whose automobile the plaintiff was riding as a guest does not arise. The basis of the distinction sought to be made by the appellant, viz. that the circumstances surrounding the injury must be such that there can be no reasonable inference other than that the injury was due to the acts of the defendant sought to be charged, is applied to prevent the inference being raised in cases involving instrumentalities other than vehicles. The doubt arising in cases involving a collision between two vehicles and the plaintiff a passenger in one has been dissipated in those cases at least wherein the facts are that the plaintiff was a passenger for hire in the defendant's train, street car, bus, or taxicab. St. Clair v. McAlister, 216 Cal. 95, 13 P.(2d) 924; Housel v. Pacific Elec. Ry. Co., 167 Cal. 245, 139 P. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171; Holt v. Yellow Cab Co., 124 Cal. App. 385, 12 P.(2d) 472; Sloan v. Original Stage Line, Inc., 124 Cal. App. 317, 12 P.(2d) 465; Kilgore v. Brown, 90 Cal. App. 555, 266 P. 297; Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Atkinson v. United Railroads of San Francisco, 71 Cal. App. 82, 234 P. 863. In that class of cases the doctrine has been limited in its application to the defendant who was carrying the plaintiff as a passenger. Tompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 P. 1165; Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 66 P. 787, 55 L. R. A. 608.

No doubt is entertained that the doctrine is applicable when the plaintiff has been injured in an accident involving only the car being driven by the defendant who is not a common carrier, as well as where the defendant is a common carrier. Cookson v. Fitch, 116 Cal. App. 544, 3 P.(2d) 27; Queirolo v. Pacific Gas & Elec. Co., 114 Cal. App. 610, 300 P. 487; Ireland v. Marsden, 108 Cal. App. 632, 291 P. 912; Crooks v. White, 107 Cal. App. 304, 290 P. 497; Brown v. Davis, 84 Cal. App. 180, 257 P. 877.

The statement of the doctrine held applicable is taken from section 59 of Shearman & Redfield on Negligence (6th Ed.), and is the statement given to the jury in the present case, viz.: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Housel v. Pacific Electric Ry. Co., supra, page 247 of 167 Cal., 139 P. 73, 74, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665.

The appellant contends that, where a collision between two vehicles is involved and the plaintiff is a passenger in one, the application of the doctrine should be restricted to those cases wherein the defendant sought to be charged was a common carrier.

In a few of the cases wherein the defendant sought to be charged was a common carrier and the plaintiff its passenger, there is language which appears to place the reason or basis for the application of the doctrine on the higher degree of care required to be exercised in the transportation of the passenger for hire. McCurrie v. Southern Pac. Co., 122 Cal. 558, 561, 55 P. 324; Housel v. Pacific Elec. Ry. Co., 167 Cal. 245, 249, 139 P. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665; St. Clair v. McAlister, 216 Cal. 95, 13 P.(2d) 924.

The inference of negligence which is stated to arise when the plaintiff has been injured by the vehicle under the control of the defendant as a common carrier, and which places upon the defendant the burden of going forward with evidence that the injury was not caused by its negligence (Bush v. Barnett, 96 Cal. 202, 31 P. 2; McCurrie v. Southern Pac. Co., 122 Cal. 558, 55 P. 324; Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 P. 169, 92 Am. St. Rep. 171), is the same in all practical respects as in cases where the doctrine of res ipsa loquitur has been applied. In some of the cases the conclusion that the inference is established is based on both grounds. Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; St. Clair v. McAlister, supra. In others the inference is considered established by the application of the principles underlying the doctrine of res ipsa loquitur, both in cases where no collision occurred as well as where another vehicle was involved. Holt v. Yellow Cab Co., 124 Cal. App. 385, 12 P.(2d) 472; Sloan v. Original Stage Line, Inc., 124 Cal. App. 317, 12 P.(2d) 465; Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627; Seney v. Pickwick Stages, 82 Cal. App. 226, 255 P. 279; Horney v. Dillingham, 81 Cal. App. 443, 253 P. 970; Atkinson v. United Railroads of San Francisco, 71 Cal. App. 82, 234 P. 863; Leitert v. Pickwick Stages, 68 Cal. App. 504, 229 P. 889. The workability of the rule that the inference of negligence arises is the same under either theory, and is summed up in Osgood v. Los Angeles Traction Co., 137 Cal. 280, at page 283, 70 P. 169, 170, 92 Am. St. Rep. 171, in the following language: "If the fault or negligence which was the proximate cause of the injury was attributable to some other vehicle under other and independent control, the defendant could so show, and that would be a good defense; but the presumption of defendant's negligence arises regardless of the fact that the injury may have been caused by some other agency. The instruction did not shift the burden of proof of the whole case to defendant. It was nothing more than saying that, upon the particular issue, plaintiff has established negligence on defendant's part, and defendant must meet this proof by 'showing that the injury was without any negligence on its part.' "

We come then to the case of Smith v. O'Donnell, 215 Cal. 714, 12 P.(2d) 933, 936, in which the plaintiff, being carried as a guest passenger in the defendant's airplane, received injuries as a result of a collision between it and a plane flown by Ebrite. While in that case it was held that the defendant was a common carrier and owed the same duty of care to the plaintiff as to a passenger for hire, and it was noted that the doctrine of res ipsa loquitur was most frequently applied against common carriers, nevertheless the underlying principles of the doctrine were held applicable by virtue of the facts of the accident itself. The court said: "The question really is whether the doctrine was applicable under the facts proved. It should be remembered that the injury was occasioned by a collision in the air with the plane of Ebrite. The foundation or reason for the doctrine is based upon probabilities and convenience. When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality, and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can the most conveniently prove it raises a presumption of negligence which the defendant must overcome by proof that there was in fact no negligence. O'Connor v. Mennie, 169 Cal. 217, 146 P. 674, 676; Judson v. Giant Powder Co., 107 Cal. 549, 48 Am. St. Rep. 146, 29 L. R. A. 718, 40 P. 1020; Kahn v. Triest-Rosenberg Cap Co., 139 Cal. 340, 73 P. 164. In other words, as is said in the first-cited case: '* * * To justify its application in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. * * *'" It was also said: "If the proper degree of care is used, a collision in midair does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury." It is to be noted that in that case the plane of Ebrite crashed upward through the right wing of the defendant's plane. Ebrite v. Crawford, 215 Cal. 724, 727, 12 P.(2d) 937. Nevertheless it was held that the plaintiff Smith was entitled to rely upon the doctrine, inasmuch as such a collision in midair does not ordinarily occur if the defendant has exercised the degree of care required of him.

It is manifest from the decided cases that no distinction can properly be made, and the application of the doctrine of res ipsa loquitur be refused, as against a defendant who had control of the vehicle in which the plaintiff was a passenger, merely on the ground that the defendant was not a common carrier. When the relationship between the parties and the defendant's duty have been shown, a plaintiff, free from negligence, has established a prima facie case when proof is made that he has sustained injury in a collision between the vehicle driven by the defendant and another vehicle. And this is so, whether the defendant be a common carrier or a private carrier, and the plaintiff a passenger for hire or a guest. As in a case where no other vehicle is involved, i. e., where the vehicle in which the plaintiff was riding overturns or is run into an obstruction, the inference raised may be overcome by the defendant's showing that the collision was not due to his negligence; and in a case such as the present this showing may be established by proof that the injury was caused solely by the negligence of the driver of the other vehicle. If the doctrine of res ipsa loquitur is applicable at all in the present case, it is obvious that it applies as stated and not as limited by the trial court in the first part of the instruction complained of, viz. to the overturning of the car. Also, if the doctrine applies, the limitation stated in the instruction cannot be a subject of complaint by the appellant.

The facts in the present case justify the implied finding of the jury that the appellant perceived Cole during the time both were entering the intersection, and in the exercise of ordinary care under the circumstances should have been able to avoid the impact with Cole's car. It is no answer in this case to say that Cole, because he was exceeding the speed requirements at that intersection, did not have the right of way. On the record the jury could properly find that Brown must have seen that Cole in any event intended to take the right of way, and in the exercise of ordinary care, in so far as the plaintiff was concerned, should have yielded that right to Cole.

Keller v. Cushman, 104 Cal. App. 186, 285 P. 399, 400, relied on by the appellant, involved an appeal by the plaintiff from a judgment entered on an order granting the defendant's motion for a nonsuit. The plaintiff's decedent was killed when at an intersection of two highways another automobile struck the automobile in which he was riding as a guest. The plaintiff sued the driver of the automobile in which the decedent was riding. As to the facts, the reviewing court stated, "All that is shown is the fact of a collision in which a car driven by a person other than the defendant, collided with the car driven by the defendant," and that the facts otherwise showed that the defendant was free of negligence. The court held that the plaintiff was not entitled to the application of the doctrine of res ipsa loquitur. In arriving at that conclusion the court followed the cases of Scellars v. Universal Service, 68 Cal. App. 252, 228 P. 879, and Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38. In the former case the principle relied upon by the court in the case of Keller v. Cushman was employed to deny the application of the doctrine of res ipsa loquitur to facts involving injury to the plaintiff's automobile supposedly while it was in the charge and control of the defendant garage. In Diamond v. Weyerhaeuser, the plaintiff was on a milk wagon which collided with the defendant's automobile. On appeal by the plaintiff from a judgment entered on a directed verdict, it was held that negligence in such a case was not to be inferred from the mere fact of injury. In the case of Keller v. Cushman, the court did not distinguish the case before it as involving the defendant as the driver of the car in which the plaintiff was riding as a passenger at the time of the collision.

The cases of Scellars v. Universal Service, and Diamond v. Weyerhaeuser, supra, also relied upon by the appellant, are therefore disposed of as being not in point on the facts.

In Harrison v. Sutter Street Ry. Co., 134 Cal. 549, 66 P. 787, 55 L. R. A. 608, wherein the plaintiff was injured while a passenger on a street car when it collided with a brewery wagon, the court, following Tompkins v. Clay St. R. R. Co., 66 Cal. 163, 4 P. 1165, held that an instruction seeking to apply the doctrine of res ipsa loquitur against the operators of both vehicles who were made defendants was properly refused.

In Edwards v. Gullick, 213 Cal. 86, 88, 1 P. (2d) 11, the plaintiff was injured while riding as a guest in an automobile driven by the defendant Gullick, which collided with another automobile. It was not concluded that an instruction which applied the doctrine of res ipsa loquitur as against Gullick was erroneous on the ground urged in that case and stated in Keller v. Cushman, supra; but it was held that, if the instruction was error in that respect, it was harmless, inasmuch as the negligence of the defendant Gullick was established by the facts in evidence.

There is no contention in the present case that the court did not properly instruct the jury that the burden rested upon the plaintiff at all times to prove her case by a preponderance of the evidence; nor is there any claim that the damages awarded were excessive.

[7] We conclude that the giving of the instruction complained of was not error and that the record supports the jury's implied finding that the defendant did not overcome the inference that the accident was due to negligence on his part.

Judgment affirmed.

IRA F. THOMPSON, Justice (dissenting).

I dissent. In my judgment, the majority opinion unduly extends the application of the doctrine of res ipsa loquitur. In the earlier cases it was thought that the doctrine was never applicable in those cases where two instrumentalities under separate control were involved in the accident. Harrison v. Sutter St. Ry. Co., 134 Cal. 549, 66 P. 787, 55 L. R. A. 608, and Diamond v. Weyerhaeuser, 178 Cal. 540, 174 P. 38. Lately, it has been held proper to extend application of the rule to one of two involved instrumentalities where, at the time of the accident, it was a common carrier vehicle and where the plaintiff was seeking to establish the concurring negligence of those in control of both. Burke v. Dillingham, 84 Cal. App. 736, 258 P. 627, and St. Clair v. McAlister, 216 Cal. 95, 13 P.(2d) 924. The reason for extending the application of the doctrine to the last-mentioned cases lies in the fact that common carriers must exercise "the utmost care and diligence" for the safety of their passengers. Section 2100, Civ. Code; Housel v. Pacific Electric Ry., 167 Cal. 245, 139 P. 73, 51 L. R. A. (N. S.) 1105, Ann. Cas. 1915C, 665; Smith v. O'Donnell, 215 Cal. 714, 723, 12 P.(2d) 933, 936. In the last-cited case, after referring to the language of the first to the effect that, by reason of the very high degree of care required of common carriers, such accidents do not ordinarily occur, it is said: "The language is peculiarly apt in the instant cause. If the proper degree of care is used, a collision in midair does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury." However, the same may not be said of one driving an automobile who is under the necessity of exercising only that degree of care which the ordinarily reasonable man would exercise. Common knowledge dictates to us that automobiles collide with great frequency, where one of the drivers thereof is using ordinary care. Hence the distinction between the two is well illustrated by the familiar statement that "* * * [T]he doctrine is applicable only where the physical cause of the injury and the attendant circumstances indicate such an unusual occurrence that in their very nature they carry a strong inherent probability of negligence and in the light of ordinary experience would presumably not have happened if those who had the management or control exercised proper care." 45 Corpus Jur. 1213.

The distinction is well pointed out in Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925, 927, 52 L. R. A. 922, 82 Am. St. Rep. 630, in these words: "Of course, the relation of the parties may determine the fact to be proved, whether it be the want of the highest care or only want of ordinary care; and, doubtless, circumstantial evidence, like direct evidence, may be insufficient as a matter of law to establish the want of ordinary care, though sufficient to prove absence of the highest degree of diligence." And in Oil Co. v. Torpedo Co., 190 Pa. 350–352, 42 A. 707, 708, the same fundamental difference is noted as follows: "The maxim, 'Res ipsa loquitur,' is itself the expression of an exception to the general rule that negligence is not to be inferred, but to be affirmatively proved. The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer."

There is a still further reason for the application of the doctrine to common carriers generally which does apply here, and it is this, that the doctrine is based in part upon what is sometimes called the rule of convenience and sometimes called the rule of necessity; i. e., "as the management and control of the agency which produced the injury is, under the circumstances to which the doctrine applies, exclusively vested in defendant, plaintiff is not in a position to show the particular circumstances which caused the offending instrumentality to operate to his injury, while defendant, being more favorably situated, possesses the superior knowledge or means of information as to the cause of the accident, and should, therefore, be required to produce the evidence in explanation." 45 Cal. Jur. 1205.

In the instant cause, it cannot be said that defendant's knowledge of the cause of the accident was superior to that of plaintiff, nor is any reason assigned why the latter should not prove the negligence of the former, if he was, in fact, guilty.

Furthermore, in order to arrive at the result reached in the prepared opinion, the cases of Keller v. Cushman, 104 Cal. App. 186, 285 P. 399, and Gritsch v. Pickwick Stages System (Cal. App.) 22 P.(2d) 554, must be overruled. In my opinion, they cannot in principle be distinguished, and, for the reasons already stated, we should adhere to the rule announced therein.

I concur: LANGDON, J.

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220 Cal. 1

KADELLO v. KADELLO.

S. F. 14909.

Supreme Court of California.
Jan. 31, 1934.

1. Divorce ⚿329.

In wife's divorce action, evidence supported conclusion that husband's divorce decree secured in Nevada was void, where there was testimony tending to show perjury by husband as to ground for Nevada divorce and that purported domicile in Nevada was fraudulent.

2. Divorce ⚿330.

In divorce action by wife, refusal to permit husband to offer evidence of wife's cruelty and adultery in support of validity of divorce decree obtained by him in Nevada on ground of desertion *held* not error.

3. Divorce ⚿214(3), 226.

In divorce action against husband, order directing payment of $100 attorney's fee, $10 costs, and $50 per month to wife, *held* proper as against objection defendant's ability to pay was not established, where evidence showed sale of house by husband and his steady employment.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Alma C. Kadello against Ludwig J. Kadello. From an order directing payment of temporary alimony, attorneys' fees, and costs, defendant appeals.

Affirmed.

Clarence E. Rust, of Oakland, for appellant.

Edward P. Talbott, of Oakland, for respondent.

LANGDON, Justice.

This is an appeal from an order directing defendant to pay to respondent certain sums for temporary alimony, attorney's fees, and costs in a divorce action.

[1] On September 8, 1932, Ludwig Kadello received a decree of divorce from Alma Kadello in Reno, Nev., upon the ground of desertion, the defendant being served personally in California. On October 7, 1932, Alma Kadello commenced a divorce action in California against Ludwig Kadello, serving him personally within this state. An order to show cause why defendant should not pay alimony pendente lite, etc., was issued, and at the hearing the court found that defendant's Nevada decree was void and made the order.

The evidence fully supports the trial court's conclusion. Defendant testified that he had a job promised him in Nevada; that he gave up his residence in Oakland, Cal., went to Reno, worked for a while pitching hay, and secured a divorce; that the expected job did not develop and he soon after returned to Oakland. On the other hand, plaintiff testified that during May and June of 1932 (within the period of her purported desertion) she lived with and had matrimonial intercourse with defendant on numerous occasions. Her testimony on this point was corroborated by

Mrs. Coehlo, her daughter by a former marriage, and by Mrs. Letty Berg, a friend. Plaintiff also testified that she did not desert him, but that he left her on June 14, 1932, telling her he was going out of town about some work.

It thus appears that several witnesses testified to perjury by defendant as to the grounds for his Reno divorce; and his story of acquisition of a bona fide domicile there is vague, indefinite, and according to the evidence submitted by plaintiff, he was not justified in leaving her at all.

In this state of the record the trial court was justified in concluding that his purported domicile in Nevada was fraudulent and that the said decree was void. See Delanoy v. Delanoy, 216 Cal. 27, 13 P.(2d) 719, 86 A. L. R. 1321.

[2, 3] Defendant complains that the court refused to permit him to offer evidence of his wife's cruelty and adultery in support of the validity of the Nevada decree. The relevancy of such evidence is not apparent in this connection. It is further objected that plaintiff did not establish defendant's ability to pay, but there was evidence of a sale of a house by defendant, and of his steady employment. The court awarded $100 on account of attorney's fees, $10 for costs, and $50 per month to plaintiff. No sufficient showing is made against the propriety of the order.

The order is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; IRA F. THOMPSON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

SNYDER et ux. v. WESTERN LOAN & BUILDING CO. et al.*

S. F. 14890.

Supreme Court of California.

Feb. 1, 1934.

Rehearing Granted March 2, 1934.

1. Mortgages 🔑187.

Neither trustee nor beneficiary under trust deed can claim rights of mortgagee in possession in absence of specific agreement; rights thereunder depending on powers of trustee, who holds legal title for security, without right to possession in either trustee or beneficiary (Code Civ. Proc. § 744; Civ. Code, §§ 2926, 2927).

2. Mortgages 🔑187.

Same rules govern rights of trustee or beneficiary under trust deed to possession of premises as are applicable by statute to mortgagee, whose rights thereto are controlled by agreement or mortgagor's consent (Civ. Code, § 2927).

3. Mortgages 🔑187.

Where mortgagee or trustee or beneficiary under trust deed wrongfully ousts one entitled to possession of premises, he is liable as disseisor.

4. Mortgages 🔑187, 199(2).

Parties to trust deed may agree respecting their rights to possession of premises and collection of rents and income to discharge indebtedness.

5. Mortgages 🔑191, 467(3).

Where parties lending money, secured by trust deed, or their trustees are expressly given right to take possession of property and collect rents and income to apply on indebtedness, they may take possession personally or file petition for appointment of receiver to do so.

6. Mortgages 🔑191, 199(2).

Trustee, given right by trust deed to appointment of receiver to collect rents and income from premises after trustors' default, *held* not entitled to take possession and retain rents collected without applying for such appointment (Civ. Code, § 3534).

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Suit by Sam Snyder and wife against the Western Loan & Building Company and another. From a judgment for plaintiffs in part, they appeal.

Reversed.

W. L. Claiborne and Gerald F. Harrington, both of Oakland, for appellants.

Donahue, Hynes & Hamlin, of Oakland, for respondents.

PER CURIAM.

Appeal by the plaintiffs from a judgment partially in their favor.

The plaintiffs sought an accounting and a recovery from Western Loan & Building Company, which will be referred to as the defendant, of sums of money alleged to have been collected by them while they were in possession of certain real property owned by the plaintiffs.

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*For subsequent opinion see 37 P.2d 86.

One Henry G. Hill and his wife owned two separate parcels of land in Oakland. One was improved by an apartment building and the other by garages for the use of tenants of the apartment house. On July 8, 1930, the Hills executed a note and deed of trust on the apartment-house property alone with the defendant as beneficiary to secure a loan of $55,000. The trust deed was duly recorded. As a part of the same transaction, the Hills also executed a conditional assignment of rents which was not recorded. The latter instrument provided for an assignment of all the rents from the apartment house to the defendant Western Loan & Building Company as further security for the debt. It also vested the defendant with power to appoint an agent to take possession, manage the premises, and collect the rents for the purposes of the assignment.

On March 16, 1931, pursuant to an exchange agreement, the Hills deeded all of the real property mentioned to the plaintiffs in exchange for real property in Utah. The deed of the Hills to the plaintiffs was duly recorded. Hill continued to operate the apartment house and garages for the plaintiffs who resided in Coalinga, Cal., and to make payments under the deed of trust to the defendant. About or prior to July, 1932, the plaintiffs defaulted under the trust deed, and on August 1, 1932, the defendant took possession of the apartment house by appointing Hill's manager its agent for the purpose. From that time the defendant collected the rents from the apartment house and the garages and applied them to the indebtedness under the trust deed. On November 25, 1932, the apartment house was sold pursuant to the deed of trust. The defendant made no application for a receiver, nor was one appointed.

The present action was commenced in August, 1932, to enjoin the defendant from exercising acts of possession, for an accounting and other relief. The trial court found that the defendant was in possession and was entitled to the possession of, and the rents from, the apartment house property by virtue of the provisions of the deed of trust. The court also found that, since August 1, 1932, the defendant had collected the sum of $210 as garage rentals to which it was not entitled. No finding was made as to the amounts received and collected as rentals of apartments, nor the amounts disbursed in the management thereof. On February 14, 1933, judgment for the plaintiffs was entered for the sum of $210.

The ground of the plaintiffs' appeal is that the trial court erred in finding that the defendant was rightfully in possession of the apartment house, during the period between August 1, 1932, and November 25, 1932, and was entitled to retain the rents collected during that period.

That the assignment of rentals separately executed by the then owners of the property was not recorded is not disputed and the record is that the plaintiffs had no actual knowledge of the existence of that instrument. It is apparently conceded that that instrument cannot operate as a consent to the defendant's possession as against the plaintiffs, and it is not disputed that the plaintiffs did not expressly consent to the possession by the defendant unless that consent is expressed within the terms of the deed of trust; nor is it disputed that the circumstances of the case do not show an implied consent. The issues rest on the proposition advanced by the defendant that it derived its authority to take possession and collect the rents either from the provisions of the trust deed or by the application to the present situation of the rules governing the rights of a "mortgagee in possession."

[1] At common law a mortgage of real property as security was accompanied by a transfer of the possession from the mortgagor to the mortgagee. The mortgagee's possession continued until the debt was discharged, unless otherwise expressly agreed. When by statute or otherwise a mortgage became a lien only and was no longer a conveyance, the transfer of the interest thereby acquired by the mortgagee was no longer accompanied by a change of possession. Code Civ. Proc. § 744; Civ. Code, §§ 2926, 2927; 41 Cor. Jur. 608, §§ 573, 579. There is, however, authority to support the proposition that a mortgagee, not entitled to possession in the first instance, who, at least after default, succeeds peaceably in obtaining possession of the mortgaged premises, cannot be ousted without a tender of the amount due. This doctrine does not depend on the terms of the mortgage, but is applicable by virtue of the relationship existing between the mortgagor and mortgagee. 41 Cor. Jur. 609–612, §§ 577, 580; 2 Jones on Mortgages (8th Ed.) § 824. In defending possession under this theory the manner of the mortgagee's entry becomes an issue. The plaintiffs here contend that the defendant obtained possession by fraud or trick and artifice, and that such an entry is unlawful. However, it becomes unnecessary to discuss that phase of the case inasmuch as it is our conclusion that the relationship among the parties, in the absence of any specific agreement, does not permit either the trustee or the beneficiary under a deed of trust to claim rights accorded to a mortgagee in possession. If the finding that the defendant was in pos-

session by virtue of the terms of the trust deed, and therefore with the express assent given thereunder, is supported, it likewise becomes unnecessary to discuss the manner of its entry.

[2, 3] There is no history or relationship among the parties in the case of a trust deed analogous to that existing with reference to a mortgage. The rights, duties, and obligations under the tripartite agreement depend on the powers vested in and exercised by the trustee who holds the legal title for purposes of security and without any incidental right to possession in either the trustee or the beneficiary. Furthermore, conceding that the defendant may rely on a doctrine analogous to that of a mortgagee in possession, it must accept the rules governing it established under our statutes. With the exception that under a trust deed title passes to the trustee, the characteristics and purposes of a trust deed and a mortgage as they exist in this state have been held to be similar. Bank of Italy v. Bentley, 217 Cal. 644, 655, 657, 20 P.(2d) 940. The right to possession does not pass to the trustee or the beneficiary under a trust deed in the absence of a special agreement. Meadows v. Snyder, 209 Cal. 270, 286 P. 1012; 25 Cal. Jur. 41, 42; 41 Cor. Jur. 609, § 575. We must apply, therefore, the same rules as to the rights of the trustee or the beneficiary to possession of the premises as are applicable by statute in the case of a mortgagee, whose rights to possession, whether before or after default, are controlled by the agreement, or the consent otherwise of the mortgagor, express or implied. Civ. Code, § 2927; Meadows v. Snyder, 209 Cal. 270, 286 P. 1012; Cameron v. Ah Quong, 175 Cal. 377, 165 P. 961; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; 17 Cal. Jur. 1020–1022; 1 Jones on Mortgages (8th Ed.) § 22. Where a mortgagee, and likewise a trustee or beneficiary under a trust deed, wrongfully ousts the one entitled to possession, he is liable as a disseisor. 19 R. C. L. 316; Meadows v. Snyder, supra.

[4, 5] Conversely it would seem to follow that the parties to a deed of trust may expressly agree with reference to their respective rights to possession, and collection of the rents and income to be applied to discharge the indebtedness. Such provisions have been upheld. Mines v. Superior Court, 216 Cal. 776, 16 P.(2d) 732; Sacramento & Placerville R. R. Co. v. Superior Court, 55 Cal. 453. Where the lending parties or their trustees are expressly given the right to enter and take possession of the property and collect and apply the rents and income to the discharge of the indebtedness, they have the option to take such possession personally or to file a petition to have a receiver appointed to take possession. Am. Bridge Co. v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144.

[6] From the facts shown by the record in this case, it is apparent that the defendant in taking possession and retaining the rents collected by it during the period involved was attempting to act pursuant to the terms of the unrecorded assignment of rentals. It is now faced with the necessity of justifying its act under the provisions of the deed of trust as against the plaintiffs, the grantees of the trustors. In the deed of trust, following the usual granting clauses, appears the following: "Together also with the rents, issues, profits and income from said premises with the right at any time after default or maturity to collect the same, and to enforce this provision the trustee shall be entitled to the appointment of a receiver." The defendant relies upon that language and upon the following language also appearing in the deed of trust: "Should trustor fail or refuse to make any payment or do any act which he is obligated hereunder to make or do at the time and in the manner herein provided, then the trustee and/or beneficiary, each in its sole discretion, may without notice to or demand on trustor and without releasing trustor from any obligation thereof: (1) Make or do the same in such manner and to such extent as it may deem necessary to protect the security of this deed of trust, either trustee or beneficiary being authorized to enter upon and take possession of said property for such purposes."

Neither these nor any other provisions in the deed of trust in so many words give to the defendant the right personally to take possession of the premises and collect the rents and income. Even should the language of the deed of trust, broadly construed, be deemed to give power generally to enter upon the premises and do anything which the trustors also could do, and under such power also to collect the rents, any such broad general power is controlled and modified by the first quoted particular provision which specifically relates to the power of the trustee to collect the rents. Civ. Code, § 3534. By that provision the manner of enforcing the right of the trustee to have the rents, after maturity or default, applied to the payment of the debt, in the event that the trustors do not accede to the demand of the trustee or beneficiary so to apply them, is limited to the power to apply to have a receiver appointed for that purpose.

We conclude that the finding of the court that the defendant was in possession pursuant to the provisions of the trust deed is not supported. It follows that the defendant on the record presented was not entitled to retain as against the plaintiffs the rents collected by it during the period involved.

The judgment is reversed.

I dissent: PRESTON, J.

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220 Cal. 71

HILMER v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 14984.

Supreme Court of California.

Feb. 5, 1934.

1. Divorce 🔑244.

Whether security for payment of alimony or support awards shall be furnished is discretionary with trial court (Civ. Code, §§ 139, 140).

2. Mandamus 🔑28.

Mandamus does not lie to control discretion of court or judicial officer, or to compel its exercise in a particular manner, except when under the facts it can be legally exercised in but one way.

3. Mandamus 🔑26.

A court may be compelled to act, but, having acted, its act cannot be reviewed on mandamus.

4. Mandamus 🔑42.

Order on motion that security be furnished for payment of support award *held* to deny motion for prematurity and not to refuse to entertain motion so as to warrant issuance of mandamus (Civ. Code, §§ 139, 140).

> Minute order declared that, "good cause appearing therefor," the motion is "denied without prejudice," and the formal order thereafter presented to the court by counsel for petitioner stated, in part, that, it "appearing to the court by stipulation of both parties that all sums of money heretofore ordered herein to have been paid by defendant to plaintiff were on said day paid, and the court being advised in the premises," the motion is denied "without prejudice upon the ground that no money being now due from defendant to plaintiff, the court is without jurisdiction to entertain said motion."

In Bank.

Application by Pearl Hilmer for a writ of mandamus to be directed to the Superior Court in and for the City and County of San Francisco, Thomas F. Graham, Judge, to compel respondent court to make an order requiring that Marshall Hilmer, petitioner's divorced husband, furnish security for payment of monthly sums theretofore decreed to be paid petitioner for support of their minor child.

Alternative writ and order to show cause discharged, and petition denied.

Ernest I. Spiegl and Robert B. Gaylord, both of San Francisco, for petitioner.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Nat Schmulowitz, and George B. Harris, all of San Francisco, for respondents.

WASTE, Chief Justice.

Application for a writ of mandamus.

It appears that petitioner procured a final decree of divorce from her husband, Marshall Hilmer, on August 10, 1932. The custody of the minor child of the parties was awarded to her, and the father of the child was directed to pay $50 a month for the child's support. Contempt proceedings have been necessary from time to time to compel payment of this award. In March, 1933, petitioner moved the respondent court for an increase of the support allowance and for an order compelling the defendant husband to furnish security for its prompt and continued payment. This motion was based on sections 139 and 140 of the Civil Code. In support thereof petitioner filed an affidavit wherein it is averred that the defendant husband repeatedly has been delinquent in making the monthly support payments; that recently and by reason of his father's demise he had come into an inheritance, not yet distributed, of approximately $12,000; that he is intemperate and incapable of handling money judiciously, and is neither a fit nor proper person to be intrusted with the monthly allowance of the minor child.

After hearing, the motion was denied, whereupon petitioner instituted this proceeding in mandamus to compel the respondent court to make an order requiring and directing that security be furnished for the future and continued payment of the monthly installments of support money. There have been filed herein many briefs, affidavits, and counter affidavits raising many sharply controverted issues of fact which, because of the conclusion we have reached, we find it unnecessary to consider or determine.

[1-3] The provisions of section 140, supra, relating to security for alimony or support awards, are permissive and not mandatory, and it is within the discretion of the trial court to require or not to require such security. Latterner v. Latterner, 121 Cal. App. 298, 302, 8 P.(2d) 870. It is well settled that mandamus will not lie to control the discretion of a court or judicial officer or to compel its exercise in a particular manner, except in those rare instances when under the facts it can be legally exercised in but one way. Kerr v. Superior Court, 130 Cal. 183, 185, 62 P. 479; Ex parte Ford, 160 Cal. 334, 346, 116 P. 757, 35 L. R. A. (N. S.) 882, Ann. Cas. 1912D, 1267; Greene v. Superior Court (Cal. App.) 23 P.(2d) 785; People v. Judson, 128 Cal. App. 768, 774, 18 P.(2d) 379; Svoboda v. Purkitt, 75 Cal. App. 148, 150, 242 P. 81. Stated differently, a court can be compelled to act, but, having acted, its act cannot be reviewed on mandamus.

The principal point of dispute herein is whether the respondent court in the exercise of its jurisdiction has acted upon and denied petitioner's motion for security or whether it has refused to exercise its jurisdiction in the premises. If the former be the fact, then, under the rule above stated, mandamus will not lie, for a court may act as efficiently by denying as by granting a motion or request. On the other hand, should it be determined that the respondent court has refused to act, mandamus will, and should, issue to put it in motion, but not, of course, to compel it to act in a particular manner, inasmuch as the situation here presented is not one within the exception, in which the court can exercise its discretion in but one way.

[4] We are satisfied after a reading of the entire record now before us that the respondent court in the exercise of its jurisdiction denied petitioner's motion for security, without prejudice to its renewal, because said court had determined that in its opinion the application was inopportune in view of the fact that all monthly support payments then due had been paid, though perhaps under compulsion and the time had not then arrived for distribution of the estate under which the defendant husband claimed the inheritance above referred to.

That the respondent court did not refuse to entertain the motion for security, but rather denied it as having been, in effect, prematurely presented, is apparent from both the minute order and the subsequent formal order made upon the denial of the motion. The minute order declares that, "good cause appearing therefor," the motion is "denied without prejudice." The formal order of denial thereafter framed and presented to the respondent court by counsel for the petitioner states, in part, that, it "appearing to the court by stipulation of both parties that all sums of money heretofore ordered herein to have been paid by defendant to plaintiff were on said day paid, and the court being advised in the premises," the motion is denied "without prejudice, upon the ground that no money being now due from defendant to plaintiff, the court is *without jurisdiction* to entertain said motion."

Petitioner seizes upon the italicized portion of said order to support her theory that the respondent court has refused to entertain the motion, thus giving rise to a situation warranting the issuance of a writ of mandamus. We are not so impressed. In our opinion the order may reasonably be construed to mean that the motion was denied without prejudice to its renewal because the respondent court was of the opinion that the time was not opportune for its granting. Such a construction comports with the record as a whole and is in accord with the respondent court's denial herein that it had refused to entertain jurisdiction of the motion. The words "without jurisdiction," employed in the order, can and should be so construed as to comport with the truth.

Examination of the record discloses that the respondent court has the welfare of the child in mind. This is evidenced by the fact as appears from an excerpt of certain proceedings incorporated herein, had upon an application for partial distribution of the estate in which the defendant husband has an interest, in which the respondent court, of its own volition and in the absence of petitioner's counsel, inquired as to what provision, if any, was being made for the support of the minor child. This and other matters disclosed by the record and briefs herein satisfy us that, while the respondent court has presently denied the motion for security without prejudice to its renewal, it will, and properly should, be in a receptive mood when timely application is again made.

For the above reasons, the alternative writ and order to show cause heretofore issued are, and each is, hereby discharged, and the petition denied.

We concur: SHENK, J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

219 Cal. 745

CITY OF OAKLAND v. BUTEAU et al.

S. F. 14804.

Supreme Court of California.

Jan. 29, 1934.

As Modified on Denial of Rehearing Feb. 27, 1934.

1. Eminent domain 🔑243(2).

Judgment in city's condemnation suit to acquire shore land *held* res judicata of question of littoral owner's right of access to navigable waters, in subsequent suit between same parties to determine extent of property condemned, where, in condemnation suit, instruction recognizing right of access was denied.

2. Deeds 🔑111.

Deed from town granting "water front" must be deemed to have granted only such property as town owned.

3. Appeal and error 🔑1099(4).

Determination on former appeal as to meaning of term used in act is law of case on subsequent appeal.

4. Navigable waters 🔑37(8).

Term "ship channel" in act granting town of Oakland lands lying "between high tide and ship channel" means merely low tide line, and does not import right of access by littoral owner to navigable waters (St. 1852, p. 180).

[Ed. Note.—For other definitions of "Ship Channel," see Words & Phrases.]

5. Navigable waters 🔑36(1).

State of California on its admission to Union acquired title to submerged lands below low tide subject only to power of Congress to regulate foreign and interstate commerce.

6. Navigable waters 🔑37(8).

State and city as successive owners of submerged lands below tide held title in trust for public, and could hold, control, and improve such land in furtherance of navigation, commerce, and fishery (Const. art. 15, § 2).

7. Navigable waters 🔑37(8)

City of Oakland as owner of submerged lands beyond low tide line, could fill or otherwise improve such lands for purpose of navigation, free from any right of access to navigable water by littoral owners holding accreted lands under grant from town of lands between high tide and ship channel (St. 1852, p. 180; St. 1923, p. 416; Const. art. 15, § 2).

8. Appeal and error 🔑1208(5).

City taking possession of property in good faith under writ of possession issued under judgment *held* liable to true owner, on reversal of judgment, only to extent of money or property received under judgment and writ (Civ. Code, § 3334; Code Civ. Proc. § 957).

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by the City of Oakland against Samuel H. Buteau and others. From an adverse judgment, and from an order fixing amount to be paid by plaintiff to defendants for use and occupation of property, plaintiff appeals.

Judgment and order reversed, and cause remanded.

Rehearing denied; CURTIS and PRESTON, JJ., dissenting. WASTE, C. J., not participating.

See, also, 180 Cal. 83, 179 P. 170.

Markell C. Baer, Port Atty., and Robert M. Ford, Asst. Port Atty., both of Oakland, for Board of Port Com'rs.

C. Stanley Wood, City Atty., and Homer W. Buckley, Asst. City Atty., both of Oakland, for City Council.

Chapman, Trefethen, Richards & Chapman, of Oakland, and William B. Bosley and Thomas H. Breeze, both of San Francisco, for respondents.

PER CURIAM.

Two appeals by the plaintiff are presented. The first is from a judgment confirming the title of the parties in and to certain property adjacent to San Antonio estuary in Oakland Harbor; and the second is from an order fixing the amount to be paid by the plaintiff to the defendants for the use and occupation of a portion of said property. The appeal from the judgment will first be considered.

Prior to 1912 the defendants, as trustees of the Merritt Hospital, were the owners of real property in the city of Oakland bounded on the north by First street, on the east by Washington street, on the south by "ship channel," and on the west by the center line of Clay street. On April 13, 1911, the city commenced proceedings to condemn said property for harbor purposes, intending thereby to acquire the title of the defendants to all of the property claimed by them within the street limits indicated, and southerly to the harbor on the south. The proceeding went to judgment and the amount of the award, to wit, $211,315.06, was paid into court for the benefit of the defendants. The final order of condemnation was entered on February 10, 1912, and on the 9th day of the following month the court made an order letting the plaintiff into possession. The order of possession described the property in the same language as the judgment of condemnation which bounded the property on the south by the "northerly boundary line of ship channel in Oakland Harbor, which northerly boundary line of ship channel is the line of ordinary low tide of May 4th, 1852, and which northerly boundary line of ship channel is the southerly boundary line of the lands granted and released to the town of Oakland by an act of the legislature * * * approved May 4th, 1852." The lands granted to the town of Oakland were described in that act as the lands "between high tide and ship channel." St. 1852, p. 180. On an appeal from the judgment of condemnation by the defendants, the District Court of Appeal affirmed the judgment on August 23, 1917. City of Oakland v. Wheeler, 34 Cal. App. 442, 168 P. 23. A petition for hearing in this court was denied on October 18, 1917, and a writ of error to the Supreme Court of the United States was dismissed on October 7, 1920. Wheeler v. City of Oakland, 254 U. S. 659, 41 S. Ct. 5, 65 L. Ed. 462. During the pendency of the appeal, a controversy arose between the plaintiff and the defendants as to the extent of the property included in the judgment of condemnation. The plaintiff took the position that the property acquired extended to the then existing line of low tide on the south, and the defendants contended that the southerly boundary of the property condemned was "ship channel" as the same existed on May 4, 1852, and that, because of certain limitations in the special verdict of the jury in the condemnation case, they were still the owners by accretion of the area of land lying southerly from that line and extending to the low tide line as the same existed at the time of the commencement of the condemnation proceeding. On February 23, 1912, the plaintiff commenced the present action to have it adjudged that it was the owner and entitled to the possession of the property between the land condemned, as it construed the judgment in condemnation, and the northerly pier head line. The defendants were then maintaining a wharf on a portion of this property. The action was tried and judgment entered in favor of the plaintiff on January 16, 1915. Following the entry of that judgment, to wit, on February 5, 1915, a writ of possession was issued, and the plaintiff took possession of the disputed territory. On appeal by the defendants from that judgment, the same was reversed on February 28, 1919. City of Oakland v. Buteau, 180 Cal. 83, 179 P. 170. During the pendency of that appeal, the plaintiff, under the authority of said writ of possession, remained in possession of the disputed area and had constructed a wharf on a portion of the premises. On the appeal it was determined that "ship channel" or the low tide line of May 4, 1852, was not the same as, but was northerly from, the low tide line existing at the time of the commencement of the condemnation proceeding, that the land between those two lines was not included in the condemnation proceeding, and that the defendants were the owners of the land between said lines by accretion to their original estate.

Pursuant to the order of reversal, the cause was remanded for a new trial. Pending the new trial proceedings, and on August 23, 1920, the defendants presented to the trial court a motion for an order to restore them to the possession of the property in controversy and to award to them the reasonable rental value of the use and occupation of the premises during the time they were out of possession and damages for the alleged failure of the plaintiff to maintain a certain wharf on a portion of the property which wharf had extended therefrom out to the navigable channel of the estuary. On January 27, 1922, the court made an order directing restitution of the disputed premises to the defendants, and directing that the matter of the claim for rental and damages be reserved pending the retrial of the cause on its merits.

On the retrial, which was commenced on December 4, 1922, it was of primary importance to fix and determine the line of low tide as the same existed on May 4, 1852, and the line of low tide as the same existed at the time of the retrial. The court took evidence as to the location of the lines in controversy, and fixed the line of low tide as of May 4, 1852, by metes and bounds, and in a general easterly and westerly direction from a point on the westerly line of Washington street, 195⅓ feet south of the south line of First street to a point in the center line of Clay street, a distance of 306⅓ feet south of the south line of First street. The low tide line of 1852 as thus fixed is referred to in the record and briefs as the Von Geldern line. This line is approximately midway between the southerly line of First street and the present line of low tide.

South of the present line of low tide as so fixed by the judgment and approximately parallel thereto is the northerly pier head line of the harbor as established by the United States government, first in 1913, and again in 1925.

At the time of the commencement of this action the plaintiff was not the owner of the submerged land southerly from the existing low tide line. However, pending the retrial and prior to the entry of the present judgment in June, 1924, the state granted to the city of Oakland those submerged lands. St. 1923, p. 416. The trial court gave recognition to this after-acquired title of the plaintiff, and by its judgment decreed that, by virtue of said grant, the plaintiff is the owner of the parcel of land bounded on the north by the existing ordinary low tide line, on the east by the center line of Washington street produced southerly, on the south by the northerly pier head line of Oakland Harbor and on the west by the center line of Clay street produced southerly, subject to the public right of navigation, "and subject to the rights and easements possessed by the trustees," defendants herein. It was also adjudged that the defendant trustees are the owners and entitled to the possession of the parcel of land bounded on the north by the Von Geldern line, on the east by the center line of Washington street (subject to the public highway easement in Washington street), on the south by the present line of ordinary low tide, and on the west by the center line of Clay street produced southerly. It was also adjudged that the defendant trustees are "the owners and entitled to the possession and enjoyment, as an incident and appurtenance of the parcel or tract of land owned by them as aforesaid, of the right and easement of ingress to said parcel or tract of land from the navigable waters of said Oakland harbor, and of egress from said parcel or tract of land to said navigable waters; and possess the right of constructing, maintaining and using, for their own private use and as a means of exercising such right and easement of ingress and egress, such wharves and structures not extending beyond the southerly boundary, as are or may be necessary and proper for that purpose without, however, obstructing or interfering with navigation on said navigable waters."

The correctness and validity of those portions of the judgment which confirm the title of the plaintiff in and to the submerged land and to the defendant trustees the title to the land between the Von Geldern line and the present low tide line are not now attacked by either side. However, the plaintiff contends that the court erred in granting the defendant trustees a right of ingress and egress to and from their property over and across the plaintiff's submerged lands to navigable waters, and in adjudging that the plaintiff's ownership of said submerged lands is subject to such right of access in favor of the defendants.

The plaintiff attacks the objectionable portions of the judgment on three general grounds: First, that the defendants are estopped by the judgment in the condemnation case from now claiming such right of access; secondly, that they are foreclosed from now claiming that right by the law of the case as established on the former appeal; and, thirdly, that under the law they are not otherwise entitled to such right.

[1] In presenting their several claims for compensation and damages in the condemnation suit, the defendant trustees asserted a wharfing out right to and upon navigable waters, and a right of access to the navigable waters of the harbor for such purpose. They requested an instruction in recognition of that right. The instruction was refused, and such refusal was specified on the appeal as reversible error. In passing upon the point, the reviewing court determined that the defendants had no title to the land below low tide, could not secure such right by adverse possession, had no right of access to navigable waters from their property, and had shown no right upon which they could base a claim for damages to or compensation for the same. In this connection the court said: "The court * * * refused to instruct as a matter of law that the defendants had such wharfing-out right. It might have instructed that they had at the time of the issuance of the summons no such right, for it has been settled in Dalton & Sons v. Oakland, 168 Cal. 463, 143 P. 721, that owners of land upon the littoral of a navigable bay have no right of access to deep water over intervening tide lands. Western Pacific R. Co. v. Southern Pacific R. Co., 151 F. 376, 80 C. C. A. 606." City of Oakland v. Wheeler, 34 Cal. App. 442, at page 453, 168 P. 23, 28.

Although the city of Oakland was not the owner of the submerged land at the time of the issuance of the summons in the condemnation suit, that case obviously was tried on the theory, so far as the defendants were concerned, that they were the owners of a valuable right of access to navigable waters, and that the taking of the lands intended to be condemned in that action would deprive them of that right. The issue of the right of access now asserted would seem to have been definitely tendered by them in the trial of that action, and on appeal and under well-settled principles they should not again be permitted to relitigate that issue, since all of the elements of an estoppel by judgment are present.

[2] The act of May 4, 1852, granted to the town of Oakland the lands lying within the boundaries of the town fixed by the act "between high tide and ship channel." An ordinance of the town of Oakland, enacted May 27, 1852, authorized a deed conveying to Carpentier, the defendant trustees' predecessor in interest, "the waterfront of said town, that is to say, all the land lying within the now corporate limits of the Town of Oakland and situated between high tide and 'ship channel.'" The deed carried the same description. The defendants therefore claim that their predecessor thus acquired the "waterfront," which is something more than merely the lands between high and low tide. But the town of Oakland could not convey to Carpentier more than it had received from the state, and it had received from the state only the lands "between high tide and ship channel." When, therefore, the town granted the "waterfront," it must be deemed to have granted only what it possessed; namely, the lands between high tide and ship channel.

[3, 4] For many years the meaning of the term "ship channel" was uncertain and undefined. It was indicated, if not definitely decided, in City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 P. 277, that the term meant the ordinary line of low tide. The defendants claimed on the prior appeal in this case, and now claim, that the definition of the term as the low tide line is too restrictive and limited; that it means something more than a mere boundary line, and imports a right of access to navigable waters. But it was definitely decided on the former appeal in this case that the term meant the line of low tide. That determination has become the law of the case, and the defendants would seem to be now foreclosed from contending otherwise. We think that the term as so used and now defined indicates no more than a boundary line, and the term has no significance other than to form the southern boundary of the defendants' land as confirmed to it in the judgment, and cannot be enlarged to import a right of access to navigable waters.

[5, 6] At the time the present action was retried, neither the plaintiffs nor the defendants were the owners of the submerged land now under consideration. Title thereto was then in the state of California. The state acquired that title upon its admission to the Union, subject only to the power of Congress to regulate foreign commerce and commerce between the states. Weber v. Board of State Harbor Commissioners, 18 Wall. 57, 21 L. Ed. 798; Hoboken v. Pennsylvania R. R. Co., 124 U. S. 656, 8 S. Ct. 643, 31 L. Ed. 543; People v. S. P. R. R. Co., 166 Cal. 614, 138 P. 94. By the Constitution of 1879 this title was safeguarded to the extent that "no individual * * * claiming or possessing the frontage or tidal lands of a harbor, bay, * * * estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water." Const. art. 15, § 2. Upon the adoption of this article, the state continued to hold its tide and submerged lands in its sovereign capacity and in trust for the people of the state. People v. California Fish Co., 166 Cal. 576, 138 P. 79; Ord Land Co. v. Alamitos Land Co., 199 Cal. 380, 249 P. 178. Upon the grant to the city in 1923 of the submerged land under consideration, the city held the title upon the same trusts and for the same uses and purposes as were attached to the state's title. Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 292 P. 1076, 80 A. L. R. 379; City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789; Patton v. Los Angeles, 169 Cal. 521, 147 P. 141; Los Angeles v. Pacific Coast S. S. Co., 45 Cal. App. 15, 187 P. 739. These uses and purposes include the right on the part of the state or its lawful grantee to hold, control, and improve said lands in furtherance of the public uses of navigation, commerce, and fishery. People v. S. P. Railroad Co., 169 Cal. 537, 147 P. 274.

[7] Considering the question of the rights of the defendants as owners of the littoral above the low tide line, it appears that the defendants concede that, if by the use of language in the original grant to the town of Oakland it was intended that the water ward boundary of the lands so granted be fixed and that the southern boundary of their lands was fixed thereby, then the plaintiff would have the right to fill or otherwise improve for purposes of navigation and commerce its submerged land southerly from the low tide line, and thus interfere with, and entirely cut off, the defendants' access to deep water. Since it has been considered and decided that by use of the term "ship channel" in the original grant the southerly boundary of the defendants' land was fixed as the low tide line, it would follow that the plaintiff has the right to fill or otherwise improve its submerged land for any purpose not inconsistent with the trusts upon which said land is held by the plaintiff and freed from

any right of access on the part of the defendants to navigable water. There is no showing that the plaintiff is intending to improve its submerged land in any way inconsistent with the grant from the state, or arbitrarily or capriciously to deprive the defendants of any right which they may lawfully exercise, and it cannot be assumed that it will do so.

Furthermore, in Dalton & Sons v. Oakland, 168 Cal. 463, 143 P. 721, it was held that the littoral owner of land on a navigable bay has no right of access to deep water over intervening tide lands which the state has granted to a city in trust for the purpose of improving its harbor in aid of commerce and navigation. We are satisfied that the same rule applies to any right of access to deep water over intervening submerged lands granted to the city, even though title to the land above the low tide line has passed to the littoral owner. The case of Shirley v. Bishop, 67 Cal. 543, 8 P. 82, relied upon by the defendants, involved the right of access to navigable waters on behalf of the owner of the littoral who also owned the land extending out to the navigable waters of the Straits of Carquinez, and it was held that such owner had a vested right of access to such navigable waters. See, also, Shirley v. City of Benicia, 118 Cal. 344, 50 P. 404. Such is not this case, for the reason that the defendants herein are not the owners of the land extending to navigable water. The land of the plaintiff intervenes. It is true that the littoral owner has such right of access as against a stranger, but this right is not available to him against the state or the grantee of the state using or as here taking definite steps to use the tide lands or the submerged lands or both for public purposes. S. F. Savings Union v. R. G. R. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823, 66 L. R. A. 242, 103 Am. St. Rep. 72, 1 Ann. Cas. 182; Boone v. Kingsbury, 206 Cal. 148, 273 P. 797.

The judgment herein purports to grant to the defendants the right of access to navigable waters, as an incident and appurtenance attached to their land, over and across the land of the plaintiff. This grant is permanent and unconditional except that the exercise of the right granted shall not obstruct or interfere with navigation upon such navigable waters. The exception, however, does not save the grant of the easement. Even though the defendants owned in fee the lands confirmed in the plaintiff, the exercise of their rights under that title would not of itself permit them to obstruct or interfere with navigation on the navigable waters of the bay.

We conclude that the judgment herein is erroneous in so far as it purports to vest in the defendants any right of access to navigable water from their land over and across the land of the plaintiff.

Following the entry of the judgment on the first trial, and on February 5, 1915, the plaintiff went into possession of the land now confirmed to the defendants, under and pursuant to a writ of possession issued by the trial court authorizing it so to do, and it remained in possession until January 27, 1922, when the defendants were restored to possession of their land by an order made on their motion. The court held in abeyance the matter of fixing the rental value and damages pending the determination of the question of title and boundaries. No appeal was taken from the order of repossession of January 27, 1922, and the defendants appear to claim some advantage because no such appeal was taken. It is unnecessary to discuss the point further than to say that the order was plainly interlocutory in character. It was also in the nature of an order pendente lite, and was obviously made for the purpose of preserving the status quo ante.

After the trial court had decided the question of title and boundaries, an order was made on June 27, 1924, fixing the rental value of the defendants' premises during the time they were out of possession and the amount of their claim for damages. The order is erroneous in several particulars:

First, it includes in the description of the property the possession of which is accorded to the defendants the land between the low tide line and the northerly pierhead line of the harbor. This is not in accord with the judgment, which confirms title of the submerged land to the plaintiff.

Secondly, during the occupancy of the disputed premises by the plaintiff, the plaintiff constructed a wharf and warehouse which occupies the land lying between the easterly and westerly lines of Clay street and extending from the pierhead line to a point northerly from the northerly boundary line of the defendants' property. A portion of this improvement is upon the defendants' land, and the order found the portion of the improvements so occupying the defendants' land to be 46.4 per cent. of the whole. This percentage is concededly erroneous, for the reason that a portion of said 46.4 percentage is located on the land of the plaintiff lying westerly from the easterly line of Clay street produced southerly and southerly from the low-tide line. The correct percentage and the amount to be charged against the plaintiff, based on the correct proportion, can properly be ascertained only by a retrial of that issue.

Thirdly, the order purports to require delivery of possession to the defendants of the submerged land owned by the plaintiff. It is conceded that any portions of the order inconsistent with the judgment are controlled by the latter. The judgment established the title of the respective parties, and the right of possession would follow the title. The form of the order purports to award to the defendants the value of the use and possession of the entire tract, including the lands confirmed to the plaintiff. In these respects the order was clearly erroneous. If the order intended to include compensation for the deprivation of the asserted right of access to navigable waters over and across the lands of the plaintiffs, it was also erroneous in that respect, for, as has been seen, no such right of access existed.

[8] Fourthly, the court fixed the compensation for the detriment suffered by the defendants apparently in accordance with the rule laid down in section 3334 of the Civil Code. The court fixed the amount on the basis of the "reasonable net rental value of said premises" for the period during which the defendants were out of possession, and otherwise described the basis for the ascertainment of the amount as "the amount representing the net rent and income reasonably to be expected from said premises for said period of time if they had been managed with ordinary care and diligence," and fixed the amount at $39,110. Section 3334 of the Civil Code provides: "The detriment caused by the wrongful occupation of real property * * * is deemed to be the value of the use of the property for the time of such occupation." But the possession of the plaintiff during the period in question could not be deemed a wrongful or an unlawful occupancy. Possession was taken pursuant to the writ of possession issued in accordance with the judgment and order of the court. The writ was not superseded, and until a reversal of the judgment constituted a justification for the occupancy as against a charge of wrongful possession. The plaintiff was in possession in good faith. Its possession was not that of a trespasser, nor was it tortious in any sense, and there is no ground for the charge that the property was not caused to produce as much revenue as could be expected under good management and under the circumstances disclosed by the record. The rule therefore to be applied is to hold the plaintiff to account for the money or property received by it under the judgment and writ of possession and to the extent of the liability applicable to a trustee (Ward v. Sherman, 155 Cal. 287, 100 P. 864; Asato v. Emirzian, 177 Cal. 493, 171 P. 90), or to the liability analogous to that of a litigant who has received the proceeds of a sale had under an erroneous judgment thereafter reversed. Such liability is limited to the amount received after deducting the statutory costs. Section 957, Code Civ. Proc.; Dowdell v. Carpy, 137 Cal. 333, 70 P. 167. In either case the law proceeds upon the theory that, in equity, the party who receives money or property in good faith under an erroneous judgment thereafter reversed should be required to restore what he has received, and not upon the theory of a supposed wrong committed. While the contrary rule was announced in Hays v. Griffith, 85 Ky. 375, 3 S. W. 431, 11 S. W. 306, 9 Ky. Law Rep. 65, that case was overruled in Bridges v. McAlister, 106 Ky. 791, 51 S. W. 603, 21 Ky. Law Rep. 428, 45 L. R. A. 800, 90 Am. St. Rep. 267. See, also, Schnabel v. Waggener, 118 Ky. 362, 80 S. W. 1125, 26 Ky. Law Rep. 258; Hess v. Deppen, 125 Ky. 424, 101 S. W. 362, 31 Ky. Law Rep. 15, 15 Ann. Cas. 670. By the great weight of authority, the generally accepted rule is that, when a judgment is reversed under the circumstances here shown, restitution must be made of all that has been received under it, and no further liability should be imposed. Rabb v. Patterson, 42 S. C. 528, 20 S. E. 540, 46 Am. St. Rep. 743; Murray v. Berdell, 98 N. Y. 480; State National Bank v. Ladd, 65 Okl. 14, 162 P. 684, L. R. A. 1917C, 1176; 4 Cor. Jur. 1235.

We therefore conclude that judgment should be entered confirming the title of the respective parties as provided in the judgment appealed from without any right of access in the defendants to and from navigable waters over and across the lands of the plaintiff; and that an accounting should be had as between the parties of the receipts and disbursements of the plaintiff arising out of the occupation by the plaintiff of the defendants' property in reliance upon the judgment which was reversed.

The judgment and the order are and each is reversed, and the cause is remanded to the trial court for further proceedings not inconsistent with the views herein expressed.

WASTE, C. J., deeming himself disqualified, does not participate herein.

219 Cal. 775

McMILLAN v. O'BRIEN.

S. F. 14820.

Supreme Court of California.
Jan. 30, 1934.

Rehearing Denied March 1, 1934.

1. **Payment** ⚷82(1).

One cannot recover voluntary payment he made on debt of another without request and with no promise of repayment.

2. **Subrogation** ⚷26.

One who pays debt of another to protect interest of his own is not a "volunteer," and is entitled to reimbursement upon theory of equitable subrogation.

[Ed. Note.—For other definitions of "Volunteer," see Words & Phrases.]

3. **Taxation** ⚷531(1).

Landowner and predecessors in interest who paid taxes erroneously assessed against them on strip of land in honest but mistaken belief that they owned strip, which of record belonged to adjoining landowner without whose request or knowledge taxes were paid, *held* "volunteers," and not entitled to reimbursement for all such taxes from adjoining landowner.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Leontine B. McMillan against R. J. O'Brien. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Livingston & Livingston, of San Francisco, for appellant.

Keyes & Erskine, of San Francisco (J. Benton Tulley, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

Action to quiet title. The suit was instituted by plaintiff to quiet title to a narrow strip of real property located on the north side of Geary street between Kearny street and Grant avenue in San Francisco, having a frontage of 9¼ inches on Geary street and a depth of 122 feet 6 inches. Defendant's answer contained the usual formal denials, and in addition contained a second count in the alternative which is the real basis of the controversy of the parties. This count alleges that defendant and defendant's predecessors in interest have paid taxes which were duly assessed to them by the county assessor upon said strip of real property for the fiscal years commencing 1907-1908 up to and including the fiscal year of 1928-1929, and prays that, if it be determined that plaintiff is the true owner of the property, defendant have judgment against the plaintiff in the sum of $1,232.35, the total amount of taxes erroneously paid by defendant and his predecessors in interest, together with interest from the date of the respective payments of said taxes to the date of the entry of said judgment, and that, in default of the payment of said amount, the defendant's lien upon said property for the payment of said taxes and interest be foreclosed. The judgment of the trial court was in favor of the plaintiff, and a decree was made and entered quieting plaintiff's title free and clear of all incumbrances. It was expressly decreed that defendant had not any right, title, claim, or interest or estate whatever in said property, and was forever barred from asserting any claim thereto.

The facts of the case which were presented upon a written stipulation entered into by both parties are simple. Plaintiff, McMillan, and defendant, O'Brien, are the owners of two adjoining lots having a frontage on Geary street. Plaintiff owns the east lot and defendant owns the west lot. The ownership of the 9¼-inch strip involved herein depends upon the location of the boundary line between the two lots. In 1903 W. W. Young, predecessor in interest of the defendant O'Brien, brought an action to quiet title to this disputed strip and to determine the boundary line between the two lots against T. Z. Blakeman, the owner of the east lot, and predecessor in interest of the plaintiff McMillan. In 1908, by a decision of the Supreme Court of this state, Young v. Blakeman, reported in 153 Cal. 477, 95 P. 888, it was finally determined that the disputed strip belonged to T. Z. Blakeman. This decision was based upon the ground that, although the deed to T. Z. Blakeman, which described his lot by metes and bounds, did not include said disputed strip, nevertheless there had been an oral agreement between the owners of said lots locating said boundary line, and by said agreement the strip of land became included in the description of the property owned by Blakeman. Thereafter the lot belonging to W. W. Young passed by devise or descent to Ella Young, Edith Young, Francis Churchill Williams, and Francis Churchill Williams, Jr., then to Edith Wakefield Huntington by grant deed for a consideration, and then to defendant O'Brien by grant deed for a good and valuable consideration. The lot of T. Z. Blake-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

man passed by descent or devise to plaintiff, McMillan. The question of the ownership of the property having been definitely decided in the case of Young v. Blakeman, 153 Cal. 477, 95 P. 888, as set out in said stipulation, there can be no doubt that the plaintiff, McMillan, as the successor in interest of T. Z. Blakeman, is the legal owner of said disputed strip of land, and as such owner is entitled to have her title quieted. Despite the settlement of the boundary dispute in Blakeman's favor, it is admitted by stipulation that during the period of time commencing in 1907, prior to the final determination of the controversy regarding ownership, down to and including the year 1929, the taxes upon said property were paid by the successors in interest of Young. It is expressly stipulated that said property appeared upon the records of the assessor of the city and county of San Francisco, and of the tax collector of the city and county of San Francisco, as follows: During the fiscal years commencing 1907-1908 and ending 1921-1922, said property appeared on said records as belonging to Ella F. Young, Edith Young, Francis Churchill Williams, and Francis Churchill Williams, Jr., and an amount aggregating $662.09 was paid by them in taxes; during the fiscal years commencing 1922-1923 and ending 1925-1926, said property appeared on the records as belonging to Edith Wakefield, and an amount aggregating $329.16 was paid by her in taxes; and during the fiscal years commencing 1926-1927 and ending 1928-1929 said property appeared on said records as belonging to defendant, O'Brien, and he paid an amount aggregating $241.12 as taxes. None of the amounts paid as taxes have ever been repaid to the parties making such payments. It is also stipulated that at all of the said times said defendant and his predecessors in interest believed that said property belonged to them at the respective times above set forth, and on account of said belief paid the taxes levied by the city and county of San Francisco on said property. It is also expressly stipulated that said taxes so paid by defendant and his predecessors in interest were paid without the request, consent, or knowledge of plaintiff, or her predecessor in interest, T. Z. Blakeman, and that neither of them had notice of the payment of said taxes.

No explanation is given of the reason why the property continued to be assessed for some twelve years erroneously to the successors of W. W. Young. However, it is apparent from the decision in Young v. Blakeman, supra, that as the agreed boundary line fell outside the property described in the deed to Blakeman's east lot, it fell within the property described in the deed to Young's west lot, and it may be surmised that, subsequent to the decision, the assessment was not changed by the successors of Young, and therefore this 9¼-inch strip continued to be assessed as being contained in the description of the property embraced in Young's deed to his lot. (The diagram of the property herein involved as set out in the decision of Young v. Blakeman, supra, shows the reasonableness of this explanation.) Whatever may have been the reason for such erroneous assessment over this period of years, it is apparent that the ownership of this strip was in fact a matter of record, and that any inquiry into its ownership would have immediately shown that plaintiff, McMillan, or her predecessor in interest, Blakeman, was the true owner. The question therefore is presented: Is a person who pays taxes on property which in fact belongs to another—and which appears of record as belonging to that other—in the honest but mistaken belief that the land belongs to him, entitled to any relief or reimbursement upon discovery of the true ownership as against the owner of the property who has not paid any taxes upon the property?

[1] It is the general rule that there can be no recovery for a voluntary payment of the debt of a third party without request and with no promise of repayment by the party whose debt is paid, and it was apparently upon the theory that the defendant was a mere volunteer that the trial court refused him any relief.

What is a volunteer? Appellant argues that the term "volunteer" implies something more than a person who does an act otherwise than under compulsion, and insists that it contains the implication of an officious intermeddling in the affairs of another. In support of his position, he cites a number of cases from other jurisdictions which hold that one who pays the taxes on the property of another, either by mistake, or under the mistaken belief that he has good title to the property, is entitled to reimbursement upon the theory of equitable subrogation. Baranowski v. Wetzel, 174 App. Div. 507, 161 N. Y. S. 153; Ingersoll v. Jeffords, 55 Miss. 37; Title Guarantee & Trust Company v. Haven, 196 N. Y. 487, 89 N. E. 1082, 1085, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131; Id., 214 N. Y. 468, 108 N. E. 819; Wilcox's Estate (Sur.) 118 N. Y. S. 254; Wiswell v. Beck, 92 Wash. 208, 158 P. 976; Childs v. Smith, 51 Wash. 457, 99 P. 304, 130 Am. St. Rep. 1107. And appellant claims that the subrogation doctrine therein upheld has been applied in California in the case of Fresno Investment Co. v. Brandon, 79 Cal. App. 387, 249 P. 548, and upon the strength of these authorities he should be granted equitable relief.

It may be noted at the outset that the rule as to remedy in cases in which parties have paid taxes under a supposition that they were the owners, which afterwards proved to be erroneous, is different in different states. Cooley, Taxation (4th Ed.) vol. 3, p. 2530, § 1270; see note 61 A. L. R. 592. Respondent has therefore, in turn, cited a number of cases of other jurisdictions which support her theory that appellant is a volunteer and is not entitled to subrogation. Iowa Homestead Co. v. Valley Railroad, 84 U. S. (17 Wall.) 153, 21 L. Ed. 622; Bryant v. Nelson-Frey Co., 94 Minn. 305, 102 N. W. 859; Adams v. Taylor, 149 Miss. 750, 115 So. 878; Jacobs v. Webster, 199 Mo. App. 604, 205 S. W. 530; Bateson v. Phelps' Estate, 145 Mich. 605, 108 N. W. 1079. And she, in turn, claims that in a number of cases California has repudiated the doctrine of equitable subrogation under similar circumstances, and has aligned itself with those states adhering to the rule that one paying taxes under a mistaken belief in his ownership cannot thereafter seek and secure reimbursement from the true owner.

We have examined all of the cases cited, both from other jurisdictions and those of our state, and are of the opinion that respondent is correct in her contention that California holds to the rule that one paying taxes under a mistaken belief in his own ownership is a volunteer, and that therefore the judgment of the trial court quieting title in plaintiff, and decreeing that defendant had no right, title, claim, interest, or estate whatever, in said property is correct.

[2] It is well recognized that one who pays the debt of another in order to protect an interest of his own is not a volunteer, and is therefore entitled to subrogation. Fresno Investment Co. v. Brandon, 79 Cal. App. 387, 249 P. 548, cited by appellant, is merely an example of this situation. In that case plaintiff paid taxes which had been levied upon defendant's personal property, but which had been assessed against the plaintiff. By section 3717 of the Political Code, "Every tax due upon personal property is a lien upon the real property of the owner thereof," and the assessment, therefore, became an apparent lien upon plaintiff's real property. In that case plaintiff had an interest to protect, and, when he paid the taxes to prevent the fixing of a lien upon his real property, he was entitled to recover the taxes paid under the equitable doctrine of subrogation. The taxes in that case were paid for the purpose of protecting his own rights and interests, which is one of the usual grounds for permitting subrogation. The decision in that case, based upon the ground that plaintiff had an interest to protect, cannot be said to support the proposition that one who has no interest to protect and who pays the taxes of another is entitled to equitable subrogation, and appellant's claim that by this decision this state has aligned itself with the authorities cited by him is not tenable.

[3] Respondent cites the cases of Stanley v. Westover, 93 Cal. App. 97, 269 P. 468, Vanderbilt v. All Persons, etc., 163 Cal. 507, 126 P. 158, 161, and Huddleston v. Washington, 136 Cal. 514, 69 P. 146, as holding that the voluntary payment of taxes upon property of another did not entitle the payer of such taxes to reimbursement. Other California cases cited by respondent were decided upon other theories, and are distinguishable from the instant case. The facts in Vanderbilt v. All Persons, etc., supra, are very similar to those of the instant case, in that the taxes were paid by an adjoining landowner upon a mistaken assessment upon a strip of land actually occupied by a portion of plaintiff's building. However, the decision of the court falls short of sustaining respondent's position, for it merely holds that "such payment would not defeat Mrs. Vanderbilt's right to have her title to this strip of land quieted." The question of whether or not defendant would be entitled to reimbursement for the payment of taxes was not discussed nor decided. The case of Huddleston v. Washington, supra, involved a clear case of an officious intermeddling in the affairs of another, in that the plaintiff in that case who was the remainderman induced the assessor to assess the entire property, including defendant's life estate, to her, and thereafter paid the taxes thereon, later seeking reimbursement from the life tenant. The case, therefore, is quite different from the instant case, in which it is expressly stipulated that the taxes were paid under an honest mistake. The case of Stanley v. Westover, supra, involves the question of a mistake of ownership, and, in our opinion, controls the decision of the instant case. Plaintiff Stanley in that case brought an equitable action to set aside a McEnerney decree in favor of the defendant Westover, and to quiet his title. Westover had acquired his title to the property from the Sonoma Lumber Company, which had purchased it at an

execution sale. The defendant Westover and his predecessors had paid taxes on the property over a period of years. The court held that the defendant was not entitled to any reimbursement for the taxes so paid, and quieted the title in plaintiff free of any claim for such taxes. The court in so holding cited and relied upon the case of Iowa Homestead Co. v. Valley Railroad, 84 U. S. (17 Wall.) 153, 21 L. Ed. 622, in which the United States Supreme Court held that taxes paid by an unsuccessful litigant during litigation over the title to property could not be recovered from the successful litigant. It is true that in both the cases of Stanley v. Westover, supra, and Homestead Co. v. Valley Railroad, supra, the mistake which motivated the paying of the taxes was a belief in the validity of a questioned title, whereas, in the instant case, the mistake which motivated the paying of the taxes was a belief in the validity of a title to property which without question belonged to another. In the other cases it required an adjudication by a court to determine the lack of ownership in those paying the taxes, whereas in the instant case a mere examination of the records would have disclosed the fact that those paying taxes were not the true owners. In both instances, the mistake on the part of those paying the taxes consisted of a mistaken belief in their ownership of the property. We therefore reach the conclusion that since in fact the defendant herein and his predecessors in interest did not in fact have any rights or interests in the property on which they, through a mistaken belief in its ownership, paid taxes, they are not entitled to equitable subrogation.

The rule laid down in the case of Holland v. Hotchkiss, 162 Cal. 366, 123 P. 258, L. R. A. 1915C, 492, that an owner coming into equity to remove a cloud upon his title should be refused relief except upon condition that he first repay to the tax purchaser or his grantees or assignees the taxes with legal interest from the time of such payment, which has been embodied in section 3898 of the Political Code, was relied upon by appellant in the case of Stanley v. Westover, supra, and there held to have no application. We are likewise of the opinion that the cases cited by appellant which deny relief to a plaintiff who seeks to quiet title unless he pays off a mortgage admittedly barred by the statute of limitations have no application to the situation here. In those cases obviously no question of volunteer payments could be involved, for the loan for which the mortgage was given as security was made at the request and with the consent of the mortgagor.

We have read the record with particular reference to the alleged stipulation of the attorney for respondent that, irrespective of whether appellant was entitled to reimbursement for payments made by his predecessors in interest, he was entitled to be reimbursed for the amount actually paid by him. We are not convinced that this conversation with the court, in which the attorney stated that there was no doubt that the taxes had been paid by defendant, O'Brien, was intended by the attorney as a stipulation that appellant was entitled to reimbursement for said payment, nor that it was considered such a stipulation by the trial judge.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; SPENCE, Justice pro tem.

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220 Cal. 26

In re McCREERY'S ESTATE.

ANGLO-CALIFORNIA TRUST CO. et al. v. RILEY, Controller.

S. F. 14842.

Supreme Court of California.

Jan. 31, 1934.

1. Constitutional law ⚷283.
Taxation ⚷867(2).

State could impose inheritance tax on transfer by will of stock in domestic corporation owned by decedent who was nonresident of United States, where stock certificates were physically present in state (Const. U. S. Amend. 14; Gen. Laws 1931, Act 8443, § 11, subd. 3; § 2, subd. 2).

2. Treaties ⚷14.

State inheritance tax imposed on transfer of stock in domestic corporation held by nonresident of United States did not discriminate against subjects of Great Britain in violation of treaty, where tax was applicable to United States citizens domiciled abroad (Treaty with Great Britain March 2, 1899 [31 Stat. 1939]).

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Proceeding by the Anglo-California Trust Company, as administrator of the estate of John Buchanan McCreery, deceased, and another, against Ray L. Riley, as Controller of the State of California, for the refund of inheritance taxes. From an adverse order and judgment, defendant appeals.

Reversed.

W. H. H. Gentry, T. H. Christiansen, and James W. Hickey, all of Sacramento, and A. W. Brouillet, of San Francisco, for appellant.

Goldman & Altman, of San Francisco, for respondents.

Todd W. Johnson and Philip D. Johnston, both of Los Angeles, amici curiæ.

PRESTON, Justice.

By this appeal the controller of this state seeks to reverse an order of the superior court in the above-entitled estate. The order complained of reversed in toto a previous order fixing and requiring the payment of an inheritance tax under the Inheritance Tax Act of California (Deering's Gen. Laws 1931, vol. 3, p. 4709, Act 8443), and further provided for refund of the tax theretofore paid. The facts upon which the appeal is based were stipulated and are substantially as follows:

John Buchanan McCreery died testate in February, 1931, a resident and citizen of Great Britain, owning 666⅔ shares of the capital stock of the McCreery Estate Company, a corporation organized and existing under the laws of the state of California and the certificates of stock representing said shares were in the state of California on the date of decedent's death, but had no business situs therein. Decedent's will was probated in England, but ancillary proceedings were had in the superior court of the state of California in and for the city and county of San Francisco. Respondents are the ancillary administrator and the widow of decedent, his sole legatee.

The inventory in said ancillary proceedings showed said shares of stock. An inheritance tax appraiser was appointed by the court in said proceedings to appraise the estate of decedent in this state and to report to the court on any inheritance tax payable to the state of California. Said appraiser thereafter reported a tax payable in the sum of $5,609.30 by reason of the transfer of said shares of stock. Said report of the appraiser was confirmed by the court and the inheritance tax on said transfer was fixed at said sum by an order of court made August 18, 1931. On the same day said tax, less the cash discount, was paid. Thereafter, and on May 4, 1932, respondents made an application to said court for a reversal of said order fixing said tax and for a refund of the tax theretofore paid. Thereafter and on October 20, 1932, said court gave its judgment and order granting this relief. From this last-mentioned order the controller has prosecuted this appeal.

Originally, the sole question raised was as to the proper construction of subdivision 3 of section 11 of said Inheritance Tax Act of California, as amended in 1929 (Stats. 1929, pp. 1834, 1846). Later, however, under an order of this court, counsel were directed to brief the following legal question: "Does the due process clause of the Fourteenth Amendment to the Constitution of the United States prevent the state of California from collecting an inheritance tax on the transfer of stock in a California corporation in the estate of a nonresident of the United States, the certificates representing the stock being physically in the state of California?" Our conclusion upon this latter question makes it unnecessary to give consideration to said question of procedure first above mentioned.

[1] It is not disputed that under subdivision 2 of section 2 of said Inheritance Tax Act, it was the legislative intent to impose a tax upon the transfer here disclosed. This section requires the payment of a succession tax, "when the transfer is by will or intestate laws of property within this state and the decedent was a nonresident of the state at the time of his death * * *." For a confirmation of the power to impose this tax, see McDougald v. Lilienthal, 174 Cal. 698, 164 P. 387, L. R. A. 1917F, 267, and Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A. L. R. 694. But to determine said constitutional question we must rely upon the applicable pronouncements of the Supreme Court of the United States on this subject. We have made a careful study of the several decisions cited and the net result of such holdings thus far is that, as to tangible personal property, the Fourteenth Amendment to the Federal Constitution forbids its taxation in any other state of the United States than the one in which it is located; that as to choses in action and other intangibles, the same section forbids taxation in more than one state. The constitutional provision protects the one class of property to the same extent as the other. The only difference in the two situations is that as to intangibles the courts still apply

the legal fiction of mobilia sequuntur personam and have thus confined the place of taxation to the state of the domicile of the owner. But this restriction has as yet been applied only to estates of decedents who were residents within the United States. Farmers' Loan Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000; First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401. The rule which selects the domicile, as distinguished from the situs of the intangibles, was and is largely one of logic and convenience. But the reasons assigned for this selection all fail where the decedent was domiciled without the United States. It by no means seems certain that a valid rule could not have been promulgated which fixed the constructive situs of the intangibles as the place of taxation instead of the domicile of the owner. Moreover, the above-cited holding does not specifically purport to fix the rule controlling the jurisdiction for taxation where the owner of the intangibles was domiciled without the United States, whether he was a citizen of the United States or a citizen of a foreign nation. Intangible property in one of the states of a nonresident of the United States receives the protection of our laws. Why may not the privilege of receiving it by transfer or succession be taxed by some state at least of the United States? And if it may be so taxed, why may not such tax be assessed in the state of the actual or constructive situs of such property?

Direct light is shed upon this question by the case of Burnet v. Brooks, 288 U. S. 378, 396, et seq., 53 S. Ct. 457, 77 L. Ed. 844, 86 A. L. R. 747, wherein the decedent was a British citizen domiciled in Cuba, where he died owning foreign bonds and stock in foreign corporations, the physical evidences of which were all situated in the state of New York. It was held that under the United States Revenue Act of 1924, which purported to tax that part of the gross estate of said decedent "which at the time of his death is situated in the United States" (section 303 (b), 26 USCA § 1095 note), said intangibles were so situated in the United States. One of the contentions made in said cause was that such taxation was forbidden by the due process clause of the Fifth Amendment to the Constitution of the United States. In an able and extended opinion, carefully reviewing and quoting copiously from previous decisions of the courts, it was held that said choses in action had a situs in the United States and consequently they might be subjected to a death duty tax by the congress and that said Fifth Amendment set up no barrier to the collection of such a tax. It therefore seems self-evident that if said choses in action were property within the United States, they were at the same time property within the state of New York; also that if the Fifth Amendment did not forbid taxation of the transfer of said property by the United States, the Fourteenth Amendment should not forbid a similar tax, if imposed by the state of New York.

Applying this reasoning to the case before us (stock in a domestic corporation), why may not the state of California tax the transfer of the property of a nonresident of the United States, which property has its actual or constructive situs within the jurisdiction of this state? To so hold, we encounter no question of the proper distribution of power between the states as the rights of no other state are involved. The question is: Has a state the power to tax the transfer of property within its boundaries, belonging to persons who were domiciled without the United States? The logic of the Burnet Case, supra, seems to justify the right of the state of California to tax such a transfer.

[2] That case disposes also of the further question raised by respondents that to tax the transfer is to violate the Hay-Pauncefote Treaty (31 Stat. 1939) now subsisting between the United States and Great Britain, in that it would require the payment of a tax by subjects of the latter country where, under similar circumstances, citizens of the former would not be liable for such a tax. The discrimination claimed is not present for the rule here announced applies to American citizens who are nonresidents of the United States and domiciled in Great Britain as well as to citizens there domiciled of Great Britain itself. Besides, it seems peculiarly proper at this juncture to follow our own decisions until the federal courts rule that such taxation is without the power of the state.

The order appealed from is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

POTTER v. CONTRA COSTA REALTY CO.

S. F. 14848.

Supreme Court of California.

Feb. 1, 1934.

Rehearing Denied March 2, 1934.

1. Vendor and purchaser 🔑119.

Purchaser fully performing contract to purchase lots from corporation failing to perform material covenants to construct sidewalks did not lose right to rescind contract on ground of laches by indulging vendor in reliance on its promise to perform such covenant.

2. Equity 🔑71(1), 81.

Laches bars equitable relief, sought by party guilty of excessive, unjustified delay in asserting rights, but delay resulting from negotiations for settlement of controversy is justified.

3. Vendor and purchaser 🔑341(5).

Purchaser rightfully rescinding contract to purchase lots because of vendor's breach of covenant to build sidewalks is entitled to return of sum paid with interest and not liable for taxes and assessments on property.

In Bank.

Appeal from Superior Court, Contra Costa County; H. S. Gans, Judge.

Action by Mrs. Stephanna Potter, formerly Mrs. S. N. Ball, against the Contra Costa Realty Company, which filed a cross-complaint. Judgment for defendant, and plaintiff appeals.

Reversed with directions.

Lovett K. Fraser, of Lakeport, for appellant.

Esmond Schapiro, of San Francisco, for respondent.

LANGDON, Justice.

This is an action to recover money paid under a contract after its rescission. Plaintiff on February 11, 1916, contracted to purchase from the predecessor of defendant company, two lots in a subdivision in Martinez, for $1,000, payable in installments. Plaintiff lived some distance away and had never seen the lots. The contract provided that during the life of the agreement the vendor should pay state and county taxes based upon the then assessed valuation, and that the purchaser should pay excess state and county taxes, and all sanitary and other assessments. The vendor further agreed to grade the street, install water mains, and put in a cement sidewalk at its own expense. On December 21, 1921, plaintiff completed her payments of $1,000, and wrote defendant requesting a deed. Early in 1922 defendant replied that a deed would be delivered on return of the contract. Plaintiff replied that she had mislaid it. Later, under date of April 25, 1923, she wrote that she had visited Martinez and found no sidewalks there. She also again requested a deed. Defendant replied on April 27, 1923, that the company would install the water mains at any time she desired, and on November 21, 1923, in response to another inquiry, defendant wrote that it would construct the sidewalk. After further delays, defendant wrote plaintiff on April 13, 1926, stating that lot owners were in the habit of putting in sidewalks themselves when they built; that the sidewalks cost $52.50; that she owed a balance of $23.47 for certain charges; and that upon receipt of her contract they would give her a deed, credit her with the sum of $23.47, and pay her the difference of $29.03, following which she could put in her own sidewalk. The letter also offered the alternative of her paying the sum of $23.47 at once, and receiving from defendant a deed and "a letter of credit for the sidewalk." Plaintiff made no answer. On July 19, 1929, defendant wrote plaintiff that it would insist upon strict performance of the contract; that there was overdue a balance of $118.31 (for taxes and assessments paid); and that unless all was paid by July 29, 1929, the contract would be terminated and prior payments forfeited. On November 14, 1929, plaintiff wrote defendant, giving notice of rescission of the contract, and demanding the return of the $1,000 with interest. Defendant refused to comply with the demand, and this suit was brought. Defendant cross-complained for the taxes and assessments paid.

The trial court found that defendant had failed to construct the sidewalks as required by the contract, but held that plaintiff was guilty of laches, which barred her right to rescind. Its decree was that plaintiff take nothing, and that her interest in the property be forfeited unless she paid the sum of $89.56 (for taxes and assessments) to defendant within 30 days from service of notice of entry of judgment. Costs were awarded to defendant. Plaintiff appealed.

[1] The judgment is sought to be justified upon the equitable principle of laches, but it derives no support from that doctrine. The undisputed facts show that plaintiff fully performed all conditions of the contract; that defendant failed to perform a material cove-

nant; that defendant in the course of the negotiations promised to fulfill its obligations, and did not, until 1929, in any way repudiate the same. That she had a right to rescind for failure of consideration is clear, and she did not lose that right by her indulgence of defendant in reliance upon its promise to perform. See, generally, Mills v. Richmond Co., 63 Cal. App. 594, 219 P. 465; Walker v. Harbor Blocks Co., 181 Cal. 773, 186 P. 356; Grotheer v. Panama Pacific Land Co., 41 Cal. App. 19, 181 P. 667.

[2] The doctrine of laches bars equitable relief where the party seeking relief has been guilty of excessive, unjustified delay in asserting rights, but delay is justified where it results from negotiations to reach a settlement of the controversy, and this must be particularly true where the defaulting party represents that he will make good his default. See Sherratt v. Hellman Com. T. & S. Bank, 112 Cal. App. 542, 297 P. 582.

[3] Plaintiff was entitled to rescind and did rescind the agreement. It follows that she is entitled to the return of the sum of $1,000, together with interest. Since defendant retains the property, this disposes of its cross-demand for taxes and assessments.

The judgment is reversed, with directions to the trial court to enter judgment for plaintiff in accordance with the conclusions expressed in this opinion.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SEAWELL, J.; SPENCE, Justice pro tem.

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220 Cal. 85

MERRITT v. MERRITT.

L. A. No. 12910.

Supreme Court of California.

Feb. 9, 1934.

1. Divorce ⚷245(1).

Existence of accrued and unpaid alimony *held* not to prevent reduction of future installments, where defendant, because of pecuniary inability, is unable to discharge arrearages.

2. Divorce ⚷239.

Alimony should be ordered only upon evidence that husband personally has means of compliance or capacity to acquire means.

3. Divorce ⚷231.

Wife is entitled to demand from divorced husband only such support as he is reasonably able to furnish from his property or earnings.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by Lou Craig Merritt against Hulett C. Merritt, Jr. From an order denying the defendant's motion to modify a previous order for alimony and support of minor child, the defendant appeals.

Order reversed, and cause remanded in accordance with opinion.

Bertin A. Weyl, of Los Angeles, for appellant.

William W. Bearman, of Los Angeles, for respondent.

PER CURIAM.

The question presented by this appeal is whether or not the trial court should have denied a motion to modify a previous order for alimony and support of a minor child in a divorce case. Certain accrued allowances for such purpose were not paid, and the court below further found that the only income of defendant was his monthly salary, which was less than the amount of the monthly allowance, and that he had no other property or assets or credit facilities except the possibility of borrowing from relatives or others.

We are of the view that the order appealed from should be reversed, with directions to the trial court to accord the parties an opportunity to introduce further evidence and to enter such order as may then be found just and equitable.

The appeal is by the defendant husband from a special order made after final judgment in a divorce action denying his motion for modification of the allowance for support of plaintiff and the minor child. Interlocutory decree of divorce was entered December 1, 1926, and an order made at that time for payment of $1,000 per month, pursuant to agreement of the parties, which was subsequently increased to $1,100 per month by an order from which defendant appealed, and which was affirmed. See Merritt v. Merritt, 106 Cal. App. 234, 289 P. 240.

Later, upon a showing of decreased income by the defendant, the allowance was reduced to $800 for the period June, 1928, to January, 1929, with a special proviso inserted by the judge that the modification shall not relieve the defendant from civil liability for nonperformance of the property settlement upon which the previous order was based. In June of 1930 the plaintiff filed an application to have defendant adjudged guilty of contempt for failing to comply with the court's order for support and maintenance, alleging substantial arrears on account thereof. An order to show cause was duly issued and served, and in response thereto defendant filed affidavits of himself and his employer's attorney showing his inability to make the monthly payments or to obtain the money to meet the past-due and unpaid sum and also filed notice of a motion for modification of the order for support of plaintiff and minor child by reducing the payment to plaintiff from $750 per month for herself and $350 per month for the child to $300 per month for her maintenance and $200 for the child. Voluminous affidavits were filed in support of and in opposition to the respective motions, and by consent of the parties they were heard together in November, 1930, and thereafter the court made an order finding that "defendant's only income is his salary amounting to $800 per month, and that he has no other property or assets belonging to him or under his control from which he receives any additional income, or which could be converted into cash, * * * and is not in wilful disobedience of the order of the court. * * * That defendant has no credit facilities whatsoever except the possibility of borrowing additional sums from his father or others who have heretofore financially assisted him, and that defendant has not exhausted his efforts or ability to borrow or obtain credit from said persons." Then followed the order purging defendant of contempt and the provision from which the appeal is taken and upon which argument for reversal is predicated: "That if defendant shall on or before December 17, 1930, pay to plaintiff in full the amount of his arrearage, being the sum of $8,750, and further amounts that shall have in the meantime become due under the existing orders of this court without interest, the court will find that the defendant is able to pay only $600 per month upon his agreement with plaintiff embodied in the decree of divorce aforesaid, and that such sum only and no more shall be enforceable by decree of court; otherwise defendant's motion for modification of the order requiring him to pay the sum of $1100.00 per month to plaintiff for her support and the support and maintenance of the minor child of plaintiff and defendant will be denied."

The transcript was filed March 7th, and appellant's opening brief, with acknowledgment of service by attorney for plaintiff, was filed April 4, 1931. No extension of time was applied for or given and no respondent's brief has been filed. The respondent was ordered to show cause at the December Los Angeles term of court why the order appealed from should not be reversed or other appropriate order made. There was no appearance on behalf of the respondent, and the case was submitted for examination and appropriate order.

By section 1 of rule V of this court, it is provided that, if respondent shall not file his points and authorities, the cause may be submitted for decision upon appellant's brief, in which case the court may, in its discretion, decide the case upon the statement of facts contained in such brief. The foregoing statement of facts is taken largely from the brief. Therein it is conceded there appears to be no California authority directly in point. We think, however, the principles which should govern herein are correctly declared in the cited cases of Craig v. Craig, 163 Ill. 176, 45 N. E. 153, 154, and Boyden v. Boyden, a Rhode Island case, reported in 50 R. I. 326, 147 A. 621, 622, 66 A. L. R. 214, and that we should follow in this state the rules therein announced.

[1] In the former case the court said: "If the existence of accrued and unpaid alimony should be held to absolutely prevent the court from altering, reducing, or altogether abrogating future installments of alimony, then it would result that, in cases of pecuniary inability of the defendant to pay and discharge all arrearages of alimony, the court would be powerless to grant relief as to future and further alimony, no matter what the changed condition of the parties in the property, or how loudly the facts and circumstances might call for the equitable intervention of the court. The hands of a court of equity are not thus bound."

[2, 3] In the latter case it was said: "Alimony * * * should be ordered upon evidence that a husband himself has means of compliance or a capacity to acquire them if he makes reasonable efforts. * * * Alimony * * * where the husband is without property may not be based on the husband's hope of gratuities or the court's surmise that he will receive them. It may be unfortunate for petitioner * * * but she is entitled to demand from him as a matter of right only such support as he is reasonably able to furnish from his property or earnings."

Without discussing the claims of concealment and subterfuge on the one hand or the assertions of good faith upon the other, it appears to us that the intervening time may have demonstrated the facts as distinguished from the belief of the parties and we feel the entire matter should be set at large for the introduction of further testimony if the parties, or either of them, so desire, and the entry of such order as to the court may then seem just and equitable.

The order appealed from is reversed, and the cause remanded to the trial court for such further proceedings as may be deemed appropriate.

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219 Cal. 737

ERICKSON v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 14965.

Supreme Court of California.

Jan. 24, 1934.

Rehearing Denied Feb. 21, 1934.

1. Courts 🔑189(15).

Municipal court of San Francisco *held* to have jurisdiction to entertain motion to quash an execution issued by clerk of court.

2. Courts 🔑189(15).

Writ of execution was issued by clerk of municipal court of San Francisco in exercise of ministerial function.

3. Courts 🔑189(15).

Municipal court has general and inherent power to control its process and to correct on motion to quash any errors or unauthorized acts of its ministerial officers.

4. Process 🔑157.

Motion to quash is proper remedy when process is void as well as when it is voidable.

5. Courts 🔑190(8).

On writ of review to review municipal court's order denying motion to quash writ of execution, order should be affirmed if municipal court had jurisdiction of subject-matter and parties.

6. Certiorari 🔑5(1).

Certiorari is not proper remedy when aggrieved party has remedy by appeal.

7. Courts 🔑190(2).

To appeal to superior court from special order made after final judgment by municipal court, it is not necessary that court rendering judgment be same court that made order (Code Civ. Proc. § 983).

PRESTON, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Petition by A. F. Erickson for writ of review to be directed to the Municipal Court of the City and County of San Francisco, and Daniel S. O'Brien, Judge thereof. From judgment affirming an order of the Municipal Court, City and County of San Francisco, denying a motion to quash a writ of execution, petitioner appeals.

Affirmed.

Prior opinion, 26 P.(2d) 461.

See, also, 21 P.(2d) 480.

Rehearing denied; PRESTON, J., dissenting.

Stanley Burke, of San Francisco, for appellant.

Leo J. Rabinowitz, of San Francisco, and Ralph C. Curren, of Los Angeles, for respondents.

SHENK, Justice.

This is an appeal by the petitioner from a judgment of the superior court in a certiorari proceeding affirming an order of the municipal court denying a motion to quash an execution.

In October, 1931, a judgment for $1,117.35 was rendered in the municipal court of the city of Los Angeles against the petitioner and in favor of one Shane. In March, 1932, Shane filed an abstract of said judgment in the office of the clerk of the municipal court in San Francisco, where the petitioner resided. Based upon said abstract, an execution was issued by the clerk of the municipal court in San Francisco and a levy thereof was made upon an automobile owned by the petitioner. Thereupon the petitioner presented a formal motion to the municipal court in San Francisco to quash the writ of execution on the ground that said municipal court was without jurisdiction to issue said writ and that the same was void. The motion was denied. No appeal from that order to the superior court was taken or attempted. The petitioner applied to the superior court for a writ of review, which was granted. Upon a return to the writ, the order of the municipal court was affirmed. Hence this appeal.

[1-5] In his opening brief the petitioner-appellant states as the legal questions involved: "Did the municipal court of San Francisco have any jurisdiction whatsoever in the cause; and, secondly, was its jurisdiction properly invoked and exercised?"

Following the question propounded, there is much discussion upon the question of the jurisdiction of the municipal court with reference to issuance and enforcement of an execution on a judgment rendered in another county. Considerable confusion has resulted because of the failure to distinguish the question of the jurisdiction of the municipal court to entertain and pass upon the motion to quash and the power of the clerk of the municipal court to issue the execution. This appeal involves the former question, namely, Had the municipal court jurisdiction to entertain the motion to quash and dispose of the same? We conclude that it had for two reasons:

First, the respondent municipal court, as a court, took no part in and had nothing to do with the issuance of said writ of execution. The writ was issued by the clerk of the court, without an order of court directing the same to issue, and the same was issued by the clerk in the exercise of a ministerial function. Santini v. Justice's Court (Cal. Sup.) 24 P.(2d) 761; Adams v. Bell (Cal. Sup.) 27 P.(2d) 757. The municipal court has the general and inherent power to control its process and to correct on a motion to quash any errors or unauthorized acts of its ministerial officers. This power does not depend on statutory enactments and a motion to quash is the proper remedy as well when the process is void as when it is merely voidable. 23 Cor. Jur., p. 535, and cases there cited. The respondent court had jurisdiction of the subject-matter of the motion and of the parties to the same. In fact the petitioner himself invoked the power of the court to pass upon the validity of the issuance of the execution. If his motion to quash had been granted, he would have obtained the relief which he sought. The action of the court in granting or denying the motion could have been attacked by an appeal to the superior court, a question which will be later discussed. The court had the power to pass upon the motion, whether its decision was correct or erroneous. The decision of this court in Matter of Hughes, 159 Cal. 360, 113 P. 684, with reference to the power of the court in certiorari, is here applicable. On page 363 of 159 Cal., 113 P. 684, 686, it is said: "The Supreme Court has jurisdiction in certiorari to review a judgment of the superior court only in a case where that court has exceeded its jurisdiction (Code Civ. Proc. § 1068), and in such cases only for the purpose of inquiring whether or not the judgment sought to be reviewed was in excess of jurisdiction. * * * Code Civ. Proc. § 1074. If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it. This has been repeatedly stated in former decisions of this court." See, also, 4 Cal. Jur., Certiorari, pp. 1022 et seq. The present case is not one wherein the court has without authority in law assumed jurisdiction to order the issuance of an execution. In such a case the court would be without jurisdiction of the subject-matter and certiorari would lie. Buell v. Buell, 92 Cal. 393, 28 P. 443. Here the respondent court had jurisdiction of the subject-matter and of the parties, and the superior court properly affirmed the order for that reason.

[6, 7] Secondly, certiorari is not the proper remedy when the aggrieved party has a remedy by appeal, even though the inferior tribunal was without jurisdiction to make the order. Code Civ. Proc. § 1068; Helbush v. Superior Court, 99 Cal. App. 501, 278 P. 1062. In other words, certiorari cannot be made a substitute for an appeal. Seaboard Surety Corp. v. Superior Court, 112 Cal. App. 248, 296 P. 633; Los Angeles Surety Co., Inc., v. Municipal Court, 111 Cal. App. 133, 295 P. 591; 4 Cal. Jur., p. 1037, and cases there cited. This rule has been subjected to certain exceptions (see Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635), but the present case does not fall within the ruling in that case nor within any other exception known to us or pointed out by counsel. The remedy by appeal to the superior court was available to the petitioner herein as an appeal from a special order made after final judgment as provided in section 983 of the Code of Civil Procedure. In order that said section in this respect be applicable, it was not necessary that the court which rendered the judgment be the same court that made the order. Wells, Fargo & Co. v. Anthony, 35 Cal. 696. The superior court would have had jurisdiction of an appeal from the order of the respondent court complained of, and, even if the superior court on such appeal had decided erroneously, certiorari would not lie. Roberts v. Police Court, 185 Cal. 65, 195 P. 1053. For this additional reason, the ruling of the superior court herein was legally justified.

From what has been said it follows that we may not, on this appeal, properly pass upon the question of the power of the clerk of the municipal court to issue an execution on said abstract of judgment. A determination thereof one way or the other could not affect the result of this appeal.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.

PRESTON, Justice.

I dissent.

The majority opinion takes a constricted view of the sole question involved and bases its conclusion upon a ground not urged by either side of the litigation. Both sides concede that the basic question raised was whether or not the municipal court of the city and county of San Francisco had jurisdiction to issue a writ of execution on an abstract of judgment, and the judgment roll supporting it, coming from another jurisdiction. The writ of review issued by the superior court to the municipal court of the city and county of San Francisco expressly reaches the proceeding had in the municipal court of the city and county of San Francisco resulting in the issuance and levy of an execution on this judgment. The majority opinion bases its conclusion upon the assumed fact that the municipal court of the city and county of San Francisco issued the execution in question without an order of the court itself. Respondent does not claim that an order of court was necessary or was absent. Coming from another jurisdiction, the execution could have been properly issued only upon an order of the court and it must be presumed that such an order was made. Moreover, this question is set at rest by the fact that the municipal court did ratify the action of the clerk by making its order refusing to recall and quash the said execution. The case of Adams v. Bell (Cal. Sup.) 27 P. (2d) 752, cited in the opinion, is itself authority for the necessity of such an order. The issuance and levy of the execution thus became the result of a judicial proceeding.

The question of the jurisdiction of the municipal court of San Francisco to issue this execution is therefore fairly presented, and, if jurisdiction be wanting, the proceeding may be reviewed on certiorari. Buell v. Buell, 92 Cal. 393, 28 P. 443. Taking said narrow view of the legal question presented is calculated to provoke additional criticism of our courts. The holding in Santini v. Justice's Court (Cal. Sup.) 24 P.(2d) 761, that the issuance of an execution on one of the court's own judgments by the clerk thereof, was a ministerial act, does not apply in the situation here presented. The judgment here is from a foreign jurisdiction and could lawfully be set up in another court only by a proper order of said court. Besides, in certain instances an order of court is required for the issuance of an execution upon the court's own judgments. See section 685, Code Civ. Proc.; Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 197 P. 334. The authorities cited in the main opinion to the effect that certiorari is not the proper remedy when an aggrieved party has a remedy by appeal are likewise not applicable to the situation here presented. Neither is the case of Wells, Fargo & Co. v. Anthony, 35 Cal. 696, in anywise helpful to the solution of the problem here confronting us. If the municipal court was wanting in jurisdiction, it is a proper use of the writ of certiorari to have this fact declared. Property has been seized under this execution and the action of this court in basing its conclusion upon the ground stated will sanction what may be the illegal seizure and sale of property.

I think that the question of jurisdiction should be fairly met and decided.

219 Cal. 742

In re McCABE'S ESTATE.

STATE v. DALECSIC.

S. F. 14845.

Supreme Court of California.
Jan. 29, 1934.

1. Escheat ⇨6.

Petition by state alleging testator died without heirs, and that estate should escheat, *held* to sufficiently allege state's interest as basis for will contest (Code Civ. Proc. §§ 1269, 1269a).

2. Appeal and error ⇨843(4).

Appellant is entitled to review of order striking amended petition, even though essentially same document as original petition to which demurrer was sustained.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceedings in the matter of the estate of Barney McCabe, deceased, wherein the State filed a contest of the probate of the decedent's alleged last will and testament, opposed by Frank Dalecsic, also known as John W. Davis. From an adverse judgment, the contestant appeals.

Reversed, with directions.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the State.

Raymond D. Williamson, of San Francisco, for respondent.

PER CURIAM.

Barney McCabe died in the city and county of San Francisco on October 21, 1931. On November 12, 1931, two documents were admitted to probate as the last will and testament of said decedent. On April 28, 1932, the state of California, through its Attorney General, filed a contest of said documents on the ground that they did not in fact constitute a will nor, if they did, were they executed as required by the law of wills. The contest further alleged that decedent died without heirs at law, and, moreover, that one Frank Dalecsic, named in said documents, was not a son or heir at law of said decedent. Finally, it was alleged that the state was the only person or entity entitled to receive said estate.

A general demurrer, and also a special demurrer, was interposed by said Frank Dalecsic and by the court sustained. The special ground of demurrer was that the state had failed to allege facts and circumstances which showed its interest in said estate and its right to appear in said proceeding by contest of the will. Ten days were allowed the contestant to amend its petition. Within that period it filed an amended petition, which in all essential particulars was identical with the original one. Thereupon respondent moved the court to strike said amended petition from the files, and also prayed for judgment on his demurrer to the original petition. This motion was granted, and judgment in favor of respondent Frank Dalecsic, followed on November 28, 1932, which judgment also ordered said petition stricken from the files. Said contestant thereupon appealed.

The allegations of the amended petition as to the absence of heirs at law were as follows: "That Frank Dalecsic and/or John W. Davis is not the son, illegitimate or otherwise, of the decedent, and in this connection contestant alleges that the decedent left no will and left no relative or heirs surviving him at the time of his death * * * there is no person, firm, corporation or individual entitled to succeed to the estate of the decedent or to any part thereof, save and except the contestant, State of California * * * that said State of California is a party in interest in said estate and is entitled to receive the same by direct distribution thereof, and that said estate is about to and should escheat to the State of California."

[1] These allegations were sufficient to show the interest of the state and also sufficient to show the facts and circumstances of such interest. Sections 1269, 1269a, Code Civ. Proc. They do not allege a mere conclusion of law. In State v. Miller, 149 Cal. 208, 212, 85 P. 609, 610, speaking of allegations almost identical with those above quoted, the court said: "It would be necessary, under this provision, therefore, with respect to such heirs, to make an allegation that there were 'no heirs to take the estate,' which is the condition necessary under section 1386 of the Civil Code, to cause the property to escheat to the state. We do not see how this can be done except by a direct averment to that effect, nor how it can be held that this is not a sufficient allegation of the fact to serve as a support for the proceeding." The above case modifies the doctrine announced in State v. Smith, 70 Cal. 156, 12 P. 121, and People v. Roach, 76 Cal. 296, 18

P. 407. It has not been cited by counsel on either side herein, nor have they attempted to distinguish it from the situation at bar. There is nothing whatsoever in the case of State v. Superior Court, 148 Cal. 55, 82 P. 672, 2 L. R. A. (N. S.) 643, which is contrary to the holding we have announced. In that case there was an entire absence of allegations of the same import as those herein found, but a clear intimation is there made that the allegations here are sufficient.

[2] The contention that by filing an amended petition contestant confessed error, admitting that the demurrer had been properly sustained, does not necessitate an affirmance of the judgment. On appeal from such judgment, the contestant is entitled to have reviewed the propriety of the order of the court striking the amended petition from the files, and this is true even though it is essentially the same document as the original petition.

The judgment is reversed, with directions to the court below to reinstate the amended petition and to proceed with the determination of the cause.

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219 Cal. 783

JANSSEN v. DAVIS et al.

S. F. 14430.

Supreme Court of California.

Jan. 31, 1934.

1. Specific performance 🔑28(1), 31.

Contract, incomplete, uncertain, or indefinite in its material terms, will not be specifically enforced, and certainty required in equity suit is much greater than that required in law action.

2. Specific performance 🔑28(2).

Contract covering lot and construction of house thereon *held* sufficiently certain to warrant specific performance in action by vendor-contractor.

> Evidence disclosed that the vendor-contractor was to receive about $11,250; that the plans and specifications were not complete when work started, but that the purchaser was to have privilege of specifying extras and other changes, that $2,537.50 owing by vendor-contractor to purchaser was to be applied on purchase price, that a first mortgage in as large amount as possible was to be negotiated with bank, and that the vendor-contractor was to take second mortgage for balance.

3. Specific performance 🔑31.

All terms and conditions of proposed agreement need not be set forth in contract to warrant specific performance thereof, since usual and reasonable terms are, in contemplation of parties, part of contract.

4. Specific performance 🔑121(9).

In suit for specific performance, finding that purchaser agreed to pay vendor-contractor $75 monthly *held* unsupported by evidence.

5. Specific performance 🔑123.

In suit for specific performance, $5,000 allowed for past interest, insurance, taxes, and other items *held* error, where such items were not proved nor fixed by findings of fact and conclusions of law.

6. Specific performance 🔑32(1).

Specific performance will not be decreed against one party when contract cannot be specifically enforced against plaintiff.

7. Specific performance 🔑21.

In suit for specific performance where property involved is community property, vendor is not entitled to judgment unless he proves that his wife was willing to join in conveyance.

8. Specific performance 🔑123.

Finding that agreed price was the reasonable and fair value of property is essential to judgment for specific performance.

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by E. A. Janssen against W. K. Davis and another for specific performance. From a judgment for plaintiff, named defendant appeals.

Reversed.

Fred L. Dreher and Dreher & McClellan, all of San Francisco, for appellant.

Ivan N. Maroevich, of San Francisco, for respondent.

PER CURIAM.

This is an appeal from a judgment decreeing specific performance of a contract for the purchase and sale of a parcel of real property, together with the improvements thereon. The plaintiff is the vendor and defendant W. K. Davis is the vendee. Judgment was rendered in favor of defendant Emelie

Davis and, inasmuch as plaintiff does not appeal, her rights are no longer involved.

The facts as disclosed by the record are as follows:

Plaintiff is a building contractor and the defendant is a real estate agent. Defendant, as agent, had sold certain property for plaintiff, as a result of which there was due and owing to defendant as and for commissions the sum of $2,537.50. Some time in June or July, 1923, defendant, who was planning to be married, approached plaintiff for the purpose of buying a home from him. Defendant was not satisfied with any of the houses then constructed and asked plaintiff to build him a house. The parties finally agreed upon a lot then owned by plaintiff and, after considerable discussion, mutually agreed as to the general plan of the house. All negotiations were oral. Plans were drawn and construction started before all of the details of the house had been agreed upon. The evidence clearly shows that the parties agreed that the total cost of the lot and the proposed building should be "about" or "approximately" $11,250. This figure was based on the general plans which had been prepared, but it was contemplated that the defendant would, during the course of construction, order certain extras or additions, for which an extra charge should be made. The defendant makes much of the fact that plaintiff did not testify to the exact amount agreed upon, but the record shows that the only uncertainty was as to the value of these extras. During the course of construction, the defendant ordered many changes, extras, and additions, the reasonable value of which brought the total value of the property to $13,250, the amount found by the trial court to be the agreed value. There is evidence that this was a reasonable and fair price for the property. Although the evidence is conflicting, there is ample evidence to sustain the trial court's finding that it was agreed that the $2,537.50 due and owing from plaintiff to defendant should be applied to the purchase price. As to the balance of the financing, the evidence is not entirely satisfactory. It was apparently agreed that a bank loan should be secured and that the balance of the purchase price should be evidenced by defendant's note, carrying 6 per cent. interest, secured by a second mortgage, or by plaintiff retaining title. There is no dispute that the parties did negotiate and secure $4,500 on a first deed of trust from a bank. The defendant refused to sign a note for the balance of $6,212.50. When the house was completed in September, 1923, defendant moved in and took possession. As far as the record is concerned, he is still in possession, although it is stated in one of the briefs that he was evicted in 1931. During that entire period, with the exception of the application of plaintiff's debt to defendant on the purchase price, defendant has refused to pay 1 cent to plaintiff, and all expenses for taxes, insurance, interest on the first deed of trust, etc., have been paid by plaintiff. Shortly after the completion of the house, a controversy arose between the parties and, in July of 1924, this action for specific performance was commenced. The defendant answered, denying the allegations of the complaint, and cross-complained for the amount of commissions due him. The case did not proceed to trial until October of 1928. After plaintiff had completed his case, for reasons that do not appear, the trial was continued and was not resumed until December of 1929. The long intermission partially tends to explain plaintiff's failure to produce certain testimony hereafter referred to.

So far as pertinent here, the trial court found that the parties had agreed upon the purchase and sale at a price of $13,250, and that it was agreed that the $2,537.50 due and owing from plaintiff to defendant should be applied on the purchase price; that it was agreed that the balance of the purchase price should be evidenced by a note in the sum of $6,212.50, drawing 6 per cent. interest, secured by a second mortgage, and subject to a first mortgage in the sum of $4,500; that defendant was to pay plaintiff the $6,212.50 in installments of $75 a month; that the plaintiff had fully performed; and that the defendant had refused to perform. No finding as to the adequacy of the consideration or fairness of the purchase price was made. The court specifically found against the allegations in defendant's answer and cross-complaint. As conclusions of law, the court found that an order of court be made requiring the defendant to specifically perform the contract by executing a note secured by a first deed of trust to the bank, or assume the existing one, and by executing and delivering to plaintiff a note in the sum of $6,212.50 at 6 per cent. interest, secured by a second deed of trust payable in installments of $75 a month; that defendant be ordered to pay to plaintiff the sum of $5,025, being the amount of installments past due, and that defendant be credited with that sum on his note when paid; that defendant be ordered to pay plaintiff in addition "any and all sums expended by said plaintiff on account of said defendant in reference to said real property * * * by way of taxes, insurance, interest on said first mortgage and interest on said second deed of trust * * * accruing or to accrue since the 25th day of September, 1923, and until consummation of said sale ordered by the Court * * *"; that plaintiff be ordered to make, execute, and deliver a good and sufficient deed to the premises upon defendants' compliance with the above order. The court failed to find the exact amount of these extra expenditures. The judgment is radically different from the findings and conclusions, in that it fixes the amount due at $19,277.47, which sum includes an itemization of the extra expenditures.

[1-3] On this appeal defendant first contends that specific performance should not have been granted for the reason that the agreement is too indefinite, uncertain, and incomplete in many of its details. It is, of course, elementary that a contract that is incomplete, uncertain, or indefinite in its material terms will not be specifically enforced in equity and that the degree of certainty required in an equity action is much greater than is required in an action at law. See Pascoe v. Morrison (Cal. Sup.) 25 P.(2d) 9, for the latest case stating the rule. We think that, measured by any reasonable standard, the contract here involved is sufficiently certain to be specifically enforceable. There was no real uncertainty as to price. The evidence clearly shows that the agreed price was $11,250 for the house as originally planned, with the understanding that additions ordered by the defendant should be extra. The reasonable value of the extras brought the purchase price to $13,250. Nor was the uncertainty as to the plan of financing so great as to preclude plaintiff from obtaining the equitable relief prayed for. The evidence shows that the parties intended that the debt due defendant from plaintiff should be applied on the purchase price and that a bank loan should be secured in as large a sum as possible, and that the balance should be evidenced by defendant's note at 6 per cent. interest. This note was to be secured by a second mortgage or by a contract of sale, plaintiff retaining title. There is no principle of equity requiring all the terms and conditions of the proposed agreement to be set forth in the contract. The usual and reasonable terms found in such contracts are, in contemplation of the parties, a part of such contract. Wagner v. Eustathiw, 169 Cal. 663, 147 P. 561; Carr v. Howell, 154 Cal. 372, 97 P. 885; 23 Cal. Jur., § 13, at p. 435. That rule has particular application to the facts of this case, where the evidence shows that defendant was engaged in the business of selling houses for the plaintiff, and that the agreement was that the debt due plaintiff should be evidenced by the type of agreement usual in such cases. The contention that the contract is uncertain for the reason that the plans and specifications were not finally agreed upon when the price was fixed, is equally without merit. It is true that when construction started in July, 1923, all of the details had not been agreed upon, but a general plan had been accepted, and it was understood that defendant could add extras as the building progressed, the reasonable value of these to be added to the purchase price. This was done, so that when the building was completed in September, 1923, the agreement had been made fully certain by performance. For the foregoing reasons, we are of the opinion that the agreement, in all respects, was sufficiently certain to be capable of specific performance.

Defendant also urges as a ground for reversal that the evidence shows that there was a cloud on plaintiff's title. Defendant bases this contention on the uncontradicted evidence offered by him that the building encroaches on the adjoining property ⅝ of an inch on one side and 2¾ inches on the other. It is contended that this constitutes a material defect in plaintiff's title. The trial court failed to make any finding on this point. Inasmuch as we are of the opinion that the judgment must be reversed for other reasons, we do not now find it necessary to pass on this point, particularly in view of the fact that there was evidence from which the trial court could have found that such overlapping was caused by the acts of the defendant in ordering dirt to be piled against the inside of the foundations, over plaintiff's objections, and that it was this added weight which caused the foundations to bulge over on the adjoining property.

[4] There are other contentions of defendant which must be sustained. In the first place, the trial court found, as stated above, that defendant had agreed to pay the balance of the purchase price in installments of $75 a month. This finding is totally unsupported by the record. Plaintiff testified that the agreement was that defendant should pay the balance in monthly installments of $100, while defendant testified the amount was $50 or $55. Nowhere in the record was the amount fixed by the trial court ($75) ever mentioned. In view of the

fact that the trial court found that even if all back installments had been paid, there would still be a material amount due and owing to plaintiff, the amount of the monthly installments becomes quite material. It is to be noted that the point here made is not that the amount of the installments was uncertain, but that the amount fixed by the trial court finds no support in the record. If the court had fixed $100, $50, or $55 as the amount of the monthly installments, such finding would have been amply sustained by the record.

[5] In the second place, as already mentioned, the trial court, in its judgment, decreed that at the time judgment was rendered, the total amount due plaintiff was $19,277.47, less the $2,537.50 due defendant for commissions. The judgment was, therefore, for $16,739.97. This figure was arrived at by adding to the $13,250 fixed in the findings and conclusion certain items for past interest, insurance, taxes, etc., totaling about $5,000. We have searched the record diligently and can find no evidence at all to sustain these charges. The plaintiff failed to introduce any evidence at all as to the amount of these charges. Moreover, the findings of fact and conclusions of law did not fix these amounts, so that the judgment is not sustained by the findings and conclusions. In view of the complete failure of proof as to these charges, the judgment cannot be sustained.

[6-8] In view of a retrial being had, there is one other point which should be mentioned. The uncontradicted evidence shows that the property here involved was the community property of plaintiff and his wife. Plaintiff's wife is not joined as a party, nor is there any evidence that plaintiff's wife was willing to join in a conveyance. It is the general rule that specific performance will not be decreed against one party when the contract cannot be specifically enforced against the plaintiff. Pacific, etc., R. Co. v. Campbell-Johnston, 153 Cal. 106, 94 P. 623; Jolliffe v. Steele, 9 Cal. App. 212, 98 P. 544; Waldeck v. Hedden, 89 Cal. App. 485, 265 P. 340. At the close of plaintiff's case the trial court, when its attention was called to this defect in plaintiff's proof, specifically granted to plaintiff the right to reopen the case to prove, if he could, that his wife was willing to join in a conveyance. A continuance was then had and, as already pointed out, the trial was not resumed for over a year. When the trial was resumed, counsel for plaintiff evidently overlooked this detail of proof. On the retrial, plaintiff should take care of this omission.

It should also be noted that the trial court failed to find that the agreed price was the reasonable and fair value of the property. This also should be taken care of on the retrial of this cause.

It is regrettable that the judgment appealed from must be reversed. We are of the opinion that the case is one clearly calling for the equitable relief granted, but, due to the failure of plaintiff to offer evidence on the above matters, no course remains to us but to reverse the judgment.

The judgment appealed from is reversed.

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220 Cal. 75

ASHLEY v. RIVERA et al.

L. A. 14500.

Supreme Court of California.

Feb. 8, 1934.

1. Appeal and error ⚷1050(1).

Admission of evidence of, and counsel's reference in argument to, plaintiff's poverty, *held* not prejudicial error warranting reversal of judgment for her in personal injury suit.

2. Evidence ⚷263(1).

Evidence of circumstances of preparation and presentation to plaintiff of statement, introduced by defendant, that plaintiff considered defendant not to blame for automobile collision, in which plaintiff was injured, *held* admissible (Code Civ. Proc. §§ 1854, 2048).

3. Appeal and error ⚷882(8).

Appellant cannot complain of prejudice by admission of evidence of circumstances of preparation and presentation to appellee of statement introduced into record by appellant (Code Civ. Proc. §§ 1854, 2048).

4. Witnesses ⚷269(4).

Cross-examination of insurance adjuster as to whether he made offer of settlement to plaintiff, if she would sign statement absolving defendant from blame, *held* proper, in view of broad field opened up by his direct examination (Code Civ. Proc. § 2048).

5. Appeal and error ⚷882(8).

Question of reversible error in admitting evidence concerning matter opened by appellant must be resolved on peculiar facts of individual case (Code Civ. Proc. §§ 1854, 2048).

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Gwendolyn Ashley against Frank Rivera, A. J. Pinney, and others. From a judgment for plaintiff against defendant Pinney, the latter appeals.

Affirmed.

Prior opinion, 24 P.(2d) 824.

Paul Nourse and Irving E. Read, both of Los Angeles (Forrest A. Betts, of Los Angeles, of counsel), for appellant A. J. Pinney.

Joe Crider, Jr., and E. H. Tilson, both of Los Angeles, for defendant Frank Rivera.

Stuart McHaffie and Charles Rubin, both of Los Angeles, for respondent.

PRESTON, Justice.

Action to recover damages for personal injuries received by plaintiff on June 11, 1929, about 11:40 p. m., as the result of a collision between the automobile in which she was riding as guest of defendant Pinney, and a city sprinkling truck driven by defendant Rivera. Defendant Rivera was driving the truck easterly on Seventh street, Los Angeles. Defendant Pinney was driving westerly on said street, intending to make a left turn, southerly, into Lake street. Before the turn was completed, the collision occurred. Plaintiff instituted this action against both of the above-mentioned parties. The evidence adduced, particularly that bearing upon issues of negligence, was highly conflicting in character. The jury found for defendant Rivera, but rendered a verdict against defendant Pinney, and in favor of plaintiff, in the sum of $5,000. Defendant Pinney thereupon appealed.

Appellant does not argue the insufficiency of the evidence to support the verdict and judgment, but reviews the evidence for the purpose of showing that the conflict therein is so great as to render prejudicial certain alleged errors, irrespective of whether they would otherwise be considered of sufficient strength to justify a reversal of the judgment.

[1] Appellant contends that the court erred in admitting evidence to show the poverty of plaintiff and that the error was enhanced by counsel in arguing plaintiff's poverty to the jury. We have reviewed the entire record and find that this claim merits scant discussion. During the course of a rather lengthy inquiry into plaintiff's earning ability, which prior to the accident was substantial, she testified that she had been a widow for ten years and had supported both herself and her two children. Counsel, addressing the jury, referred to her as "poor" and "not wealthy." It is patent that if this testimony and these remarks were out of order, the error was slight and could easily have been cured, had it been so requested, by proper instruction to the jury. At any rate, it is clear that appellant suffered no prejudice which would warrant a reversal of the judgment.

[2-4] We are thus brought to the sole issue of substance on this appeal. It is appellant's claim that the court erred in admitting testimony, over his persistent objections, to prove an alleged offer of compromise and settlement in his behalf, showing the interest of his insurer in this cause and that, particularly under said direct conflict in the evidence, it constituted reversible error. The testimony complained of relates to Defendant's Exhibit 2, which purports to be a statement by plaintiff of the manner in which the collision occurred, concluding with the sentence: "I consider that the driver of the other car was solely to blame and that Mr. Pinney was not to blame in any way." Underneath this closing sentence, and in a different handwriting, are the words: "I read this and consider correct as near as I can." This statement was brought into the case by counsel for appellant, during his cross-examination of plaintiff, in the following manner:

"Q. Mrs. Ashley, will you write on that piece of paper these words: 'I read this and consider correct as near as I can.' A. 'I read this and consider correct as near as I can.' Q. * * * That is sufficient. * * * Mr. Tilson: I would like to have a look at that too. Mr. Read: All right. I will ask you if this is your handwriting at the bottom of this piece of paper. Just look at the handwriting. A. Yes. Q. The answer is 'Yes.' Now, I will offer in evidence this statement on behalf of the defendant Pinney. Mr. McHaffie: We would like to have an opportunity before it is put in evidence to know when and where the statement was made and the circumstances, and why it wasn't signed. It is unsigned. * * * We want to know the reason why this statement is now presented and who presented the statement to the witness, and what their interest was in the matter under consideration, and its connection with this particular law suit. The Court: If it is not explained at this time, I will permit you to ask the questions. * * * I think I will admit it subject to any explanation the witness may make." The statement was thereupon introduced in evidence and read to the jury.

When plaintiff was called for redirect examination, counsel for appellant asked the court to instruct plaintiff's counsel that they must not permit any evidence to be brought before the jury having reference to the question of insurance involved in the case, or else it would be assigned as prejudicial error. Plaintiff took the stand and was again shown the statement. She testified that she did not write it, but first saw it at her home, where it was brought by a man who stated he was the insurance broker or adjuster from the Automobile Club of Southern California. She then gave a detailed account of her conversation with this man. She testified that the statement had been prepared prior to his visit; that he induced her to write the above-quoted words at the close thereof and also tried to get her to sign it; that she refused to sign without having time to think the matter over; that he offered to settle with her for $600 or $800, stating that she could still make claim against the truck driver; that he returned the next day, but she did not answer the door and never saw him again.

After plaintiff rested her case, said insurance adjuster was called as a witness by defendants and gave his version of the visit with plaintiff. He testified that the statement was prepared in her apartment after she told him how the accident happened and, at his request, she wrote that it was correct; that he did not care whether she signed it; that he explained to her that Mr. Pinney's car was being repaired by the Automobile Club, which intended to seek reimbursement from the truck driver and stated that he would be glad to help her collect from the truck driver who, she said, was responsible for the accident. On cross-examination he testified that he did not make plaintiff any offer of settlement if she would sign the statement, as he had no authority to pay money anyway; that he was merely investigating the case.

Section 1854 of the Code of Civil Procedure provides: "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence." Section 2048 of said Code permits cross-examination of a witness "as to any facts stated in his direct examination or connected therewith."

We fail to see how appellant can escape application of these sections to justify admission of the evidence in question by the trial court. When appellant introduced the statement, he opened the door to inquiry surrounding the facts and circumstances of its preparation and presentation to plaintiff. How this information could have been adduced without revealing the existence of insurance and the substance of the interview between plaintiff and said adjuster, is hard to see. Appellant is now in no position to complain that prejudice has resulted from his own act in introducing said statement into the record. It is also immaterial that the alleged objectionable matter was again mentioned upon cross-examination of the adjuster. It was already in the record and nothing of prejudice to appellant was added. Moreover, in view of the broad field opened up by the direct examination of the adjuster, we cannot say that said cross-examination exceeded its proper scope. We conclude that all the evidence of which appellant complains was pertinent to the explanation of said Exhibit 2 and was invited by the introduction of said exhibit in evidence.

[5] The question of reversible error growing out of the admission of evidence of this character must always be resolved upon the peculiar facts of the individual case; hence, we shall not cite the numerous authorities on the subject. The case of Zarafonitis v. Yellow Cab Co., 127 Cal. App. 607, 16 P.(2d) 141, states a ruling similar to the above. The cases of Citti v. Bava, 204 Cal. 136, 266 P. 954, and Squires v. Riffe, 211 Cal. 370, 295 P. 517, are not in point as in both of them the inquiry which led to introduction of the objectionable evidence was opened by the plaintiff.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.; SHENK, J.; SEAWELL, J.

220 Cal. 46

HALLINAN v. PRINDLE et al.

S. F. 14494.

Supreme Court of California.

Feb. 1, 1934.

Rehearing Denied March 2, 1934.

1. **Charities 🔑45(2).**

Whether hospital is charitable institution depends on method of transacting its business as well as its charter powers.

2. **Hospitals 🔑8.**

Physicians and surgeons 🔑18(6).

Res ipsa loquitur doctrine *held* inapplicable in malpractice suit against hospital, physician, and nurse, where complaint alleged and plaintiff affirmatively showed how his injuries were inflicted.

3. **Judgment 🔑199(5).**

Judgment notwithstanding verdict against defendant, whose attorney did not move for directed verdict, but merely stated that he thought such motion in order and dropped matter when court said he preferred that it come up after verdict, *held* erroneous (Code Civ. Proc. §§ 629, 1003).

4. **Judgment 🔑199(1).**

Request for directed verdict is not compliance with statutory requirement that motion therefor be made before entry of judgment non obstante veredicto (Code Civ. Proc. §§ 629, 1003).

5. **Trial 🔑333, 340(5).**

Verdict against physician and nurse for "$ No dollars" and against hospital for $10,000 in malpractice suit was too incomprehensible to support judgment, and court erred in refusing to instruct jury to reconsider and reframe verdict.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by T. J. Hallinan against Kirk H. Prindle and others. From the judgment rendered, plaintiff appeals.

Reversed.

Prior opinion, 11 P.(2d) 426.

Vincent W. Hallinan, of San Francisco, Joseph J. Bullock, of Redwood City, and C. K. Bonestell and Michael Riordan, both of San Francisco, for appellant.

Hartley F. Peart and Hadsell, Sweet & Ingalls, all of San Francisco, for respondent Kirk H. Prindle.

Redman, Alexander & Bacon, of San Francisco, Ross & Ross, of Redwood City, and Herbert Chamberlin, of San Francisco, for respondents Ann M. MacKinnon and Church of St. Matthew Mills Memorial Hospital.

PER CURIAM.

On and prior to December 7, 1929, Kirk H. Prindle was a licensed physician and surgeon of this state, practicing his profession in San Mateo county, and having an association with the Church of St. Matthew Mills Memorial Hospital and also with Dr. Chidester, medical superintendent and director of said hospital, which institution will hereafter be referred to as the hospital. Ann H. MacKinnon had been in the employ of the hospital as a nurse approximately one year and a half at the time plaintiff sustained the physical injury for which damages were sought against the defendants. She was in charge of the emergency room and also had charge of the preparation of the rooms in which minor operations were performed. No other qualification or experience is shown.

Church of St. Matthew Mills Memorial Hospital is a corporation existing under the laws of this state, and its principal place of business is at the city of San Mateo. It was incorporated in November, 1911, in the name of the Church of St. Mattnew Red Cross Hospital. The original articles of incorporation declare that the incorporators "voluntarily associate themselves together for the purpose of incorporating a private corporation," and that the purposes for which it is formed are "to conduct and maintain" said hospital "established in the city of San Mateo * * * by Elizabeth Mills Reid; and to establish and maintain in connection therewith a school or schools for the training of nurses for the care of the sick; and to acquire, hold and own property and to receive gifts, bequests and devises for the conduct and maintenance of the said hospital and schools." On June 9, 1921, upon petition of the directors to the superior court of the county of San Mateo, the name of said hospital was changed to Church of St. Matthew Mills Memorial Hospital, and the business of the hospital has since been conducted in the latter name. The reasons given for the change of name are: First, that the hospital which said corporation conducted was established by Elizabeth Mills Reid, and the Church of St. Matthew and Mrs. Reid had from the time of its establishment contributed to the support and maintenance of said hospital and furthered financially and otherwise the growth and use of the same; second, that the words "Red Cross" had "caused confusion in the minds of people not accurately informed regarding the plan of its operation, one of the most common misunderstandings regarding the method of operation being that it is an institution maintained and supported by the American Red Cross, and that it has some connection with or is a part of the charitable institution and organization known as the American Red Cross. That this corporation has no connection with and is not a part of the American Red Cross and is not supported nor maintained by it, nor does it have or receive any financial aid or otherwise from the American Red Cross."

[1] The above contains all there is to be found in the articles of incorporation bearing upon the question as to whether the hospital was a charitable institution. Respondent hospital contends that plaintiff comes within the rule that, where one accepts the benefit of a public or of a private charity, he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants. The character of the corporation, however, is to be determined not alone by its powers as defined in its charter, but also by the method of transacting the business of the hospital. Stewart v. California Medical Missionary & Benevolent Association, 178 Cal. 418, 176 P. 46. The evidence on this phase of its character, while somewhat scant, will be considered later.

The plaintiff, a married man, was manager of a title and trust company, and a resident of Hillsborough, near the locality in which the hospital is located. He had had his appendix removed by Dr. Chidester at said hospital some time before he was operated upon for the removal of a cyst upon the exterior wall of the abdomen, out of which operation this action arose. After the appendix operation he consulted Dr. Chidester upon a condition of sterility, and was turned over by Dr. Chidester to Dr. Prindle, whom he understood to be the house physician and assistant of Dr. Chidester. Plaintiff was advised by Dr. Prindle to have the cyst removed and was assured that it would be a very minor operation and would cause him no great inconvenience. Accordingly plaintiff entered the hospital, and Dr. Prindle directed Ann H. MacKinnon, the nurse, to put the operating room in order and instructed her that he would use novocaine as the local anesthetic. Instead of furnishing novocaine as the anesthetic to be injected, she prepared and brought to the surgeon a solution of formalin, admitted to be a highly dangerous caustic and corrosive fluid which rapidly destroys the flesh and bodily tissues. Supposing the solution so furnished to be novocaine, without making an investigation for himself, he injected the formalin solution into plaintiff's abdomen and, upon observing a violent reaction upon the part of the patient, he discovered the mistake and immediately injected novocaine into the area in which he had previously injected formalin, and also removed by incision, as far as possible, the area affected by formalin. That the corrosive substance destroyed quite an area of flesh and tissue of the body and caused the plaintiff to suffer great pain during the slow healing process there can be no doubt. As to the permanency of the damage suffered by reason of the burns which he received from said injection there is a conflict in the evidence.

[2] Plaintiff by his action for damages suffered by reason of said negligence joined the hospital, the physician, and nurse as tort-feasors. He alleged that the hospital was managed and operated for hire, and that the nurse was the employee of Dr. Prindle and the hospital. The acts constituting negligence as to each participant are set forth in painstaking detail and the pain suffered by plaintiff and the probable effect of said injuries upon his organism are meticulously set forth. It is pertinent to observe here that, by reason of the allegations of the complaint as to the manner in which the tort was committed and the evidence introduced by plaintiff, including the examination of the defendant physician, the doctrine of res ipsa loquitur, invoked by plaintiff, was eliminated from the case by the affirmative showing made by plaintiff as to the manner in which the injuries were inflicted, even if there were a case in which the doctrine might otherwise have been properly applied, which question we do not decide.

The principal point presented by appellant goes to the substance of the verdict and the refusal of the court to return the jury to the jury room with directions to correct or make clear an enigmatical verdict, and its refusal thereafter to enter a judgment against all three defendants in the sum of $10,000; that being the amount of damages which the jury found plaintiff had suffered as set forth in the verdict returned as against the hospital. Said verdict was as follows: "We the jury in the above entitled cause find for the plaintiff as follows: Against Kirk H. Prindle in the sum of $ No dollars. Against Church of St. Matthew Mills Memorial Hospital, a corporation, in the sum of $10,000. Against Ann MacKinnon in the sum of $ No dollars." Before presenting its verdict, the jury returned for instructions as to whether it would be permissible to find in different amounts against the several defendants; that is, whether, if it found all several defendants joint participants in the commission of a tort, but believed one or two less culpable than the other, or the others, it could apportion the amount of damages according to the degree of culpability which it should find that each particular defendant's participation therein merited. There seemed to have been some confusion in the mind of the court as to the exact information the jury desired, but it was finally instructed that it could not apportion the damages and it again retired to the jury room. Soon thereafter it returned with the verdict above set out. Upon receiving the verdict, the court ordered it recorded. Immediately after the verdict had been read as recorded, Mr. Hallinan, appellant's counsel, addressing the court, moved the court to return the jury to the jury room. He contended that the verdict was void for the reason that the jury could not apportion the damages, as he contended it had attempted to do by the verdict returned. His contention was that the verdict was in effect a verdict against all of the defendants, and the jury should be instructed to specifically find against the other two defendants in the same sum as it found against the hospital, to wit, in the sum of $10,000. Counsel for the other respective defendants objected to a reconsideration of the verdict. Quite a colloquy took place between Mr. Hallinan and the court as to what the procedure should be. Mr. Hallinan said to the court that the verdict was void and the jury should be given an opportunity to correct it. The court replied that he did not have the power to do it and expressed regret that he had no such power. Mr. Hallinan replied that the court had the power to correct the verdict. The court thereupon said, "Now the case is over, I will say that I agree with you that it is not a proper verdict to render, but it has been rendered and I shall not direct them to render any other verdict," and it thereupon dismissed the jury. Shortly before the final arguments commenced, the court inquired of counsel the time they desired to present their arguments to the jury, whereupon the following occurred:

"Mr. Bacon: I really do not know. I had a motion. I think that would be in order at this time on behalf of the hospital, under the decision—

"The Court: A motion for a non-suit?

"Mr. Bacon: A directed verdict.

"The Court: I would rather that comes up later on, maybe after the jury has returned the verdict, not now."

Nothing further was done in the matter until the court reconvened the following day. The jury was dismissed on the previous day. Plaintiff contended that the verdict was *against* all the defendants and the damage suffered by plaintiff had been definitely fixed by the jury at $10.000, and therefore it became the duty of the court to assess a like amount against all the joint tort-feasors. This motion was denied. The attorneys for the hospital suggested to the court that they had requested permission of the court on the day before to make a motion at this time (the day following) for a directed verdict in favor of the hospital notwithstanding the verdict, as provided by section 629, Code of Civil Procedure, reserving the right to move for a new trial in the event the motion was denied. They thereupon asked the court to enter a judgment in favor of the hospital notwithstanding the verdict rendered against it. The ground of the motion as then and there stated was that the evidence showed that the hospital was a charitable institution and that due care had been used in the selection of its employees and nurse. The insufficiency of the evidence was urged as a ground for entering said judgment. The attorney for the nurse requested, in view of the form of the verdict, that judgment be entered in her favor on the ground that the jury so indicated by its verdict. The attorney for the physician also moved for judgment notwithstanding the verdict, on the ground of insufficiency of evidence to support a judgment against him. The court summarily held that the verdict was in his favor and he had no ground of complaint. The learned judge further said that there was much merit in the motion made on behalf of the hospital. He also expressed himself as not in sympathy with the verdict and thought it absolutely wrong, but it was not the time to pass upon it, as the matter would all come up on motion for a new trial.

[3, 4] The motion made on behalf of the hospital for judgment notwithstanding the verdict was granted. This was error. The hospital did not at any time move for a directed verdict. As shown by the above quotation from the record, its attorney *thought* that such a motion "would be in order," but the court remarked that he would prefer that that matter come up after the jury returned

its verdict. Here the matter was dropped and no motion for a directed verdict was made. It is obvious that the motion could have been nothing more than a belated gesture after the jury had performed its office and had been dismissed. This point was definitely settled in the Estate of Caldwell, 216 Cal. 694, 16 P.(2d) 139, 141, citing a long list of authorities, including Estate of Easton, 118 Cal. App. 659, 5 P.(2d) 635; Estate of Yale, 214 Cal. 115, 4 P.(2d) 153; Estate of Fleming, 199 Cal. 750, 251 P. 637. The Caldwell Case holds that the making of a motion for a directed verdict is a condition precedent to the entry of judgment non obstante veredicto. Section 629, Code Civ. Proc. The situation discussed in that case is very close in all material respects to the situation in the instant case. There the attorney expressed his intention of asking for a directed verdict. The judge there, as here, said he preferred to let the case go to the jury and that he would exercise his prerogative after the jury passed on the matter. This court said: "This statement of respondents' counsel * * * was not a motion for an instructed verdict. A motion is an application for an order (section 1003, Code Civ. Proc.), and counsel's statement of what he intended to do was not an application for an order. Neither can the language of the court, though indicating perhaps that his opinion on the facts favored the cause of respondents, be considered an order. An order is a direction of a court or judge, made or entered in writing, and not included in a judgment. Section 1003, Code Civ. Proc." A requested instruction for a directed verdict is not a compliance with the requirements of said section 629. Estate of Caldwell, supra. "The main purpose of the statute in requiring such a motion * * * to be made as a condition precedent to the exercise of the court's power to render judgment non obstante veredicto is to give the party against whom the motion is directed an opportunity to introduce whatever further and additional evidence he may have at hand to overcome the *grounds* of the motion." Estate of Caldwell, supra; Estate of Easton, supra. (Italics ours.)

The court was therefore without power to render judgment in favor of the hospital, as no motion was made, and consequently no opportunity was given to appellant to offer evidence to supply whatever defects the moving party may have pointed out. The court may have granted a new trial, if so advised, after the entry of judgment in conformity with the verdict. This was the limit of its power. The verdict was so unusual in form and substance as to have confused the court and all the attorneys engaged in the trial of the cause. Even the attorney for the nurse, who claimed the verdict acquitted her of all liability, moved to make the judgment more certain in her favor. The attorneys for Dr. Prindle, who now claim the verdict was in their client's favor, gave notice of appeal from the judgment as entered upon the verdict to the first appellate district, "from the judgment made and entered in the above entitled action on the 4th day of June, 1931, in *favor of plaintiff and against defendant Kirk H. Prindle.*" (Italics ours.) They also gave notice to the county clerk to prepare the record on appeal.

[5] Appellant contends that it was the jury's effort to exculpate the nurse and the physician, who, he contends, were joint tort-feasors, and mulct the hospital for the entire damages. Unquestionably this is true as to the nurse. She was called by the plaintiff as a witness and admitted that she took from a medicine cabinet containing a number of other bottles, some of which contained dangerous corrosive substances, and without looking at the label of said bottle, or otherwise making any kind of examination as to the contents of said bottle, the one containing formalin and prepared the solution which was injected as an anesthetic. It is the testimony of both the nurse and the physician that formalin, which is a solution of formaldehyde, gives out an exceedingly sharp, penetrating odor. The only suggested mitigating circumstance which she offered in her defense was that the operating room contained such odors as are ordinarily present in an operating room, and that said odors had a tendency to neutralize the formalin odor. The bottles in the cabinet were labeled, and, when asked if she read the label before pouring the fluid into the glass for use, she answered: "I hardly could have read it and poured out the formalin." She made no defense to the action, but nevertheless the verdict of the jury does not assess her with any damages. As to her it reads: "Against Ann H. MacKinnon in the sum of $ No dollars." Did the jury mean to say that, notwithstanding her admissions of negligence and all the other evidence corroborating her admissions, she was not a participant in the tort, or did it conclude that she was but the servant or employee of the hospital and that the hospital for some undisclosed reason should bear the entire award? The verdict cannot be explained on any legal ground so far as the nurse's liability is concerned.

There is not a scintilla of evidence to support a verdict in her favor. The allegations of the complaint that she was negligent in her duties were not contradicted. It would be an anomaly and contrary to the decisions of this court to hold her to be free of negligence and to hold the hospital, whose agent she was, guilty of negligence. There is force in the argument of appellant that the jury passed the matter of liability for the tort on to her principal and, contrary to the rule, did in effect forgive one admittedly a tort-feasor and penalize the other. That the jury desired to apportion the damages is made plain by the information which they requested from the court as to whether they could return a verdict fixing varying sums against the several defendants, or whether "all would have to be alike." After considerable discussion between court and jury they were told substantially that in an action against joint tort-feasors the law will not permit an apportionment of damages, since it will not attempt to measure the degrees of culpability of the joint tort-feasors. Davis v. Hearst, 160 Cal. 143, 116 P. 530. Finding they could not apportion the damages, the jury placed the whole amount of damage assessed upon one of the alleged tort-feasors. This in effect was a violation of the principle laid down in Davis v. Hearst and many other decisions.

The evidence as to the surgeon's responsibility was a contested matter. One ground of justification urged was that it was the practice and custom of physicians practicing in the community or locality in which he practiced and treated appellant for the physician to accept without test or question the anesthetic prepared by the nurse in charge of the operation in hand. It is contended by the appellant that the pungent odor should have been detected by the operating surgeon, and that the nurse, although employed generally by the hospital, was under the personal direction and control of the surgeon, and that she was selected by him as his assistant and thereby the surgeon became responsible for her negligence. Other issues are raised, but, in view of the order of retrial which we feel compelled to make under the state of the record, we express no opinion at this time as to the effect of the evidence before us or which might be presented in another trial. The hospital insists that it is exempt from liability on the ground that it is a charitable institution and therefore not responsible for the negligent acts of employees, provided it has used care in their selection. We have set forth all there is in the charter bearing upon the purposes of its incorporation, including its reason for changing the name made necessary to avoid the common mistake that it was connected with the charity administered by the American Red Cross and also to honor the name of its benefactor.

Evidence was offered tending to establish the charitable character of the hospital on the one hand, and counter evidence was offered tending to show it was operated for profit even though the general purposes may have been charitable. Stewart v. Calif. Medical, etc., Ass'n, 178 Cal. 418, 176 P. 46. A conflict exists as to this issue.

Having pointed out reversible error in one or two specific instances and considered the nondescript character of the verdict, we are of the view that it is too incomprehensible to support a judgment in favor of any of the parties to the action. The jury should have been returned to the jury room with instructions to reconsider and reframe their verdict. We also feel that the examination of witnesses was too strictly limited in several instances.

The judgment is therefore reversed as to each of the defendants, and the entire cause is set at large.

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220 Cal. 34

TITCOMB v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY et al.

S. F. 14971.

Supreme Court of California.

Feb. 1, 1934.

1. Divorce ⚷332.

Local courts, notwithstanding foreign divorce decree and foreign decree relating to custody of children, have jurisdiction to determine custody upon their becoming residents of state.

2. Divorce ⚷332.

Decree awarding custody of children, whether entered in divorce proceedings or independently thereof, is not final, but subject to modification in state where rendered according to changed circumstances.

3. Divorce ⚷332.

Where children whose custody has been judicially inquired into in another state subsequently become residents of state, children

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

become subject to supervisory jurisdiction of state.

4. Divorce 🔑298(1).
Paramount consideration in awarding custody of child as between parents is welfare of child.

5. Divorce 🔑332.
Where circumstances upon which foreign decree awarding custody of child is based have not changed, local courts, on principles of comity, may refuse to decree change of custody.

6. Divorce 🔑332.
Local courts, when children become residents of state, have inherent jurisdiction to inquire into custody of such children, although parents have been validly divorced in another state, either with or without provision for custody.

7. Parent and child 🔑2(1).
In absence of judicial determination, mother has equal rights with father to custody of minor children while they live in state of separation (Civ. Code, §§ 198, 214).

8. Parent and child 🔑2(4).
Court is without jurisdiction to make permanent custody order taking child from mother without hearing and notice (Civ. Code, §§ 198, 214).

9. Parent and child 🔑2(4).
Court, pending hearing on application for custody of minor children of parents living in state of separation, has jurisdiction to make ex parte order for temporary custody pending hearing (Civ. Code, §§ 198, 214; Probate Code, § 1442).

10. Parent and child 🔑2(4).
Summary power of court, on application for custody of child in custody of one parent, to make ex parte order for temporary custody pending hearing, should be exercised with extreme caution (Probate Code, § 1442).

11. Parent and child 🔑2(4).
Jurisdiction of superior court to determine custody of minor children depends upon children being inhabitants or residents of county (Probate Code, § 1440; Gen. Laws 1931, Act 3966, § 3).

12. Divorce 🔑332.
Ex parte orders, on application of father, awarding custody of minor children to father, *held* void as being in excess of jurisdiction of superior court, where neither children nor father were residents or inhabitants of county and foreign decrees had awarded custody of children to mother (Probate Code, §§ 1440, 1500; Civ. Code, § 213; Pol. Code, § 52; Gen. Laws 1931, Act 3966, § 3).

13. Parent and child 🔑2(4).
Verified petition or affidavits on application for ex parte order for temporary custody of children should aver jurisdictional fact of children's residence in county (Probate Code, § 1442).

14. Certiorari 🔑68.
Sufficiency of evidence to establish jurisdictional facts may always be inquired into on certiorari.

15. Certiorari 🔑17.
Parent and child 🔑2(4).
Where verified petition or affidavit on application for ex parte order for temporary custody of children does not allege jurisdictional fact of children's residence in county, ex parte orders based thereon are void, and will be annulled on certiorari (Probate Code, § 1442).

16. Parent and child 🔑2(4).
Court, in exercise of supervisory jurisdiction over children, is not authorized to make summary ex parte custody order taking children from mother without proof by affidavit or verified petition of jurisdictional facts and showing of necessity therefor (Probate Code, §§ 1440, 1442).

17. Parent and child 🔑2(4).
Requirement that affidavits or verified petition, on husband's application for ex parte orders taking custody of children from mother, make showing of necessity therefor, is jurisdictional (Probate Code, §§ 1440, 1442).

18. Parent and child 🔑2(4).
Father's amended application for custody of children, containing jurisdictional averments, *held* not to validate void ex parte orders taking custody of children from mother entered previously, or give vitality to contempt proceedings against mother based on void ex parte orders (Probate Code, §§ 1440, 1442).

In Bank.

Original application by Dorothy Titcomb, also known as Dorothy T. Trippel, for a writ of review and writ of prohibition prayed to be directed to the Superior Court in and for Santa Clara County. William F. James, Judge thereof, to annul certain orders and to prevent further action in a contempt proceeding.

Writ of prohibition granted, orders annulled, and proceeding dismissed.

Prior opinion, 23 P.(2d) 65.

Paul Nourse, of Los Angeles, Thomas V. Cassidy, of Huntington Park, and Clifford A. Russell, of Sacramento (John J. Jones, of San Jose, of counsel), for petitioner.

E. L. Maxwell, of Mountain View, and Newby & Newby, of Los Angeles, for respondents.

SEAWELL, Justice.

This is a proceeding in certiorari to review certain orders of the superior court of Santa Clara county entered in a proceeding brought by A. A. Trippel to obtain custody of his two minor children, a boy and girl, aged respectively, 12 and 10 years, issue of his marriage with petitioner herein, Dorothy Trippel, also known as Dorothy Titcomb. By said orders, which were entered ex parte without notice to petitioner, Dorothy Trippel, the court decreed that A. A. Trippel should have custody of said children pending hearing on his application for permanent custody, and thereafter said court cited petitioner herein to show cause why she should not be punished for contempt for disobedience of said custody orders and unlawful interference with their execution. After granting the writ of review, this court stayed further proceedings in respondent court, and thereby restrained further prosecution of the contempt hearing.

The parties were married in the state of Arizona in 1919, and resided in that state several years before removing to California. They separated in September, 1928, and Mrs. Trippel thereafter brought suit for divorce in the county of Los Angeles. An interlocutory decree was entered in her favor, and the custody of the children awarded to her, with permission to take them to the home of her parents in Arizona. A final decree of divorce was never entered in said action.

Dorothy Trippel alleges in her petition for writ of review filed herein that she obtained a divorce from A. A. Trippel in Santa Cruz county, state of Arizona, on December 5, 1931. Said decree made no provision for the custody of the children, who were then in California. Prior to the commencement of the divorce action, A. A. Trippel had brought a proceeding in Arizona to obtain custody of the children, and in said proceeding the court of Cochise county, by decree rendered on June 26, 1931, had awarded the mother custody for nine months of the year, and the father custody for the three months of June, July, and August of each year, with the provision that, if either party should violate any provision of the decree, such party should forfeit all right to custody. On September 1, 1931, A. A. Trippel failed to return the children to petitioner, but prior thereto, in violation of the express provision of the custody decree, removed them to California, and brought an action for divorce in the superior court of Sacramento county in 1932. In said action he prayed that the custody of the children be awarded to him. Petitioner procured extradition of A. A. Trippel from California to Arizona on a charge of kidnapping the children. He appeared before the court in Cochise county and was adjudged guilty of contempt. On June 1, 1932, said court, with the children present in person, found that A. A. Trippel had forfeited all custody rights, and ordered that Dorothy Trippel have continuous custody. On August 27, 1932, said court granted her permission to remove the children to California. The several Arizona decrees and orders referred to in the petition for review are annexed to said petition as exhibits.

On April 6, 1933, A. A. Trippel filed an application in the superior court of Santa Clara county praying that permanent custody of the two children be awarded to him, and that Dorothy Trippel be cited to show cause why his application should not be granted. He alleges therein that he and Dorothy Trippel "are married, and not legally divorced, and that they are living separate and apart." On information and belief he alleges that the children are not now in the "legal custody" of their mother, and that they are in Los Angeles county. He does not allege that he is a resident of Santa Clara county, or make any averment whatsoever as to his place of residence. Notwithstanding the father's application contained no prayer for custody pending hearing, the court made an ex parte order on the day the application was filed that the father have custody pending the hearing of the application, and on April 13, seven days later, made a further ex parte order that the sheriff of Los Angeles county forthwith obtain said minors and deliver them into the custody of A. A. Trippel. On May 1 said court ordered that Dorothy Trippel be cited to show cause why she should not be punished for contempt for unlawful interference with the execution of said custody orders. She thereafter filed a special appearance, through her attorney, objecting that the Santa Clara county court had no jurisdiction of said minors, which objection was overruled. It appears from the record of a partial hearing held on July 25, 1933, before this court had granted a stay of proceedings, that prior thereto the children had been removed to Arizona by their mother.

We are of the view that the ex parte custody orders in the circumstances appearing from the record herein are void and in excess of the jurisdiction of the court. Before considering the grounds which render said orders invalid, it is pertinent to make certain preliminary observations regarding the custody proceedings herein.

[1-5] It is apparent from the allegations of A. A. Trippel's application for custody, to the effect that he and his wife are "not legally divorced" and the children are not in the "legal custody" of their mother, that he proposes to attack the legality of the Arizona divorce and custody decrees. As noted above, the divorce decree made no provision for the custody of the children. It must be conceded that, although the Arizona divorce and custody decrees were in all respects valid, the courts of the state of California would nevertheless have jurisdiction upon the children thereafter becoming residents or inhabitants of this state to determine their custody in accordance with their best welfare. De la Montanya v. De la Montanya, 112 Cal. 101, 116, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Anthony v. Tarpley, 45 Cal. App. 72, 187 P. 779. It is of the inherent nature of custody decrees, whether entered in divorce proceedings or independently thereof, that they are not final and conclusive, but subject to modification in the state where rendered as circumstances change. Where children whose custody has been the subject of judicial inquiry in another state subsequently become residents or inhabitants of this state, they are subject to the supervisory jurisdiction and guardianship of this state, to be exercised for their protection. The paramount concern in awarding custody as between parents is the welfare of the child, who is not the property of his parents. If it appears that the circumstances upon which the prior order of another state is based have not changed, our courts, on principles of comity, may refuse to decree a change of custody, but the decree of the other state is never a bar to inquiry as to the best interests of the child. In re Wenman, 33 Cal. App. 592, 165 P. 1024.

[6] It follows in the case herein that the right of this state to inquire into the custody of the minors, provided they are residents or inhabitants of this state, does not depend upon the Arizona custody decrees being subject to collateral attack on jurisdictional grounds. Nor does the right to maintain a custody proceeding in this state depend upon the validity or invalidity on jurisdictional grounds of the Arizona divorce decree. Although A. A. Trippel, by alleging that he and his wife are "not legally divorced," but living separate and apart, no doubt intended to invoke the provisions of section 214, Civil Code, providing for inquiry into the custody of children when the parents live in a state of separation without being divorced, a failure to establish his allegation that they were not legally divorced would not bar a custody decree. The courts of this state, as indicated above, have inherent jurisdiction without express statutory provision therefor to inquire into the custody of children resident in this state, although their parents may have been validly divorced in another state, either with or without provision for custody of the children of the marriage.

[7-9] Petitioner, Dorothy Trippel, contends that our courts are without jurisdiction to take children from the custody of one parent and award them to the other parent by ex parte order entered without notice and hearing. In the absence of a judicial adjudication, the mother has equal rights with the father to the custody of their children while they live in a state of separation. Section 198, Civ. Code. There can be no doubt that our courts are without jurisdiction to make a permanent custody order taking the child from the mother without hearing and notice (Ex parte Becknell, 119 Cal. 496, 51 P. 692; In re Dahnke's Estate & Guardianship, 64 Cal. App. 555, 222 P. 381; In re Arkle, 93 Cal. App. 404, 269 P. 689; note, 76 A. L. R. 242), but the question herein is whether under any circumstances jurisdiction exists to make an ex parte order for temporary custody pending hearing. We are of the view that such a power exists where necessary for the protection of the child, whose welfare is the paramount consideration in these proceedings.

Section 1442, Probate Code (formerly 1747, Code Civ. Proc.), provides that in a guardianship proceeding "when it appears to the court or judge either from a verified petition or from affidavits, that the welfare of the minor will be imperiled if he is allowed to remain in the custody of the person then having his care, an order may be made providing for his temporary custody until a hearing can be had on the petition. And when it appears that there is reason to believe that the minor will be carried out of the jurisdiction of the court, or will suffer some irreparable injury before compliance with such order providing for the temporary custody of the minor can be enforced, the court or judge, at the time of making the order for temporary custody, may cause a warrant to be issued, reciting the facts, and directed to the sheriff, coroner, or a constable of the county, commanding such officer to take the minor from the custody of the person in whose care he then is and place him in custody in accordance with such order." This section applies in proceedings brought by one parent claiming guardianship adversely to the other parent. A decree awarding custody to a parent claiming adversely to the other parent differs only in formal respects from a decree appointing one parent guardian of the person of the child. The effect in either case is to confer upon the party appointed the care and custody of the child. We regard section 1442 as plainly applicable where a parent seeks custody of the child—that is, his guardianship—through a custody order, as well as where he prays for issuance of letters of guardianship on the person of the child.

[10] Although the contrary view has been expressed in another jurisdiction (Gitsch v. Wight, 61 Utah, 175, 211 P. 705), we are of the opinion that even in the absence of express statutory authorization the courts of this state would have inherent power, either where letters of guardianship are prayed for or where the prayer is for custody, to take the child from the person having its care by such a temporary custody order as is provided for in section 1442, Probate Code. This follows from the premise that the controlling factor is the welfare of the child, rather than the rights of those claiming its custody. This summary power should be exercised with extreme caution where the child is in the care of the other parent.

[11, 12] Although petitioner, Dorothy Trippel, cannot succeed in her contentions urged as to the questions above discussed, her claim that the two ex parte custody orders entered by the superior court of Santa Clara county are, in the particular circumstances of this case, void and in excess of the jurisdiction of the court, must be sustained.

Upon an examination of the provisions of our law relating to the guardianship and custody of minor children, we find that jurisdiction of our superior courts depends upon the child being an inhabitant or resident of the county. Section 1440, Probate Code, confers jurisdiction to appoint a guardian of the person of a minor on the superior court of the county in which the minor "resides or is temporarily domiciled." Petitions filed under the Juvenile Court Act (2 Deering's Gen. Laws 1931, Act 3966, p. 2079, § 3) must show that the minor "is within the county, or residing therein." The right of the court of the county of which the minor is an inhabitant to entertain a custody or guardianship proceeding, notwithstanding his legal residence is elsewhere, has been sustained repeatedly. Ricci v. Superior Court, 107 Cal. App. 395, 290 P. 517; In re Green, 67 Cal. App. 504, 226 P. 76; Collins v. Superior Court, 52 Cal. App. 579, 199 P. 352. The statutory provisions as to jurisdiction in guardianship and custody proceedings are legislative enactments of well-settled jurisdictional principles. The requirement as to the child being a resident or inhabitant of the county where the proceeding is instituted is jurisdictional in nature. In De la Montanya v. De la Montanya, 112 Cal. 131, 133, 44 P. 354, it is declared that jurisdiction to appoint a guardian for infants under the American system is entirely local.

In the case herein there is no contention that the two minor children were ever actually resident, in the sense of being physically present, in Santa Clara county. A. A. Trippel alleged in his application for custody that they were in Los Angeles county. The jurisdiction of the Santa Clara county court to adjudicate their custody must, if it is to exist, be predicated upon their being legally resident in said county by virtue of the fiction of law that the residence of the father is the residence of the minor child. This fiction could prevail only on the theory that the father was resident in said county, and that the Arizona decrees awarding custody to the mother were invalid and in excess of the jurisdiction of the Arizona court. Section 52, Pol. Code. Otherwise, the residence of the mother, admittedly in Los Angeles when the custody application was filed, would determine the residence of the children. Section 213, Civ. Code; section 1500, Probate Code.

It was held in De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165, and Id., 112 Cal. 131, 44 P. 354, that, where the children whose custody and guardianship are sought to be adjudicated are absent from the state, together with their father, when the proceeding is commenced and continuously thereafter, their custody cannot be determined, although their legal residence or domicile is in the county in this state wherein the proceeding is brought. The question of whether the county of the father's residence, where it is the legal residence of the child, can entertain a proceeding for custody or guardianship, and upon securing the presence of the child within the jurisdiction by citation to produce him directed to the mother within the state, adjudicate custody or guardianship, although said minor is not and never has actually resided in said county, but has actually resided with his mother in another county in this state, does not seem to have been decided. It is not necessary to decide this question in the case herein, for the reason that the father's application for custody contains no allegation that he is or ever has been a resident of Santa Clara county, or any allegation whatsoever as to his place of residence, and the transcript of evidence introduced upon the partial hearing held on July 25, 1933, which is embodied in the return to the writ of review, reveals that he was not at the date of the filing of the application, or at the date of said hearing, a resident of Santa Clara county, and that he never had been a resident of said county. The most that can be said is that he may intend some time in the future to take up his residence in said county. Therefore on no theory could the two minor children herein be residents of Santa Clara county.

In the answer to the petition for writ of review it is contended that the failure of the application for custody, or the ex parte orders based thereon, to recite the jurisdictional facts, did not render said orders void; that insufficiency of the pleadings or findings goes to the jurisdiction of the court only in certain proceedings, which, unlike custody and guardianship proceedings, are purely statutory and unknown to the common law. Chollar Mining Co. v. Wilson, 66 Cal. 374, 5 P. 670; Elberta Oil Co. v. Superior Court, 74 Cal. App. 114, 239 P. 415.

[13-16] The answer to respondent's contention is that the verified application upon which the ex parte orders are based is something more than a pleading. By section 1442, Probate Code, the summary ex parte order for temporary custody is authorized to be entered only upon a verified application or affidavits from which it appears that the welfare of the minor is imperiled, and a warrant to procure the minor is authorized upon a showing that there is reason to believe that the minor will be carried out of the jurisdiction, or suffer irreparable injury. Although not expressly stated in section 1442, the jurisdictional fact of the minor's residence in the county should also be averred in the verified petition or affidavits. The verified petition or affidavits are a form of evidence, which is permitted, in the necessities of the case, to establish the jurisdictional facts in lieu of their proof at a hearing held upon notice. It is the rule that the sufficiency of the evidence to establish the jurisdictional facts may always be inquired into in proceedings in certiorari. 4 Cal. Jur. 1110; Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350; Dreher v. Superior Court, 124 Cal. App. 469, 12 P.(2d) 671. Where, in the exigencies of the case, such facts are required to be established by evidence of a particular kind, as in the instant case by affidavit or verified petition in the nature of an affidavit, and such affidavit or petition wholly fails to establish the residence of the minors in the county of Santa Clara, the ex parte orders based thereon are void, and will be annulled on certiorari. Even in the absence of a particular statute we are of the view that a court in exercising supervisory jurisdiction over children would be without right to make a summary ex parte custody order taking the children from the care of their mother without proof by affidavit or by verified petition of the jurisdictional facts and a showing of the necessity therefor.

[17] In the case herein not only is there a failure to show the jurisdictional facts as to the residence of the minors, but the application fails to allege that the welfare of the children will be imperiled if they are allowed to remain with the mother pending hearing, or that the applicant has reason to believe they will be carried from the jurisdiction, or to set forth facts from which these requisites may be inferred. The father does not even pray for an order for temporary custody. The right of the court to take the custody of the children from their mother by ex parte order is a summary emergency measure, and the requirement that the affidavits or verified petition make a showing of necessity therefor is jurisdictional.

[18] As noted above, on July 25, 1933, a partial hearing was had in the superior court of Santa Clara county on the father's application for custody before issuance of the writ of review and stay by this court, and a transcript of the proceedings taken at said hearing has been made a part of the return to the writ of review. During the course of said hearing, A. A. Trippel filed an amended application for custody, wherein he averred that he was an inhabitant of California, resident in the county of Santa Clara. Said amended application would not validate the void ex parte custody orders entered several months previously, or give vitality to the contempt proceedings based on said orders. In re Dahnke's Estate & Guardianship, 64 Cal. App. 555, 566, 222 P. 381. Furthermore, as noted above, it conclusively appears from the testimony of A. A. Trippel elicited on cross-examination by counsel for Dorothy Trippel, that he was not at the date of filing the application or at the date of the hearing a resident of Santa Clara county, and that he never had been a resident of said county, but giving the broadest possible interpretation to the evidence, the most that can be said is that he has an intent to take up his residence in said county some time in the future. The court should have granted the motion of counsel for Dorothy Trippel to dismiss the action on the ground that it was improperly brought in Santa Clara county. Petitioner, Dorothy Trippel, applied to this court for a writ of prohibition as well as for a writ of review. We granted the writ of review, on the theory that full relief could be afforded to her through said writ. In reviewing the proceedings in the court below upon said writ, we find that the custody proceeding initiated on April 6, 1933, should be dismissed, and in annulling the two ex parte orders and the contempt order based thereon, it is competent for this court to prohibit further prosecution of said custody proceeding and direct the court below to dismiss said proceeding.

In this proceeding in review the question of the relative fitness of the parents to have the care of their minor children is not involved. Before the court below had completed its inquiry into that subject the stay of proceedings issued from this court. The mother was not present at the hearing of July 25, and no testimony was offered in her behalf. Suffice it to say that, if she were guilty of the acts of gross immorality with which A. A. Trippel charges here over a period of years commencing while they were still living together as husband and wife, it is inconceivable that the Arizona court would have sustained her right to custody when it was challenged.

The custody orders of April 6, 1933, and April 13, 1933, and the order and citation for contempt are annulled and set aside, and further prosecution of the custody proceeding commenced on April 6 is prohibited, and the court below directed to dismiss said proceeding.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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219 Cal. 766

BROOKS v. CITY OF GILROY.

S. F. 14933.

Supreme Court of California.

Jan. 30, 1934.

Rehearing Denied March 1, 1934.

1. Municipal corporations 🔑217(1).

Whether city had city engineer when it hired street improvement engineer *held* immaterial on question of legality of his employment, where it subsequently appointed him city engineer after declaring such office vacant (St. 1911, p. 751, § 41).

2. Municipal corporations 🔑231(2).

One hired by city as street improvement engineer *held* not city "officer" prohibited from being interested in city contract; his employment being to perform only particular engineering work specified.

[Ed. Note.—For other definitions of "Officer," see Words & Phrases.]

3. Municipal corporations 🔑231(2).

Language of city council's resolution, referring to one hired as street improvement engineer as "city engineer," *held* not controlling on question whether he was mere employee or city officer prohibited from being interested in city contract; nature and character of services determining question in large measure.

4. Municipal corporations 🔑231(2).

One hired by city as street improvement engineer under statute authorizing council of city without city engineer to appoint person to discharge duties of such officer *held* not city "officer" prohibited from being interested in city contract (St. 1911, p. 751, § 41).

5. Municipal corporations 🔑865(1).

Balance in city treasury at end of fiscal year should be ascertained by adding to balance at beginning of year taxes falling due during year and amounts illegally paid out in determining whether indebtedness, on which city is sued, exceeds its revenue for such year.

6. Municipal corporations 🔑220(8).

Evidence *held* sufficient to support trial court's finding in action against city for value of street improvement engineer's services that indebtedness therefor did not exceed city's revenue for fiscal year in which incurred.

7. Appeal and error 🔑1011(1).

Appellate court will not disturb trial court's finding on substantially conflicting evidence.

8. Municipal corporations 🔑865(1).

Amount for which court found city indebted for engineer's services, not amount of his claim presented to council, is proper basis for determining whether indebtedness exceeds city's revenue for fiscal year in which incurred.

9. Municipal corporations ⚷220(8).

Action against city for reasonable value of engineer's services under legal contract lies in favor of engineer or his assignee.

10. Municipal corporations ⚷220(4), 313.

City council had right to abandon street improvement before construction of any part thereof, subject to statutory liability for incidental expenses, including compensation of city engineer for work done (St. 1911, pp. 737, 766, §§ 17, 79 (3).

11. Municipal corporations ⚷220(8).

Street improvement engineer, not fully performing contract with city because of council's abandonment of improvement before construction of any part thereof, could sue only for reasonable value of services rendered after such abandonment (St. 1911, pp. 737, 766, §§ 17, 79 (3).

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by D. C. Brooks against the City of Gilroy. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 21 P.(2d) 144.

E. D. Crawford, of Gilroy, D. T. Jenkins, of San Jose, and Walter G. Fitzgerald, of Gilroy, for appellant.

Charles N. Kirkbride, Ernest A. Wilson, and Kirkbride, Wilson & Brooks, all of San Mateo (John D. Willard, of San Francisco, of counsel), for respondent.

CURTIS, Justice.

This action was instituted by the plaintiff against the city of Gilroy upon a claim assigned to him by Charles E. Sloan to recover for services as an engineer, alleged to have been performed by Sloan for said city in connection with certain street improvements which the city of Gilroy planned to construct in said city. There is no conflict in the evidence as to the rendition of the services by Sloan or as to their reasonable value. Upon these issues the court found in favor of the plaintiff, and rendered judgment in his favor for the sum of $11,621.12. From this judgment, the defendant city has appealed.

[1] It is first contended by the city of Gilroy that the contract whereby it employed Sloan to act as engineer in connection with said street improvement work was invalid and without any legal binding effect for the reason that said city at the date it entered into said contract of employment had a legally appointed and acting city engineer. It is admitted that Sloan's employment was made under the provisions of section 41 of the Improvement Act of 1911, under which the said city was acting in making said street improvements. This section provides in part as follows: "In all those cities where there is no city engineer, the city council thereof is hereby authorized and empowered to appoint a suitable person to discharge the duties herein laid down as those of city engineer, and all the provisions hereof applicable to the city engineer shall apply to such person so appointed. Said city council is hereby empowered to fix his compensation for such services." (Stats. 1911, p. 751.)

The defense that the contract was illegal for the reason that the city of Gilroy had a city engineer at the time it entered into said contract with Sloan was not made in the pleadings, nor did the court make any finding regarding that issue. It does not appear that at the trial of this action this defense was particularly stressed nor was it openly relied upon by the city of Gilroy. This may have been the reason why the court failed to find whether said city had a legally appointed and qualified city engineer at the time it entered into its contract with Sloan. There is some evidence, which was probably incompetent, and which no doubt would have been denied admission had objection been made to its introduction, that on January 9, 1924, when the city council of the city of Gilroy first took official action regarding Sloan's appointment, the city of Gilroy had an acting city engineer by the name of H. B. Fisher, who some time in the year 1912 had been appointed city engineer of said city, or at least had been employed by said city to perform certain engineering work for said city. We will assume, however, simply for the purpose of this discussion, but not in any way determining that such was the fact, that H. B. Fisher was on the 9th day of January, 1924, city engineer of the city of Gilroy. To properly determine, however, whether Sloan's appointment was illegal by reason of the assumed fact that the city of Gilroy had a city engineer at the time it entered into its employment of Sloan, it is necessary to make a more detailed statement of facts than we have made above. It appears from the record before us that under date of January 9, 1924, Sloan wrote and delivered a letter to the mayor and common council of the city of Gilroy asking to be appointed city engineer in connection with its contemplated street improvement and paving work. In this letter, he stated that he would do the required engineering work for said improvement, including supervision of construction, for a compensation of 8 per cent. of the contract price of said improvement. On the same day the council met and passed a resolution "that we hire Charles E. Sloan as per his agreement on the table," evidently referring to Sloan's letter. On February 11, 1924, the city council again met and at this meeting declared the office of city engineer vacant, and appointed Charles E. Sloan to said office. On March 3, 1924, Sloan was authorized to prepare plans and specifications for said work and improvements, and on March 17, 1924, the city council adopted the plans and specifications for the paving of said streets prepared by Sloan and fixed his compensation at 8 per cent. of the contract price of said work and improvement. Thereafter, the council passed a resolution of intention to do said work, and subsequently took all the necessary proceedings required by the statute for the construction of said work and improvement, including the awarding of the contract to the Southwest Paving Company for the sum of $464,845. No contract, however, was entered into with said company for said work and improvement, and, on September 11, 1924, the city council by resolution abandoned said proceedings, and the bond given by said paving company at the time of the filing of its bid was ordered returned to said company. On May 4, 1926, Sloan presented a claim to the city council for his services rendered in said proceeding in the amount of $30,263.37, which claim was rejected by the council on the day of its presentation. Sloan thereafter assigned his claim to the plaintiff, and, on August 12, 1926, plaintiff commenced this action on said claim. Upon a trial of the case before the court, as stated above, judgment was rendered for plaintiff in the sum of $11,621.12, for the reasonable value of said services.

From the foregoing statement of facts, it is quite evident if the city council was without authority on January 9, 1924, to appoint Sloan to act as city engineer in the construction of said work and improvement by reason of the fact that said city had at that date a duly appointed and qualified city engineer, that on February 11, 1924, after it had declared the office of city engineer vacant, such lack of power to so employ Sloan no longer existed. The record shows that after the city, on February 11, 1924, had declared the office of city engineer vacant, it then proceeded to appoint Sloan to such position. After this appointment of Sloan, he was directed to prepare the plans and specifications for the contemplated street work and his compensation was fixed, and it was under this employment that he performed the services for which his assignee was awarded judgment. It therefore appears to us to be entirely immaterial, as far as the legality of Sloan's employment is involved, whether the city of Gilroy had a city engineer on January 9, 1924, or at any other time prior to February 11, 1924, when Sloan was employed. It is true the trial court found that Sloan was appointed city engineer on January 9, 1924, and based its judgment in plaintiff's favor on that finding. But in view of the undisputed evidence before us, we do not think the actual date of Sloan's appointment is controlling if the evidence shows, as it does without any contradiction, that, if he was not legally employed on the prior date, he was on the subsequent date, after which he rendered the services here involved.

[2, 3] It is next contended by appellant that the percentage contract between Sloan and the city of Gilroy was illegal for the reason that Sloan was on March 17, 1924, when the resolution was passed by the city of Gilroy fixing Sloan's compensation at 8 per cent. of the total cost of said improvement, an officer of said city, to wit, its city engineer, and was, therefore, prohibited by law from being interested in any contract made with the city. Appellant relies upon Kennedy v. City of Gustine, 199 Cal. 251, 248 P. 910, in support of this contention. That case is very similar to the present case. An engineer was suing for services rendered by him under circumstances which were in principle precisely like those involved in this case. It was contended by the city that the engineer was an officer of the city and, therefore, his contract with the city was void. The court held that he was not an officer of the city, and affirmed a judgment awarding him compensation for his services. In the course of the opinion, the court said (page 255 of 199 Cal., 248 P. 910, 911): "It is clear, however, that the plaintiff was not an officer of the city, but that he was employed, not to discharge the general duties of the office of city engineer, but only the particular engineering work specified in the contract." We think this was the nature of Sloan's employment by the city. In his letter dated January 9, 1924, he says: "I hereby make application to be appointed city engineer in connection with your contemplated street improvement and paving work," and, as we have

seen, the resolution adopted that day in response to Sloan's application was "that we hire Charles E. Sloan as per his agreement on the table" (meaning no doubt the January 9th letter of Sloan's). It is true that in the resolution of the board and in other documents, he is referred to as "city engineer," but such language is not always controlling. It is the nature and character of the services that he is called upon to perform that determine in a large measure whether he was an officer or simply an employee of said city. The evidence in this case shows that Sloan was employed in connection with this particular and definite piece of work and not to perform generally the duties of city engineer. This point was passed upon and decided in Kennedy v. City of Gustine, supra, where, as we have said, the facts are quite similar to those in the present case. There the court said (page 255 of 199 Cal., 248 P. 910, 911): "From the minutes of the board of trustees and the contract itself, it is clearly apparent that the plaintiff was not an officer of the city, but an employee thereof. Any reference to him in the minutes, or the contract, or in the evidence as 'city engineer' is not controlling. Whether a position or office is a public office depends 'not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position, and make, and mark it a public office, irrespective of its formal designation.'" (Citing authorities.) It is apparent therefore that the case of Kennedy v. City of Gustine, supra, does not support appellant's contention that Sloan was the legally appointed and acting city engineer of the city of Gilroy. On the other hand, we think that case supports the claim of plaintiff that Sloan was simply employed to perform a definite piece of engineering work and not to act as the city engineer of said city.

[4] Another answer to the contention of appellant that Sloan was the city engineer of the city of Gilroy is to be found, we think, in the phraseology of said section 41 of the Improvement Act of 1911. While under the charter of the city of Gilroy, the common council had authority to appoint a city surveyor (which term we think is synonymous with city engineer), it has been appellant's contention all through this case that Sloan was appointed under said section 41 of the Improvement Act of 1911. This section of the act gives the council no authority to appoint a city engineer, but simply authorized the council in cities where there is no city engineer, "to appoint a suitable person to discharge the duties herein laid down as those of city engineer." We think that Sloan's appointment was clearly for that limited purpose and not to discharge generally the duties of city engineer. The provision of law relied upon by the appellant, therefore, than an officer of a city is prohibited from being interested in any contract with the city would not apply to Sloan in so far as it concerns his contract with said city.

[5-8] Another defense interposed by the city of Gilroy was "that the indebtedness sued upon is greater than the income and revenue of the City of Gilroy for the year in which the same was incurred and also in which it became due and payable, if at all." It is conceded that the "indebtedness sued on" was incurred, if at all, on September 11, 1924, the date on which the city council of the city of Gilroy abandoned the proceedings initiated by said council for the construction of said work and improvement. This would bring said indebtedness within the fiscal year 1924–1925. On the trial it was shown that the balance in the city treasury at the beginning of this fiscal year was $7,551.15 and that the taxes for said year became due and delinquent on the third Monday in September, 1924. There was, therefore, available the year's taxes for that year in addition to said balance in the treasury with which the city could meet its expenses for said year. It further appeared by a financial statement admitted in evidence in behalf of the city that the balance in the treasury at the end of the fiscal year, 1924–1925, was $8,440.37. It was shown, however, upon cross-examination of the city's accountant that at least one item in said financial statement was illegal. In fact, as to this item, which was paid out for the construction of the Forest street bridge, it was stipulated "that the payment of all amounts on the bridge are invalid as against this contract and those amounts are deemed to be in the treasury." Reading from the context, it is clear that "this contract" referred to is the contract of the city of Gilroy with Sloan. The amount paid out on the bridge was $4,660. If this amount is added to $8,440.37, which the financial statement of the city showed was in the treasury at the end of the fiscal year after deducting the payment on the bridge, we have as the legal amount in the treasury at the end of said fiscal year over $13,000, which exceeds the amount recovered by the plaintiff on his demand against the city. Such a procedure appears to be the approved method of ascertain-

ing the true balance in the treasury. 6 McQuillin's Municipal Corporations (2d Ed.) p. 63. There were other items in this financial statement which were questioned by the plaintiff and which were attacked by him in his cross-examination of said accountant. Upon this evidence the court found against the defendant on its affirmative defense that the indebtedness sued upon exceeded the annual income and revenue of the city. We think there was at least a substantial conflict in the evidence upon this issue and in accordance with the well-established rule that an appellate court will not disturb a finding where the evidence is in substantial conflict, this finding of the court must stand. Appellant in certain parts of its briefs contends that the amount of Sloan's claim as presented to the city council, to wit: $30,263.37, and not the amount found by the court, to wit: $11,621.12, should be the basis on which the court should determine whether the indebtedness due Sloan from the city exceeds its annual income and revenue. We think there is no merit in this contention and the appellant cites no authority to sustain it. The indebtedness due Sloan was not fixed by the claim presented by him to the city council, but by the findings of the court subsequently made in the action.

[9-11] Finally appellant contends that there can be no recovery by the plaintiff for the reasonable value of the services performed by Sloan. As already stated, the court found the reasonable value of said services to be a certain sum and gave judgment for this amount. Appellant bases its objection to the judgment so rendered on its contention that the contract was void or at least illegal, and, therefore, an action for the reasonable value of the services performed thereunder would not lie in favor of Sloan or his assignee. We have held, however, that the contract was legal, which is a sufficient answer to appellant's present contention. We might further add that an action based on the reasontble value of said services was the only proper action which would lie in favor of Sloan, notwithstanding his contract for the payment of his services on a percentage basis. As we have seen, the contract was not fully performed by Sloan for the reason that the city council abandoned the proceedings for the construction of said work and improvement before any part thereof was constructed, and Sloan's contract provided for the supervision by him of the construction of said work as the same was to be performed by the contractor to whom the contract might be let. This the city council had the legal right to do. But in such case, according to section 17 of the act (St. 1911, p. 737), "the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury." By section 79, subdivision third, of said act (page 766), "incidental expenses," as used in said act, "shall include the compensation of the city engineer for work done by him." It is quite evident from these sections of the act that the claim of Sloan, after the abandonment of the work by the city council, was limited to the reasonable value of his services done under the contract, or in the language of the statute, "for work done by him." The same question was before the court in the case of Kennedy v. City of Gustine, supra, and in its decision this court said: "A city is not primarily liable for the cost of street improvements made pursuant to the terms of the act of 1911, but the same becomes a lien on the property to be benefited, if the improvements are actually made. Section 17 of the act, however, provides: 'In case the work is abandoned by the city, * * * the incidental expenses incurred previous to such abandonment shall be paid out of the city treasury.' Section 79, subd. 3, provides: 'The term "incidental expenses," as used in this act, shall include the compensation of the city engineer for work done by him.' It thus appears by the terms of the act * * * that the plaintiff is entitled to reasonable compensation for his services."

We have covered all the points raised by the appellant against the judgment in this action. In our opinion none of them is of sufficient merit to justify a reversal of the judgment.

Respondent has a motion before us for leave to introduce further evidence in this case. It is denied, and the judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

136 Cal.App. 375

JACKSON & PERKINS CO. v. BYRON-BETHANY IRR. DIST. et al.*

Civ. 9201.

District Court of Appeal, First District, Division 2, California.

Jan. 25, 1934.

Hearing Denied by Supreme Court March 26, 1934.

1. Pleading 🔑8(2).

Allegation that irrigation district in entering agreement to furnish water did not act in governmental, political, or public capacity, but exercised proprietary and private right, *held* conclusion of law.

2. Waters and water courses 🔑263.

Plaintiff claiming damage because defendant irrigation district furnished salt water for irrigation, but admitting he could not recover for acts of defendant done in governmental capacity, *held* not to have alleged any facts showing defendant acted in proprietary capacity in supplying water.

Plaintiff sought recovery on theory that defendant district violated terms of private contract to furnish water, and alleged that district did not act in governmental capacity, because it entered contract with plaintiff prior to execution of lease whereby plaintiff became entitled to farm land within district, so that district was not obligated to furnish water to plaintiff.

3. Waters and water courses 🔑263.

In absence of contrary allegations, it is presumed irrigation district in furnishing water acted within its ordinary governmental capacity, since district is public corporation and agency of state and its officers as public officers are presumed to have regularly performed their duties (Code Civ. Proc. § 1963, subd. 15).

4. Waters and water courses 🔑261.

Order of board of supervisors authorizing formation of irrigation district, that water was suitable for irrigation, is conclusive in collateral attack by action against district for damage from furnishing of salt water for irrigation (St. 1897, p. 254).

5. Waters and water courses 🔑263.

Court must assume in absence of other allegations that water furnished by irrigation district, whether it contained salt or otherwise, had been determined to be suitable for irrigation and beneficial to lands using it (St. 1897, p. 254).

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by the Jackson & Perkins Company of California against Byron-Bethany Irrigation District and others, to recover damages to nursery stock resulting from furnishing of salt water for irrigation. From a judgment for defendant after sustaining demurrer to the second amended complaint, plaintiff appeals.

Affirmed.

John J. Jones, of San Jose, for appellant.

Dennett & Zion, of Modesto, for respondents.

STURTEVANT, Justice.

The trial court made an order sustaining a demurrer to the plaintiff's second amended complaint without leave to amend. From the judgment entered thereon, the plaintiff has appealed.

The complaint contains two counts. In the first count, in effect, the plaintiff alleged that it is a Maryland corporation doing business in this state; that defendant district is a public corporation organized under the statutes of 1897, page 254; that the personal defendants are directors of the district; that John Doe is the fictitious name of the manager of the district; that plaintiff is engaged in raising choice roses and nursery stock; that on November 1, 1930, plaintiff leased a piece of land, describing it, situated in Contra Costa county, Cal.; that on December 1, 1930, it entered into possession; that said land is located within the boundaries of the defendant district but that plaintiff is not an inhabitant of said district. Continuing the plaintiff alleged:

"VII. That prior to the execution of said indenture of lease hereinabove referred to, plaintiff entered into an agreement with said defendants for the furnishing of water suitable for irrigation purposes for the irrigation of the nursery stock contemplated to be planted by plaintiff corporation upon said demised premises. That in entering into said agreement said defendant, Byron-Bethany Irrigation District, and said defendants were not acting in any governmental, political or public capacity, but were exercising merely proprietary and private rights.

"That said agreement was consummated by said defendants agreeing to furnish plaintiff necessary and suitable water for irrigation purposes at an agreed price per acre foot.

"VIII. That thereafter and on or about the 2nd day of September, 1931, the defendants in the exercise of their proprietary and private rights and not acting in any governmen-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 516.

tal, political or public capacity, furnished water to plaintiff for the irrigation of the nursery stock belonging to plaintiff and growing upon said hereinabove described premises. That on said 2nd day of September, 1931, and for several days prior thereto, said water so furnished by said defendants contained large amounts of salt, which said fact was known to said defendants. That on the said 2nd day of September, 1931, plaintiff corporation requested the furnishing of water suitable for irrigation purposes. That on said 2nd day of September, 1931, said defendants knew that the water available for irrigation purposes contained large amounts of salt, which said fact was not known to plaintiff corporation, nor did defendants, or any of them, convey said information or give plaintiff any notice whatsoever of the presence of said fact.

"That on said 2nd day of September, 1931, on the date when said water so furnished as aforesaid was turned upon the premises occupied by plaintiff corporation, there was among other varieties of roses then growing upon said demised premises belonging to plaintiff corporation, some 92,000 roses, of the varieties commonly known and designated as follows: 6,000 Talisman, 6,000, President Herbert Hoover and 80,000 Hollywood.

"That by reason of said water containing large amounts of salt as hereinabove alleged, said nursery stock of 92,000 roses above described, was completely destroyed, and by reason thereof great damage was occasioned to plaintiff.

"IX. That on September 2, 1931, the market value of Talisman roses was 12c each, the market value of President Herbert Hoover roses was 12c each, and the market value of Hollywood roses was 16c each. That the total market value of all nursery stock destroyed aggregated the sum of $14,240."

In the second count, in the place of paragraph VIII, supra, the plaintiff inserted a paragraph worded as follows:

"II. That thereafter and on or about the 2nd day of September, 1931, defendants in the exercise of their proprietary and private rights and while not acting in any governmental, political or public capacity, furnished water to plaintiff for the irrigation of the nursery stock belonging to plaintiff and growing upon said hereinabove described premises. That on said date and for several days prior thereto, the water belonging to said defendants and so furnished as aforesaid, contained large amounts of salt, which said fact was known to defendants. That defendants knew that the presence of salt to the extent that it was then present in said water was highly destructive to plant life, but notwithstanding this fact defendants with full knowledge of the presence of said salt in large quantities in said water and of the highly destructive properties of water containing such quantities of salt, wilfully and negligently turned said water upon the lands hereinabove described." Otherwise the allegations are the same.

In their briefs both counsel treat the case as though the complaint contained only one count. Although the complaint placed its charge against the district, its directors, and its managing agent, the briefs are confined to a consideration of the liability of the district, and are silent as to the other defendants. In what follows we will confine our discussion to the points made in the briefs and will discuss those points in the order as presented by the plaintiff.

Both counts sound in tort. Cooley on Torts, p. 2. The defendants assert, and the plaintiff does not contend to the contrary, that the district is not liable in an action pleading a tort. Nissen v. Cordua Irr. Dist., 204 Cal. 542, 269 P. 171. In its brief the plaintiff states:

"This action was instituted by appellant corporation seeking to recover damages for an alleged violation of the terms of a private contract between it and respondent Irrigation District, by the terms of which the latter was to furnish water suitable for irrigation purposes at an agreed price per acre foot. * * *

"Under the pleadings, it is appellant's contention that respondent district through its agents was acting in the capacity of a private contractor. It is conceded that if it was acting as an arm of the state, performing a governmental function, appellant may not recover.

"In determining whether an act is in the performance of a governmental function, the courts have on occasions encountered difficulties in deciding on what side of the line the facts of a particular case place it; but the underlying principles which guide are quite generally agreed upon. * * *

"In this regard, we respectfully submit that respondent Irrigation District was under no obligation to furnish water to appellant for the reason that according to the allegations of paragraph VII of appellant's second amended complaint, the contract in question was entered into prior to the execution of the lease under which appellant entered into possession of the land in question. Therefore, we have a set of facts which for purposes of demurrer must be admitted as true in which respondent Irrigation District through its duly authorized representatives entered into an agreement with appellant corporation to furnish water suitable for irrigation purposes sufficient for the project which appellant was contemplating entering upon.

"Concededly appellant was not an owner of land within the district, neither was it at the time of the entering into the contract in question a lessee of a land owner within the district; therefore, the respondent district was under no obligation to furnish water to appellant under any circumstances, and as a consequence when it entered into the contract in question it was not exercising any governmental function, but was acting in purely a proprietary manner. * * *

"In the light of the foregoing, therefore, do we urge that respondents, having entered into the contract prior to the execution of the lease whereby appellant became entitled to farm land within the boundaries of respondent district, and the latter not being obligated to furnish water to appellant, respondent district was acting in a proprietary capacity and not exercising any governmental function. * * *"

[1, 2] As noted above, the plaintiff frankly concedes that, if the defendant district was acting as an arm of the state, performing a governmental function, the plaintiff may not recover. But, it claims, that according to its allegations, "* * * prior to the execution of said indenture of lease hereinabove referred to, plaintiff entered into an agreement with said defendants for the furnishing of water suitable for irrigating * * *" the lands thereafter leased. In other words, the plaintiff's claim is that the defendant district must at its peril first ascertain an applicant's title to real estate before the district accepts a contract to serve such applicant or otherwise the district becomes liable as in its proprietary capacity. The plaintiff does not cite any authority sustaining its contention. We know of none. The district is concerned with furnishing water to its patrons and collecting for the service—it is in no manner interested in the title of any one of the patrons to the specific tract of land that is so served.

The plaintiff alleged: "That in entering into said agreement said defendants were not acting in any governmental, political or public capacity, but were exercising merely proprietary and private rights." The defendants contend such allegations are conclusions of law. We think it is clear that they are. 21 Cal. Jur., p. 25; Bailes v. Keck, 200 Cal. 697, 703, 254 P. 573.

Manifestly, supplying water to lands within the district was the primary function of the defendant district. No facts are alleged showing the district performed other functions. There is no allegation that the defendant supplied or had facilities to supply anything but one kind of water. There is no allegation that it had any surplus waters. Nor is there any allegation that the water supplied to the plaintiff was different in kind from the water supplied to each and every other patron of the district. It is therefore patent that the complaint does not allege any fact or facts showing that in supplying the plaintiff it was acting in whole or in part in a proprietary capacity as distinguished from a governmental capacity.

[3] It is conceded by both sides that the defendant district is a public corporation and as such an agency of the state. Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A. L. R. 72. It follows that its officers are public officers. Rose v. Superior Court in and for Imperial County, 80 Cal. App. 739, 252 P. 765. It will be presumed, therefore, that the defendants have regularly performed their duties. Code Civ. Proc. § 1963, subd. 15. That is, in the absence of allegations to the contrary, it will be presumed the district acted within its ordinary governmental capacity.

[4, 5] Moreover, when the district was being organized it became necessary to show that the water to be used was suitable for irrigation and that the lands to be irrigated therewith would be benefited by its use. Stats. 1897, p. 254. The order of the board of supervisors authorizing the formation of the district is, in this collateral attack, conclusive as to those facts. Board of Directors v. Tregea, 88 Cal. 334, 354, 26 P. 237, Miller & Lux, Inc., v. Secara, 193 Cal. 755, 766, 227 P. 171. Therefore we must assume, in the absence of other allegations, that the water furnished by the defendant, whether it contained some salt or otherwise, had been determined to be suitable water for irrigation and beneficial to the lands using it.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

136 Cal.App. 523

PORTER v. GRANICH.

Civ. 7646.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Appeal and error ⚷110.

Motion for new trial is not appealable.

2. False imprisonment ⚷31.

In action for false imprisonment following plaintiff's arrest for fraudulently issuing checks, evidence sustained findings that no crime was committed and that payee procured arrest without reasonable cause (Pen. Code, § 476a).

The evidence indicated that checks given by plaintiff's company to defendant had been dishonored through mistake of bank due to temporary absence of bank's manager with whom plaintiff's company had credit arrangement for overdrafts. These checks were later covered by certified check, and thereafter business was transacted between plaintiff's and defendant's firms, and there was evidence from which jury might find that defendant procured arrest of plaintiff in order to obtain payment of balance due on open book account.

3. False imprisonment ⚷23.

In false imprisonment action based on charge of issuing bad checks, court's rejection of evidence offered to show that defendant obtained judgment from plaintiff in another case subsequent to arrest *held* not error, where court did not exclude applicable parts of other proceedings.

4. New trial ⚷31.

Refusal to grant new trial for counsel's conduct in emphasizing defendant's apparent foreign extraction *held* not abuse of discretion, where objection was not made during trial.

5. False imprisonment ⚷31.

Evidence tending to show that, after payment of amount of dishonored checks, payee procured arrest of drawer in order to force payment of balance due on open account, justified award of exemplary damages on ground of malice.

6. Appeal and error ⚷930(1).

Reviewing court assumes as proved that which is both supported by evidence and necessary to jury's verdict.

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by George T. Porter against Fred Granich. From an adverse judgment and order denying new trial, defendant appeals.

Judgment affirmed, and appeal from order denying new trial dismissed.

Prior opinion, 25 P.(2d) 493.

See, also, 20 P.(2d) 972.

Aaron Elmore, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

This appeal was decided by this court September 29, 1933, and subsequently respondent, against whom the decision went, complained in a petition for a rehearing that the opinion failed to mention important facts. Upon a more particular examination of the transcript, we became convinced that respondent was correct in this, and we granted a rehearing.

[1] This case is for damages both compensatory and punitive for false imprisonment. The case was tried before a jury, and resulted in a verdict for plaintiff against the defendant for $1,000 compensatory and $4,000 punitive damages. A motion for a directed verdict was made and denied. After the verdict had been returned, a motion for judgment notwithstanding the verdict was duly made and denied by the court. A motion for new trial was made and denied. This appeal under section 953a, Code of Civil Procedure, is from the judgment following the verdict and from the rulings on the motions mentioned. The motion for new trial is not appealable.

The plaintiff (respondent) George T. Porter was the secretary and treasurer and later president of Universal Sales Company, hereinafter sometimes referred to as the sales company. This company was a customer of Fred Granich (appellant), who conducted a wholesale plumbing business. This business relation had extended for some time prior to the month of September, 1928. During said month four checks had been issued by the sales company to Granich for goods delivered, but the checks were not honored at the bank upon which they were drawn. Porter testified that the checks were dishonored only because of the temporary absence of the bank manager, with whom he had a credit arrangement for overdraft of more than the sums of these checks, and this is borne out by the testimony of the manager. This arrangement, however, was unknown to Granich. Porter testified that a cashier's check was given Granich for the sum of these checks, but that Granich had failed to redeliver the dishonored checks to him. The method of doing business between the two firms was that on small business the sales company was to have daily credit and on larger business the sales company was to pay as the money was received from the jobs. The progress was slow on some of the jobs, and Granich had been urging payment, and on December 14, 1928, Granich called at the business office of the sales company and wanted payment of the balance due of $1,200 in round figures. Considerable discussion, not all amicable, ensued, and Granich demanded payment in full by Friday evening following. Porter testified that Granich told him that he had handled other accounts, he had collected other accounts that way, that he would show him that he could get him arrested and throw him in, until he did pay. Porter further testified that Thursday, the following day, Granich called by telephone asking if he was going to have that money Friday. The following is quoted from Porter's testimony: "If you do not have that money, I am going to make serious trouble for you, I would be sorry if I didn't dig up some money for him, and he wanted the full $1,200.00, he wasn't going to wait any longer." The conversation related at the business office was in the presence of a stenographer, who substantially corroborated Porter's account of it.

A Mr. Levers, who had some relation with the sales company during the time referred to in this case, testified that Granich came to their place of business a few days before the arrest and talked about the account. He said Granich was pretty mad, and said he would make serious trouble or "Hell for Mr. Porter," if he did not get his money. The witness told him Porter was at the bank trying to get matters straightened out. Granich said, if he did not get the money, he would have Porter arrested. He further testified as follows: "A. These conversations all took place within two weeks of the arrest of Mr. Porter. Q. Before or after? A. Before. I never saw Mr. Granich until yesterday, since. There was a question came up about collecting checks that were bad. He told me that there (were) ways of doing that, that if you worked with the police department, and I asked him about the method and he said, 'Well, you have to have friends in the police department and you take these checks to the friend in the police department and they will collect them for you.'" Friday evening about 5 o'clock two police officers entered his office and arrested Porter. The officers had the referred-to checks and showed them to Porter, who told them they had been paid. They answered that Granich claimed otherwise. Quoting one of the policemen as Porter testified, "That was not the story Granich told us." A little later they took Porter to jail. There Porter again stated that the checks had been paid, and that no crime had been committed. The captain in charge said, "Well, I will call up Mr. Granich." Whereupon he dialed Granich's number on the telephone and asked for Mr. Granich and then stated over the telephone that Porter claimed the checks had been paid. Porter said he heard the captain say into the telephone, "Well, you be in in the morning and sign a complaint." Then he turned to Porter and said, "That's all there is today, that man is going to be in in the morning and sign a complaint against you, I will lock you up or you will have to give us $1200.00." Porter was locked up.

At the time Porter was sick and had seven boils on his face and neck. He was kept in jail until Sunday morning. While in jail he was placed in a tank or large cell containing the dregs of humanity as picked up in a large city indiscriminately thrown together. No heat was provided, and the ventilators had to be left open to accommodate the number imprisoned with him. The latrine was foul and the bunks were lousy. He slept little, if any, during the imprisonment, but sat upon his bunk. The whole picture as related by Porter, and it is not denied in the main, is revolting to one who cherishes the doctrine that one is presumed to be innocent until proven guilty. Happily the old jail wherein the scene of this drama originated has long since been abandoned, and we fervently hope that the utter disregard for law and for the liberty of citizens that is evidenced by the facts of this case were wholly and forever discontinued along with the abandonment of the old Bastile. One witness (Mr. Levers) said Porter looked ten years older when released and that he had lost much weight. Porter testified that many people heard of his arrest, and in his business he was humiliated by references to his having been in jail. During the imprisonment Porter was fingerprinted, photographed, and herded out with the others for observation of those identifying criminals. He was taken to a room where writing tests were made, and here again he explained the checks had been turned down through mistake and that they had been paid, and the officer in charge said to another, "If Granich wants this man held he will have to sign the complaint himself, I would not take a chance in this case." Soon after the arresting officer came in and Porter was released.

After that there was a meeting in the district attorney's office, both Porter and Granich being present, and, after an examination of the case, the deputy district attorney refused to issue a complaint, and Granich was angry, saying he wanted his money.

Paul Benjamin, an attorney at law employed by Granich testified that Granich brought the four checks to his office a few days before the arrest, together with some accounts, and said he would like to get his money. Mr. Benjamin checked accounts and delivery of merchandise to see if they compared with the checks, and, finding that they did, made some inquiry at the bank, and then went to the complaint department of the district attorney's office. Mr. Benjamin testified that he took the checks to the district attorney on December 14, and told Deputy Frampton what he knew about the matter. Frampton advised him to go to Capt. Mailheau of the city police forgery detail, and he did this and the arrest followed. Mr. Benjamin further testified that Granich did not instruct him to take the checks to the district attorney or police department nor did Granich know that this was being done. It may be noted that it does not appear that Mr. Benjamin was informed by Granich that he had long since received the money on the checks or that Porter claimed that the checks were dishonored through mistake at the bank. In fact, it is due Mr. Benjamin to say here that it nowhere appears that he knew of these important facts before the arrest. These are the general facts upon which the appeal lies. There are other incidental facts which we shall mention along with our analysis, which follows immediately.

It should be noted in connection with Mr. Benjamin's testimony that he says Granich instructed him "to get his money" and did not instruct him to go to the district attorney or the city police. Mr. Benjamin, however, almost directly went to officers of the law without making any inquiry of Porter as to why the checks were unpaid, and made no attempt whatever within proper legal methods to get the money. The conclusion almost necessarily follows that Mr. Benjamin got the idea that a crime had been committed directly from Granich. Coincident also, it may be mentioned here that the officers arresting Porter seemed not concerned so much about the crime—they would arrest Porter if the $1,200 was not paid. Again, the payment was mentioned after the arrest and after Porter was incarcerated in the jail. The jury was entitled to draw inferences from these facts that Granich did not believe the checks had been drawn to defraud anybody, he knew he had not been defrauded —and that he used them "to get his money" through the police, and that all of these circumstances were not merely coincidences. Had either Granich or Mr. Benjamin or any of the others having to do with the arrest done the obviously proper things that Officer Crowley did, they would have found out that there was absolutely nothing to the criminal charge. It appears that things were progressing toward a criminal complaint, but this officer testified why it was never issued. Crowley testified: "I was handed the complaint, that is the preparation for a complaint—allegations—for investigation, and I went down to the city jail and called Mr. Porter out and talked with him about the case and was informed by him that he did not intend to commit a crime, that he had credit arrangements with the bank, I would check further into it and I would not sign the complaint. And so I did call the bank and the bank said that they had permitted him overdrafts, but they had stopped the overdrafts, and I asked them if they had informed him of the fact, and they said no, they hadn't given him notice, written notice to the effect that he had been cut off his credit. So, due to that fact, that he had originally had credit with the bank, and my experience on check cases, I did not believe we would be able to secure a conviction, and so I said I would not sign a complaint. I believe I called the complaining witness at that time and told him to come down to the district attorney's office the following Monday morning." It may here be noted parenthetically that the sales company checks cleared that same bank in the sum of $10,625.82 between the date of the checks mentioned and the arrest, and even after that and during the investigation in the district attorney's office Mr. Benjamin with Granich at his side argued for a complaint, and, when it was refused, Granich "was mad."

We shall now particularly notice appellant's points as they are set out in the opening brief, the italicized text being the subheadings, although we have abbreviated some of them:

If the act of appellant's attorney binds the appellant, the evidence shows that there was probable cause for the arrest as a matter of law because:

(1) *The evidence shows that the respondent was guilty of an actual violation of section 476a of the Penal Code.*

(2) *There was reasonable cause to believe the offense had been committed.*

[2] The evidence shows clearly that the firms had been doing considerable business

over a continuing period of several months. The sales company had drawn other checks when their funds were not sufficient, and they had always been made good. In this instance, as has been related, the checks had been given and later covered by one certified check. From the time these checks were drawn to the date of the arrest thousands of dollars of business between the firms had been transacted. The money demanded by Granich on the occasion we are here concerned with, it would seem, had no relation to these checks. It is clear that there was never any intention to defraud anybody by the giving of the checks. The intention to defraud is a necessary element of section 476a of the Penal Code. Certainly Granich knew that there had been no intention to defraud through these checks when he was threatening Porter's arrest. Had Granich been in the fullest of good faith, he would not have brought the checks into the controversy at all, and the fact that he did is almost conclusive evidence that he used the checks because he had them in his possession and, being marked "unpaid", they would add weight to his threats of arrest. If this is not true, upon what possible theory was he threatening arrest? We think there is ample evidence from which the jury could have determined, as the verdict indicates it did determine, that no crime was committed and that there was no reasonable cause for any one to believe that a crime had been committed, and that Granich set the whole affair in motion in order to get his money on the open book account.

The second assignment of error refers to the denial of the motion for a directed verdict and for judgment notwithstanding the verdict. Our comment already made disposes of this assignment.

The next assignment of error relates to the denial of the motion for new trial, and, although the attempted appeal on this ground is ineffectual, appellant's points could be made under the appeal from the judgment. We therefore consider the points made. The claim that the evidence was insufficient has already been treated.

Error in the admission and rejection of evidence.

[3] But one instance under this point need be referred to. It was sought to show, through the pleadings and evidence in another civil suit, that subsequent to the arrest Granich secured a judgment of $1,200 against the sales company, and that the checks involved herein were in that case. The court refused the testimony, but did not limit Granich from introducing any part of such proceedings found applicable. While parts of the evidence in the referred to case might have been proper as evidence in the instant case, the issues were different. We see no error in the court's ruling.

[4] It appears that counsel for Porter mispronounced the name of Granich habitually during the trial and in the course of argument referred to Porter as an American boy. The inference is that counsel was purposely trying to prejudice the jury against a man with a foreign name. The point was not called to the court's attention during the trial, and the court does not seem to have been impressed with it upon motion for a new trial. The trial judge was in a much better position to pass upon this point than we can possibly be. It does not appeal to us as an abuse of discretion.

Absence of malice to justify the award of exemplary damages.

[5, 6] The facts as revealed by the witnesses called on behalf of Porter, if believed, are sufficient upon which to base malice.

We have carefully reviewed all of the authorities cited in the briefs, and we do not herein refer specifically to them, for the reason that the law seems well settled and well understood by both parties to this litigation. The difference is in the conclusions of the opposing parties arrived at from the evidence. We have applied the well-known rule of assuming as proved that which is both supported by the evidence and necessary to the jury's verdict. Tested by this rule, we unhesitatingly decide this appeal in favor of respondent.

The appeal from the ruling on the motion for a new trial is dismissed. The rulings on the other motions are sustained.

The judgment is affirmed.

We concur: **CRAIG, J.**; **ARCHBALD**, Justice pro tem.

136 Cal.App. 608

ADAMS PIPE WORKS v. OKELL WELL MACHINERY CORPORATION et al.

Civ. 9303.

District Court of Appeal, First District, Division 2, California.

Feb. 6, 1934.

Rehearing Denied March 8, 1934.

Hearing Denied by Supreme Court April 5, 1934.

1. **Appeal and error** ⚷536.

Reporter's transcript not bearing certificate of trial judge is not properly part of record.

2 **Corporations** ⚷215, 217.

Stockholder's liability created under constitutional section was contractual, and creditor's right thereunder cannot be impaired by repeal of such section while action is pending to enforce antecedent obligation (Const. art. 12, § 3).

3. **Appeal and error** ⚷173(10).

Where no statute of limitations was pleaded either by demurrer or answer, such point cannot be raised on appeal.

4. **Appeal and error** ⚷907(3).

When neither error nor prejudice appears on judgment roll and appeal is taken on judgment roll alone, reviewing court cannot presume that error or prejudice occurred.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by the Adams Pipe Works against the Okell Well Machinery Corporation and others to enforce stockholder's liability. From an adverse judgment, defendant Cora M. Lane appeals.

Affirmed.

Tanner, Odell & Taft and S. W. Odell, all of Los Angeles, for appellant.

Andrew M. Strong, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

[1] This is an appeal on the judgment roll alone from a judgment following a trial by the court sitting without a jury. While the appeal was pending in the Second Appellate District, appellant was granted permission on motion for diminution of the record to file the reporter's transcript of the proceedings in the lower court. Such a transcript was filed, but it does not bear the certificate of the trial judge. As this transcript is not properly a part of the record on appeal, we confine our decision to the certified transcript which contains the judgment roll.

[2] Here we find a simple action brought to enforce the liability of a stockholder under the provisions of section 3 of article 12 of the Constitution prior to its repeal on November 4, 1930.

The appellant argues that, since the constitutional section was repealed before final judgment had been entered in this case, the creditor's remedy against the stockholder was abolished. Coombes v. Franklin, 213 Cal. 164, 1 P.(2d) 992, 4 P.(2d) 157, is cited as authority. This case was reversed in Coombes v. Getz, 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866. The point is not now open to controversy. The liability heretofore created under the constitutional section was contractual (Dean v. Shingle, 198 Cal. 652, 662, 246 P. 1049, 46 A. L. R. 1156), and the right of the creditor cannot be impaired by repeal of the section while an action is pending to enforce an antecedent obligation (Hawthorne v. Calef, 2 Wall. 10, 17 L. Ed. 776; Coombes v. Getz, supra).

[3] It is argued that the cause of action was barred by some statute of limitations. But no statute was pleaded either by demurrer or by answer; hence the point cannot be raised on appeal. 16 Cal. Jur. pp. 603, 641.

[4] The criticism of the complaint would present some controversy if the questions were properly raised. It is argued that the complaint fails to present a cause of action because it does not allege that appellant was a stockholder at the time the debt was incurred, and that it is uncertain because it does not allege the proportion of the whole subscribed capital stock which appellant owned. Both the findings and the judgment recite that the cause was heard "upon stipulation of facts and testimony." Then the court specifically finds that when the indebtedness was incurred the appellant "was, and now is, the owner of seven-ninths of the capital stock issued. * * *" Since the appeal has been taken on the judgment roll alone, it is fair to assume in support of the judgment that the stipulation mentioned in the findings covered the identical points which the appellant now raises. Certainly when neither error nor prejudice appear upon the judgment roll we cannot presume that either occurred.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

136 Cal.App. 457

LANDRETH v. SOUTH COAST ROCK CO.

Civ. 1435.

District Court of Appeal, Fourth District,
California.
Jan. 27, 1934.
Rehearing Denied Feb. 21, 1934.
Hearing Denied by Supreme Court March 26, 1934.

1. Estoppel 🔑52.

Ordinarily, party may waive statutory or contract right.

2. Contracts 🔑292½.

Defendant who filed answer, offered evidence, and submitted case, without asserting that contract sued on contained arbitration agreement, waived right to arbitration (Code Civ. Proc. §§ 1282, 1284, 1285).

3. Appeal and error 🔑197(1).

Objection that there was variance between pleadings and proof must be presented to trial court; otherwise it is waived.

4. Appeal and error 🔑219(2).

Reviewing court will not consider objection that findings are outside issues, where case was tried without objection to pleadings and findings are justified by evidence.

5. Pleading 🔑398.

Variance between pleading and proof is not "material variance" unless adverse party has been misled to his prejudice in maintaining action or defense upon merits.

[Ed. Note.—For other definitions of "Material Variance," see Words & Phrases.]

6. Pleading 🔑237(6).

Court may find facts according to evidence or may order immediate amendment without costs, where variance between pleading and proof is immaterial.

7. Appeal and error 🔑1010(1).

Trial court's finding supported by material and competent evidence cannot be disturbed on appeal.

8. Contracts 🔑350(1).

Distributor of sand and rock products *held* justified under evidence in allowing discount to customer for prompt payment, where contract between producer and distributor did not prohibit granting discount.

9. Damages 🔑68.

Distributor of gravel and rock products who allowed customer to do his own hauling and credited hauling charge on customer's bill for materials purchased, instead of depositing proceeds of bill in bank, as required by contract with producer, *held* liable to producer for interest thereon from time when money should have been deposited (Civ. Code, § 3302).

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Clayton H. Landreth, doing business under the firm name of the Capistrano Rock & Sand Company, against the South Coast Rock Company. Judgment for plaintiff, and defendant appeals.

Affirmed in part, and reversed in part, with instructions.

Head, Wellington & Jacobs, of Santa Ana, for appellant.

Charles D. Swanner, of Santa Ana, for respondent.

MARKS, Justice.

Plaintiff and defendant entered into a contract dated April 1, 1931, whereby plaintiff agreed to produce sand, gravel, and rock at his plant near the town of San Juan Capistrano in Orange county, and make deliveries to defendant on defendant's trucks at the place of production. Defendant agreed to transport and market the products, making collections for the sales. The receipts for each month were to be deposited in the First State Bank of San Juan Capistrano and apportioned between the parties on or about the 15th of the following month. Plaintiff was to receive 50 cents a ton for production charges, which was to be the first charge paid from the gross receipts. Defendant was to receive transportation charges as the second charge against the gross receipts. The balance was to be divided equally between the parties. The agreement contained a provision that "in case any disagreement or difference shall arise at any time between the parties hereto, or any person claiming under them in relation to this contract, either as to the construction or operation thereof or the respective rights and liabilities thereunder, such disagreement or difference shall be submitted to the arbitration of three persons."

This action grew out of a dispute between the parties concerning payments on two separate accounts, one of which we will refer to as the Griffith account and the other as the Collins account.

Prior to April 1, 1931, plaintiff had a contract whereby he was to furnish rock, sand, and cement, mixed in batches, to the Griffith Company to be used in paving a part of the state highway. It was agreed by the parties here, prior to the making of their contract, that plaintiff should complete this contract and that the Griffith account would not come within the terms of the contract of April 1, 1931. It was further agreed that defendant would receive 10 cents a ton, or 10 cents a batch, for the deliveries on the Griffith contract. Apparently defendant made the collections on this contract and deducted 10 cents a ton as its share of the receipts. A batch of the materials weighed approximately thirty-five hundred pounds. Plaintiff maintained the agreement was to pay 10 cents a batch, but defendant maintained that it was to pay 10 cents a ton. The trial court, upon conflicting evidence, found in accordance with the testimony of the plaintiff.

Arthur P. Collins was a dealer in sand, rock, and gravel with his place of business in the city of Laguna Beach. He purchased his materials from the parties here; defendant acting as the seller. Collins did his own hauling, for which he was paid by the defendant. His bills for materials were almost entirely paid with credits for hauling done for defendant. Defendant made settlements with plaintiff as though Collins had paid in cash. The materials purchased in April, 1931, were credited as paid June 22; those in May, as July 11; those in June, as August 12; those in July and August, as November 11; those in September, as October 20; and those of October, as early in November. Plaintiff received his payments on those dates, with the possible exception of the October account.

The billheads used by the parties contained a statement that a discount of 20 cents a ton would be allowed each purchaser, provided the monthly account was paid by the 15th of the following month. Collins was allowed this discount, although plaintiff did not receive his share of these receipts until the dates we have just given, all but one of which came after the 15th day of the subsequent month. Plaintiff claimed Collins was entitled to no discount on the bills which he failed to pay by the 15th of the subsequent month and that defendant owed him one-half of the discount so given. The trial court resolved this question in favor of plaintiff.

The complaint contained two causes of action: (1) For a balance due and unpaid upon an open book account; and (2) for money had and received by the defendant. The answer denied the material allegations of the complaint and set up as a separate defense the agreement to arbitrate.

Defendant urges that, as the contract contained an agreement to arbitrate any differences, plaintiff's action should have been stayed until an arbitration was had. He relies upon the provisions of section 1284 of the Code of Civil Procedure, which provides that, where the court is satisfied that the issue involved in an action is referable to arbitration it "shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

Sections 1280 to 1293, inclusive, of the Code of Civil Procedure, adopted in 1927, are intended to provide for arbitration of disputes arising under contracts containing an arbitration clause, before the court adjudicates the merits of the controversy. Plaintiff urges the unconstitutionality of these sections, but from the view we take of this case it is unnecessary to decide this question.

As we have noted, section 1284 of the Code of Civil Procedure would indicate that the party relying on the agreement to arbitrate should make an application to the court for a stay of the pending action. Section 1282 of this same Code gives to a party aggrieved by the failure, neglect, or refusal of another to perform under an arbitration agreement, the right to petition a superior court for an order directing such arbitration. Section 1285 provides for a summary hearing of any application made under the authority of the arbitration act. It would seem clear from these and the other sections of the act that the Legislature intended to give a party desiring arbitration the right to demand it, and that the party desiring the arbitration should take some steps to secure it. This was the procedure followed in the case of Tiffany Productions, Inc., a Corporation, v. Superior Court of Los Angeles County, 123 Cal. App. 50, 10 P.(2d) 798.

[1, 2] It is well settled that ordinarily a right given by statute or created by contract may be waived by the party in whose favor it exists. Dicta in the case of Palmer v. Fix, 104 Cal. App. 562, 571, 286 P. 498, would indicate that, where a suit was pending, involving a contract containing an arbitration agreement, and the defendant made no request or application to the court to stay the action pending such arbitration, he waived his right to demand such a proceeding and submitted to the jurisdiction of the court to render judgment upon the merits. While this is dicta, it would seem to be well founded in reason. The act in question does not by its terms seem to intend to deprive the superior court of jurisdiction of cases involving contracts with arbitration agreements, but merely to provide a summary means by which the arbitration agreement can be enforced should one of the parties desire to rely upon it. It would seem to be the right of the party to invoke this summary power of the court which would be waived if he did not avail himself of it.

"A person may waive any civil right and the benefit of any statute or code provision in respect of his rights and obligations, unless such waiver would be against public policy. Indeed, it is one of the maxims of jurisprudence that 'anyone may waive the advantage of a law intended solely for his benefit.' For example, the protection afforded by the statute of limitations may be waived, and an agreement to do so is not against public policy. The principle is well established that a contracting party may waive the provisions placed in a contract solely for his benefit." 25 Cal. Jur. 929.

In the instant case defendant made no application to the trial court to stay the proceedings or to order the arbitration. It rested upon the allegations of its answer, offered its evidence, and submitted its case. As far as the record shows, it did not urge the agreement to arbitrate during the trial. Under these circumstances we have concluded that it waived its right to have an arbitration.

Defendant contends that there is a material variance between the complaint and the evidence and the findings. An examination of the record shows that a bill of particulars was furnished by plaintiff setting forth the details of his demand against defendant. The opening statements of both counsel show that they clearly understood the nature of the controversy, namely, whether the 10 cents to be retained by defendant on the Griffith job was to be reckoned on the ton or on the batch basis, and whether defendant was entitled to allow the discount on the items of the Collins account where payments were made to plaintiff after the 15th of each month. Evidence was introduced by both parties on these issues without objection, and the case was submitted to and was decided by the trial court on this evidence.

[3-6] An objection that there was a variance between the allegations of the pleadings and the proof offered at the trial must be presented to the trial court or it is waived. Martin v. Della, 211 Cal. 74, 293 P. 25. An objection that the findings are not within the issues made by the pleadings will not be considered on appeal where the case was tried without objection to the sufficiency of the pleadings to raise such issues and the findings are justified by the evidence. Spellacy v. Dauterman, 122 Cal. App. 416, 10 P.(2d) 114. "Variance between the allegations in a pleading and the proof is not to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. * * * Where a variance is not material, and does not actually mislead the adverse party to his prejudice, the court may find the facts according to the evidence, or may order an immediate amendment without costs." Murnane v. Le Mesnager, 207 Cal. 485, 279 P. 800, 804.

[7] As we have indicated, the testimony on the Griffith account was sharply conflicting. Plaintiff and his witnesses testified that the agreement was to pay defendant 10 cents a batch, and defendant's witnesses testified that it was to be 10 cents a ton on all materials delivered. The trial court found by inference in accordance with the testimony offered by plaintiff, and, as there is material and competent evidence supporting this finding, we cannot disturb it on appeal.

[8] In regard to the Collins account, plaintiff maintains, and the trial court concluded, that defendant had no right to grant Collins a discount more generous than one given to any other customer, nor should defendant have retained, for weeks or months, the money for the materials purchased by Collins, for which Collins paid by hauling for defendant.

The contract contains no direct provisions covering this question. It provides that "The Seller (defendant) is given the exclusive right and privilege of selling and distributing the product of the Producer (plaintiff)"; and further that "The Seller shall render all statements and bills of accounts, and shall promptly deliver duplicate copies thereof to the Producer. All receipts shall be promptly deposited in a special account to be kept under the name of Mission Materials Company in the First State Bank of San Juan Capistrano. Disbursements from said account shall be made by the bank at least once a month on or about the 15th day of the month." Then follows the manner in which the receipts will be apportioned; bills receivable but not paid, not being taken into consideration. The agreement further provided: "It is specifically understood and agreed by and between the parties that the parties hereto are not operating as a partnership hereunder, but, on the contrary, each party is operating as a sole and separate business, and shall operate its part of its business free from the interference of the other in the matter of its employees, methods of operation and manner of conducting its business. Neither party shall be liable for any debts or obligations of the other party, and each party shall be responsible for and shall pay its costs, charges and expenses in operating its business, it being the intention of the parties that the business of each shall be solely and separately under its direction and care. Each of the parties hereto promises and agrees, however, to fairly and in good faith carry out its part of this agreement in order that there may be coordinated working in the production of materials by the Producer and the sale and delivery of materials by the Seller."

We have searched the contract, and can find no provision in any way directly affecting any discount to be given purchasers who paid their bills by the 15th of the succeeding month, or that those not paying bills by that date should not receive a discount. The evidence shows that practically all of the customers paid their bills by the 15th of the month and were given a discount of 20 cents a ton. A few paid after that date and were also given the discount. Defendant allowed Collins the 20 cents a ton discount and gave him a different basis of credit from that extended to the majority of the other customers. We can find nothing in the contract prohibiting such procedure.

[9] Defendant did breach one clause of the contract in its handling of the Collins account in that it did not promptly deposit the money collected in the account in the First State Bank of San Juan Capistrano so that it could have been distributed on or about the 15th of each month. Each time Collins hauled a load for defendant, defendant became indebted to him for the amount of his charge. Instead of paying him in cash, defendant credited the hauling charge on Collins' bill for materials purchased. This had the same effect as though Collins had paid for an amount of materials equaling in cost his hauling bill. The accounts were kept on a monthly basis. At the end of each month defendant had collected from Collins the total amount of Collins' hauling charges for that month. Under the plain terms of the contract this money should have been promptly deposited in the bank account, that is, by the 15th of the succeeding month, so that plaintiff might have received and had the use of the money to which he was entitled. However, plaintiff ultimately received the money. His detriment would amount to interest at the rate of 7 per cent. per annum from the 15th of each month to the date he received payment. Section 3302, Civ. Code. He cannot collect the 20 cents per ton discount given to Collins which was never collected by defendant. We have assumed that the October, 1931, account of Collins was so adjusted that plaintiff received his full portion of the money in November. The record is not entirely clear on this question. As this portion of the judgment must be reversed, this can be definitely settled on a retrial of this issue. The parties should be permitted to amend their pleadings, should they be so advised. Under the theory which we have taken of the Collins account, the allegations of the complaint will not permit the introduction of evidence if objection be made at the trial.

The portion of the judgment involving the Griffith account in the sum of $247.80 is affirmed. The portion of the judgment involving the Collins account in the sum of $219.75 is reversed, with instructions to the trial court to retry the issue in accordance with the views here expressed. The parties will pay their own costs of appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

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136 Cal.App. 611

PIERCE et al. v. RILOVICH.

Civ. 8116.

District Court of Appeal, Second District, Division 2, California.

Feb. 6, 1934.

Rehearing Denied March 8, 1934.

Hearing Denied by Supreme Court April 5, 1934.

1. Attorney and client 🔑162.

That attorneys suing for fees did not allege full performance of contract admittedly terminated by defendant, nor await final results of efforts of other counsel and possibly running of limitations to demand compensation for work accomplished, cannot bar suit for reasonable fees.

2. Attorney and client 🔑165.

Complaint for attorneys' fees alleging work done and discharge of plaintiffs by defendant *held* sufficient under statute requiring allegation that plaintiffs "duly performed all the conditions" (Code Civ. Proc. § 457).

3. Attorney and client 🔑140.

Attorneys' failure to perform contract after having been discharged could not defeat right to recover reasonable fees for services rendered before discharge.

4. Appeal and error 🔑930(1).

It must be presumed that jury were unbiased.

5. Attorney and client 🔑167(2).

In action for attorneys' fees, existence of employment and rendition of services by plaintiffs *held* for jury.

Appeal from Superior Court, Los Angeles County; Pat R. Parker, Judge.

Action for attorneys' fees brought by William I. Pierce and another, copartners, doing business as Pierce & Gould, against Anton Rilovich. From an adverse judgment, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

J. L. Murphey and Louis Luckel, both of Los Angeles, for appellant.

Pierce & Gould and E. S. Gardner, of Ventura, for respondents.

CRAIG, Justice.

In an action for attorneys' fees alleged to have been earned, judgment was rendered upon a verdict in favor of the plaintiffs, from which judgment the defendant appealed.

At a stage of certain litigation theretofore commenced, the appellant in June, 1926, entered into a contract in writing employing the respondents to "attempt to enforce a contract for supplying water to his land in Ventura county, made by S. L. Stuart and Martha A. Stuart, either through an action already commenced or by other proceedings as may be found best, or possibly other case or cases." Said contract was set forth in the complaint herein, which alleged that said litigation had been prosecuted through trials of questions of law and to the perfection of appeal. Since the trial of the instant case, said pleadings have been approved by the Supreme Court with directions that the demurrer be overruled.

Respondents prayed reasonable fees to the date of their discharge. Admitting the employment and subsequent discharge, the answer dilated at length upon the plight of the defendant client in which neighbors manifested pity because of his enforced abstention from agricultural pursuits through lack of water, and denied that the employment had been terminated without just cause. It was further alleged that "said plaintiffs well knew that it was their duty to have said appeal advanced for hearing, in order that this defendant might obtain a judgment therein, ascertaining his rights in the premises; but that they wholly neglected such effort; and that defendant has suffered great damage and injury by reason of such failure and neglect on their part"; that "the hearing of said appeal has been unnecessarily delayed, and defendant charges that the said plaintiffs have been negligent, and have not acted with sufficient care in the premises." By an amendment it was alleged that because of his inexperience in legal matters and of ill health the defendant entered into an unreasonable and void contract to pay excessive fees. Neither the answer nor the evidence offered tended to reveal disapproval of said contract or services prior to completion of the record on appeal to the Supreme Court.

[1] Objection was made to the introduction of any evidence upon the ground that the complaint herein failed to state a cause of action, but that if it did state one the suit was prematurely instituted. As to the last point, no reason or authority is advanced. That respondents did not allege full performance of a contract admittedly terminated by appellant, nor await final results of the efforts of other counsel and possibly the running of the statute of limitations to demand compensation for work accomplished, cannot bar a suit for reasonable fees for such work.

[2, 3] The only discernible question of serious import appropriately headed as required by the rules is presented under the "law of the case" in the appellant's brief, wherein is quoted section 457 of the Code of Civil Procedure, which relates to pleading conditions precedent and requiring that parties allege that they "duly performed all the conditions." It is insisted that "nowhere in the complaint is there a statement that complies with this section; they do not show that they complied in any way with the contract." The said section provides that such an allegation may be in general terms. We think the complaint sufficient in this regard. It was alleged that said attorneys were employed to conduct the litigation described, and that as the defendant's sole attorneys they "prosecuted said action diligently, assiduously, carefully and with reasonable skill and great labor and did all and everything that could or might or ought to be done properly and/or effectively in behalf of said Anton Rilovich as plaintiff in said action to secure water for his said lands, to enforce said contract made by the said Stuarts and to obtain damages sustained by said Rilovich", etc.; and that "Anton Rilovich without any reason therefor violated his said contract of employment of these plaintiffs * * * and discharged them as his said attorneys from further connection with said cause or proceedings and notified them that he had secured and hired another attorney to care for his said case." Of course, failure to perform the contract, after having been discharged, could not defeat a right to recover reasonable fees for services rendered before the discharge and at the instance of the defendant, and obviously in such a case full performance could not have been truthfully alleged. To state the facts alone renders absurd any contention that the right to recovery requires a showing of complete performance. It was for the court and jury to believe or to disbelieve evidence tending to show that counsel had exercised a wise and judicious discretion with such reasonable dispatch as was permitted by the circumstances, and that they had been discharged and their contract canceled without legal justification. Though the appellant perchance be, as portrayed in his briefs, "a Spartan, rich in the glory of Thermopylae," it still remained to be determined whether the respondents rendered legal services for which they should receive reasonable fees, and if so the amount thereof. Much discussion is devoted to Jackson v. Campbell (Cal. App.) 3 P.(2d) 375, Id., 215 Cal. 103, 8 P.(2d) 845. Since the appeal was transferred to the Supreme Court, we direct our attention

only to its opinion. It there held that the contract under consideration, which was construed as providing for an attorney's fee of 35 per cent. of the amount of recovery, was valid, and upheld the judgment of the superior court therefor. This authority is not in point on any issue here involved.

[4, 5] Cases cited wherein contracts of employment were obtained by undue influence of attorneys over clients, or by fraud or imposition, or where the compensation was clearly excessive and amounting to extortion are not of assistance in determining the value of services rendered when the contract no longer exists. There was no evidence of undue influence, fraud, or imposition tending to induce the employment here in question. While it is asserted that the appellant did not have a fair trial, we find no justification for the charge. It must be presumed that the jury were unbiased and in view of the verdict, that they were honest in believing testimony that the plaintiffs devoted their exclusive time during fifteen months to the defendant's cause, and that their efforts were put forth in good faith with reasonable diligence and skill toward expected successful results. That these are questions of fact for the jury has repeatedly been held settled law. 6 Cor. Jur., p. 764, § 357; Tasker v. Cochrane, 94 Cal. App. 361, 271 P. 503. Criticisms and belittling statements concerning opposing counsel, interspersed with terse but immaterial quotations from bards and wise-cracking wags, which make up a considerable part of the appellant's briefs do not aid us. Self-styled "comments" upon asserted inexperience and want of enterprise of counsel, plaintiffs herein, disparagement of their professional standing, and discredit of the sincerity of superior court judges who ruled upon the pleadings are, to characterize such language mildly, unworthy and ineffective methods of briefing. The only questions of concern to the court are as to the existence of the employment of and the rendition of services by the respondents herein. These were entirely for the jury and the trial court to decide. It is not necessary to dwell upon the reasonableness of the award by the jury of $1,000 to the plaintiff attorneys, since appellant concedes that aside from questions which we have considered "the jury could have very well given the amount in considering the terms of the contract, whether void or not, and could follow, and would naturally be impressed and controlled by the evidence of Judge Rogers." Since the contract of employment first made was, by the parties, removed from the transaction, no opinion as to its sufficiency need be or is expressed. Upon the whole record the verdict and judgment must as a matter of law be held sufficiently supported by substantial evidence and not excessive or erroneous.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

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136 Cal.App. 532

LYNN v. NATIONAL AMUSEMENT CO. OF VENICE et al.

Civ. 8086.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1934.

Theaters and shows ⚿6.

In action for injuries sustained by patron when thrown out of basket in ferris wheel on which she rode, evidence *held* not to show that negligence of amusement resort operators in constructing or operating ferris wheel proximately caused accident.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Ruby Lynn against the National Amusement Company of Venice and another. From a judgment in favor of plaintiff, defendants appeal.

Reversed.

Edward C. Mills, of Los Angeles, for appellants.

M. C. Spicer and W. O. Graf, both of Los Angeles, for respondent.

CRAIG, Justice.

As the result of an attempt to ride upon a small device installed for the amusement of children, personal injuries were incurred for which the plaintiff instituted an action for damages. Findings of fact, conclusions of law, and judgment were rendered in her favor, and the defendants appealed.

The complaint alleged that in a certain amusement resort to which general admission was charged the defendants maintained and operated a certain "ferris wheel on which the public were invited to ride; that the ferris wheel was arranged to be operated by the use of a crank with which said wheel was turned over, which crank was attached to it and that the turning of said

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

wheel turned over baskets in which patrons were invited to ride; * * * the plaintiff paid an admission fee of twenty-five cents and on said date entered one of the baskets on said ferris wheel and while riding thereon said wheel was turned at an excessive rate of speed so that the basket in which plaintiff was riding was turned over, throwing the plaintiff out. * * * That the defendants were negligent in failing to construct, maintain and operate the said ferris wheel in such a way that the baskets in which patrons were permitted to ride would not turn over when the wheel was operated at an excessive rate of speed, and that the said negligence of the defendants was the proximate cause of the injuries suffered by plaintiff." Issue was joined upon each of the foregoing allegations, and following a trial findings were made reciting in part that "the plaintiff did not assume any risk by riding on said ferris wheel and that she did not know, nor could she have ascertained that the baskets in said ferris wheel would turn over when the wheel was operated at an excessive rate of speed."

The uncontradicted evidence tended to show that the utmost speed possible when said wheel was operated was about five feet per second, or less than three and one-half miles per hour; that it was installed and maintained for the amusement of small children only, and that four children were riding therein when the plaintiff and a companion arrived, and was being turned by a control wheel without crank by two young boys who were patrons; that the same was at no time operated by an employee of the defendants nor intended to be so operated. An inspection before and after the accident revealed no imperfection or unusual condition in the construction or operation of the wheel. The plaintiff, aged over twenty-one years, and weighing about 117 pounds, and a companion weighing about 140 pounds, having paid the general admission, approached the wheel, requested that they be permitted to ride, whereupon two of the children alighted, and the two women boarded the same, but the plaintiff testified that she was compelled to allow one foot to protrude therefrom. The wheel had made about five revolutions when her basket ceased to function properly, she grasped and hung from a rod for a time, and her companion was thrown clear of the wheel. The plaintiff finally fell, and was injured. Authorities bearing upon such cases are not numerous. "Negligence manifestly cannot be predicated of any act until you know what the act is. Until you know what did occasion an injury, you cannot say that the defendant was guilty of some negligence that produced that injury." Benedick v. Potts, 88 Md. 52, 40 A. 1067, 1069, 41 L. R. A. 478. Since there was an entire lack of evidence to support the allegation of defective mechanism or operation of the wheel or of proximate cause and injury must be attributed, if at all, to such proof, the judgment cannot be sustained. From this it follows that other questions argued become abortive.

The judgment is reversed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

BUTTERFIELD v. BUTTERFIELD.*

Civ. 1497.

District Court of Appeal, Fourth District, California.

Jan. 27, 1934.

Hearing Granted by Supreme Court March 26, 1934.

1. Appeal and error 🔑612(2).

Certificate of county clerk to correctness of copies of documents contained in transcript on appeal from order denying motion for change of venue *held* not proper authentication of transcript which, therefore, cannot be considered (Rules of District Courts of Appeal, rule 29).

2. Appeal and error 🔑612(2).

Stipulation of counsel that transcript on appeal is correct *held* not proper authentication of transcript which, therefore, cannot be considered (Rules of District Courts of Appeal, rule 29).

3. Appeal and error 🔑612(4).

Certificate of trial judge certifying that transcript on appeal is correct of all proceedings had on motion for change of venue *held* not proper authentication of transcript which, therefore, cannot be considered (Rules of District Courts of Appeal, rule 29).

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Suit by Silvia A. Butterfield against William L. Butterfield. From an order denying

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*For subsequent opinion see 34 P.2d 145.

motion for change of venue, defendant appeals.

Affirmed.

Lovett K. Fraser, of Lakeport, for appellant.

Jess G. Sutliff, of Independence, for respondent.

JENNINGS, Justice.

This is an appeal by the defendant from an order of the superior court denying defendant's motion for change of place of trial from Inyo county to Lake county.

The record on appeal is presented in the form of a typewritten transcript which is entitled "Transcript on Appeal." It does not contain a bill of exceptions.

The transcript does contain what purport to be copies of various papers. The documents which are therein contained include the complaint filed in the action, demurrer to the complaint, affidavit of merits of the defendant, notice of motion for change of venue, demand for change of venue, minute order of court denying motion for change of venue and overruling demurrer, notices of denial of motion for change of venue and of the overruling of the demurrer, summons showing service of process on the defendant, order directed to defendant to show cause why he should not be required to pay a suitable sum of money, weekly or monthly, for the support of minor children, also attorney's fees and costs and expenses of suit, memorandum of points and authorities on the motion for change of venue and the demurrer, which memorandum was filed by defendant's counsel after the court had disposed of these matters, notice of appeal, request for transcript, certificate of county clerk to the correctness of the copies of the aforesaid documents. These papers are followed by a stipulation of counsel for both parties which is entitled "Stipulation To Transcript." This document contains the following language:

"It is hereby stipulated that the foregoing transcript on appeal is correct, that the same shows true and correct copies of all papers on file in the county clerk's office of the county of Inyo, that the minute orders, therein contained, are full, true, and correct copies thereof as made and entered in the minutes of the superior court; that all papers on change of venue were duly served upon counsel for plaintiff; that the said foregoing papers shall constitute the transcript on appeal in this case and that the appeal from the order denying change of venue may be heard and determined upon the foregoing transcript, and the court may certify to the same without further notice.

"Dated: July 28th, 1933.

"Jess S. Sutliff,
"Attorney for plaintiff and respondent.
"Lovett K. Fraser,
"Attorney for defendant and appellant."

Appended to the transcript is a certificate of the judge which is as follows:

"The attorneys in the above entitled action having stipulated that the foregoing transcript is correct and may be certified by me without further notice, therefore the foregoing transcript on appeal is hereby settled, allowed and certified, as true and correct of all the proceedings had on motion for change of venue.

"Dated: August 3rd, 1933.

"Wm. D. Dehy,
"Judge of the Superior Court."

[1, 2] It is our conclusion that the above-described transcript does not present a properly authenticated record and that for this reason we are not justified in considering it. In the first place, the certificate of the county clerk presents no evidence of the authenticity of this record. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748; Britt v. East Side Hardware Co., 25 Cal. App. 231, 143 P. 244; Patterson v. Rutherford, 39 Cal. App. 647, 179 P. 704. Equally ineffective as proper authentication of the record is the stipulation of counsel since the law provides that a judge alone may certify as to what evidence was received and what proceedings were had at the hearing before him. Manuel v. Flynn, 5 Cal. App. 319, 327, 90 P. 463; Pouchan v. Godeau, 21 Cal. App. 365, 131 P. 879; Clark v. McCain, 107 Cal. App. 668, 290 P. 901.

[3] The certificate of the judge made pursuant to the stipulation of counsel goes no further than to certify that the transcript is a true and correct transcript of all the proceedings had on the hearing of the motion. It is manifestly insufficient and does not provide a proper authentication of the record. Harrison v. Cousins, 16 Cal. App. 515, 117 P. 564; Guyot v. Cassab, 118 Cal. App. 742, 745, 5 P.(2d) 912; Salinas v. Riverside Finance Co., 126 Cal. App. 675, 14 P.(2d) 1025.

Since the record is not authenticated either in the manner required by rule XXIX of the rules for the Supreme Court and District Courts of Appeal or in accordance with any provision of the law, we are not justified in giving consideration to it.

The order from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

PEOPLE v. VAILE.†

Cr. 1276.

District Court of Appeal, Third District, California.

Jan. 30, 1934.

Hearing Granted by Supreme Court March 1, 1934.

Criminal law 🔑1202(1).

Judgment adjudging defendant an habitual criminal *held* proper, where defendant had been previously convicted of burglary, assault with intent to murder, and jail escape, notwithstanding it was not established defendant was imprisoned (Pen. Code, § 644, as amended by St. 1927, p. 1066).

Appeal from Superior Court, Yolo County; Forrest A. Plant, Judge.

Alton H. Vaile was adjudged an habitual criminal, and he appeals.

Affirmed.

For prior opinion, see 25 P.(2d) 993.

Alton H. Vaile, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

After the opinion in this matter had been filed, certain facts were called to our attention which necessitated a re-examination of the question presented.

The judgment under which this defendant was committed was entered October 14, 1930. In the information charging the various offenses of which appellant was convicted and sentenced he was also charged with having been previously convicted of three separate felonies, namely, burglary, assault with intent to commit murder, and jail escape, conviction of which upon his arraignment he admitted. Thereafter on June 9, 1933, an order was issued out of the superior court of Yolo county reciting the judgment and conviction of defendant, but that the court had omitted to find said defendant an habitual criminal without right of parole and directed that he be returned from the state prison at Folsom for further proceedings. Subsequently and on June 12, 1933, the defendant appeared in court and after arraignment for judgment the court found defendant to be an habitual criminal and sentenced him to imprisonment for life in the state prison without right of parole. It is from this latter judgment and finding that defendant now appeals.

The law as existing in 1930, when the conviction of defendant was had, did not require any pleading or proof that any of the three felonies charged had been attended with imprisonment and it was not necessary that the felonies belonging to any particular class or group. Section 644, Penal Code (St. 1927, p. 1066), which then applied, read in part as follows: "* * * Every person convicted in this state of any felony who shall have been previously three times convicted, either in this state or elsewhere, of any felony, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole. * * *"

In 1931 this section was amended (St. 1931, p. 1052), but with those amendments we are not concerned, as the rights of this appellant are measured by the statute in force at the time of plea and judgment.

The judgment of the trial court that appellant is an habitual criminal deprived of the right of parole is therefore affirmed.

BRIX v. PEOPLE'S MUT. LIFE INS. CO.*

Civ. 8467.

District Court of Appeal, First District, Division 1, California.

Jan. 24, 1934.

Hearing Granted by Supreme Court March 22, 1934.

1. Pleading 🔑403(2).

Insurer setting up, as defense, matter of controversy in construction of indemnity contract sued on, waived objection that no specification of controversy was stated in complaint (Code Civ. Proc. § 1060).

2. Pleading 🔑403(1).

Defect in pleading is cured by subsequent pleading of omitted matter by other party.

3. Courts 🔑118.

Superior court had jurisdiction of action to recover $400 in unpaid installments on accident policy, and for determination of insured's rights under policy (Code Civ. Proc. § 1060).

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† For subsequent opinion see 42 P.2d 321.

*For subsequent opinion see 41 P.2d 537.

4. Insurance ⚷665(3).

Evidence, in action on accident policy, sustained finding that insured's statement that he was a "rigger" by occupation did not constitute misrepresentation regarding occupation, where work did not take him off ground.

Definition of "rigger" includes not only the operation of hoist but putting up, mantling, and dismantling of rigging, that is, steel lines and cables, and the erecting of derricks and hoists.

5. Insurance ⚷665(5).

Evidence sustained finding insured sustaining permanent displacement of shoulder joint was "wholly and continuously disabled" within accident policy terms.

6. Insurance ⚷672.

Court had jurisdiction to render judgment requiring insurer's payment of future installments under accident policy, where only condition to payment was within issues of case, and was determined (Code Civ. Proc. § 1060).

7. Insurance ⚷672.

Where accident policy provided for payment of permanent disability indemnity so long as insured lived and suffered total loss of time, judgment requiring insurer's payment of future indemnity installments should permit insurer to establish that insured's permanent disability had ceased to exist (Code Civ. Proc. § 1060).

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Arthur J. Brix against the People's Mutual Life Insurance Company, in which defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Modified and, as modified, affirmed.

Prior opinion, 18 P.(2d) 103.

See, also, 12 P.(2d) 108.

A. B. Weller, of San Francisco (Niles C. Cunningham and Glensor, Clewe, Schofield & Van Dine, all of San Francisco, of counsel), for appellant.

Newlin & Ashburn, of Los Angeles, and McCutchen, Olney, Mannon & Greene and F. Eldred Boland, all of San Francisco, amici curiæ for appellant.

Samuel M. Samter and J. J. Posner, both of San Francisco, for respondent.

Stanley F. Davie, of San Francisco, and Eugene K. Sturgis, of Oakland, amici curiæ for respondent.

PER CURIAM.

A rehearing was granted in this cause in order to give further consideration to the question of the trial court's power to enter judgment for the payment of future monthly installments of insurance benefits which the trial court held were due under the so-called permanent disability clause of the insurance policy sued upon; and, after having done so, we are satisfied that, except as to the matter of the modification of the terms of the judgment as hereinafter ordered, the following opinion, written by the late Judge Strother while sitting as justice pro tem. of this court and heretofore filed herein, correctly disposes of the points involved on the appeal:

Action upon a policy of indemnity insurance.

The first count in the complaint is for the recovery of the sum of $400 unpaid installments on an accident insurance policy issued by appellant to respondent, and such installments as might fall due pending trial of the action. The contract is set out and made part of the complaint. The second count includes by reference all the allegations of the first count, and in addition alleges that a controversy had arisen as to the rights of plaintiff under the contract.

The defendant demurred generally and specifically, among other objections raising the question of the jurisdiction of the court and the failure of plaintiff to specify any particulars of the alleged controversy as to plaintiff's rights. The demurrer was overruled and defendant answered, admitting the execution of the contract, proof of loss, and the payment by it of five monthly installments, provided for by the contract; denying the injuries to plaintiff, and denying that any controversy existed as to the rights of the parties. As a special defense, defendant alleged that plaintiff had not been and would not be continuously under the care of a physician as provided in the policy.

[1-3] Appellant asserts upon this appeal that the superior court of the city and county of San Francisco was without jurisdiction of the action to recover the sum alleged to be due on the contract, actions for that amount

being within the exclusive jurisdiction of the municipal court, and that, no specification of controversy having been stated in the second count of the complaint, judgment should have gone in its favor. Assuming, without deciding, that its position was correct in the inception of the action, respondent waived the objection by answering and setting up as a special defense a matter of controversy in the construction of the contract. The common-law rule still obtains that a defect in a pleading is cured by a subsequent pleading of the omitted matter by the other party. The superior court having exclusive jurisdiction of actions brought under section 1060, Code of Civil Procedure, properly retained the action. The court is authorized by the section to determine the rights of the parties and grant "other relief."

The other grounds of error urged by appellant are that the findings and judgment are not supported by the evidence, and that "the judgment itself is not of the character contemplated by the law of this state."

[4] The first objection to the evidence is that plaintiff made a material misrepresentation in answers to questions as to his occupation. He stated that he was a "rigger" by occupation. The answer to the next question was: "The duties of all my occupations are stated in full as operating hoist machine." The definition of "rigger" as given in dictionaries, and testified to by a witness, includes not only the operation of hoist but putting up, mantling, and dismantling of rigging—that is, steel lines and cables—and the erecting of derricks and hoists.

Defendant's attorney testified that there was a classification of nonacceptable occupations, under a rule of the company, which included work required to be done in the air. It was not, however, shown that this rule was ever brought to the knowledge of plaintiff. The policy itself sets forth that the insurer will not be liable for sickness resulting from certain diseases, or injuries suffered in named occupations, which do not include that in which plaintiff was engaged. The policy contains the further provision that "no reduction shall be made in any indemnity herein provided *by reason of change in the occupation* of the Insured or *by reason of his doing any act or thing pertaining to any other occupation*." (Italics ours.) In fact, plaintiff was not, before or at the time of receiving his injuries, engaged in work which took him off the ground. The trial court did not err in finding that there was no misrepresentation.

[5] The defendant by its contract expressly agreed that if the injury should "wholly and continuously disable the Insured from performing any and every kind of duty pertaining to his occupation," that it would pay him the indemnity during his life. The contention of the appellant is that the evidence does not sustain the finding of total disability by the court. The plaintiff suffered displacement of one shoulder joint, with the result that the arm would drop out of the socket even without exertion. Several operations were performed to remedy the condition, but without success. While there was some slight conflict in the expert surgical testimony, the overwhelming weight of it was to the effect that the condition was irremediable. The testimony of an expert in the occupation, that the performance of its duties required great strength, and the ability to use both hands, whether it be considered as that of a "rigger" in the general sense, or limited to the operation of a hoisting machine, was uncontroverted.

The court rendered a present judgment for the amount of the indemnity installments due at the time of the trial, and further requiring the defendant to pay at the same rate during the life of the plaintiff. The finding was in exact conformity with the great weight of the evidence, and the judgment in exact conformity with the agreement of appellant, assuming that respondent's disability will continue for the rest of his life, as found by the court.

[6] Has the court jurisdiction to render judgment requiring the payment of future installments in a case such as this? We can find no ground in reason or precedent against it. In actions for damages for breach of continuing contracts, courts estimate and give judgment for damages that are certain to accrue in the future. In actions for damages for personal injuries, if the injuries are found to be permanent, judgment is given in an amount to recover the loss of the injured party for his natural life, estimated according to the mortality tables. It is true that courts have refused, where action has been brought for installments due on a contract calling also for future installment payments, to give judgment, when there is no accelerating clause, for the payments in the future. But we are satisfied that the reason and distinction is that in such contracts there are mutual and concurrent covenants or agreements, express or implied by law, failure to comply with which by the plaintiff might, in

the future, avoid the contract as to the defendant. But here the only condition as to the payment of the indemnity was within the issues and determined, and there is no reason why the plaintiff should be remitted to another action in case of defendant's failure to pay in the future.

[7] The clause of the policy upon which the portion of the judgment relating to future payments is founded provides that: "If 'such injury' shall not result in any of the specific losses enumerated in Section A, but shall wholly and continuously disable the Insured from performing any and every kind of duty pertaining to his occupation for one day or more, so long as the Insured lives and suffers total loss of time, the Company will pay a monthly indemnity at the rate of One Hundred ($100) Dollars." The finding of the court upon this issue was: "That on or about the 31st day of August, 1929, plaintiff, at Valley Springs, California, suffered permanent accidental bodily injuries effected directly and independently of all other causes, which said bodily injuries so sustained as aforesaid consisted of the permanent dislocation of plaintiff's right acromio-clavicular joint; that such permanent bodily injuries sustained as aforesaid have ever since August 31st, 1929, wholly and continuously disabled said plaintiff and for all time will wholly and continuously disable plaintiff from performing any and every kind of duty pertaining to his occupation, which said occupation at all times herein mentioned was a rigger;" and its conclusion of law was: "That the said bodily injuries suffered by plaintiff and in said complaint particularly set forth were and will be permanent and have wholly and continuously disabled plaintiff and for all time will wholly and continuously disable plaintiff from performing any and every kind of duty pertaining to his occupation as rigger." A similar adjudication was incorporated in the judgment, which then proceeded to adjudge and decree that "plaintiff have and recover from defendant the sum of one hundred ($100.00) dollars per month commencing with the month of March, 1931, during the rest and remainder of plaintiff's natural life."

On petition for rehearing it was urged that, in view of the condition contained in the clause of the policy above quoted, the insurer had the right to be relieved from payment of future permanent disability indemnity if such permanent disability ceased to exist; that this right carried with it the privilege of establishing or seeking to establish subsequent to the entry of judgment the fact that plaintiff's physical condition had so changed or improved as to take his case out of the operation of said so-called permanent disability clause; but that the form of judgment entered forever precluded the insurer from exercising such right. That such right exists seems clear from the wording of said clause, and therefore, in order to avoid any possible ambiguity which might arise on this point, it is ordered that the judgment be, and the same is hereby, modified by adding to the provision last above quoted the following: "Provided that this provision of the judgment shall be subject to modification by the court if hereafter it shall be established by competent evidence, and so found by the court on motion of defendant, that on account of subsequent change or improvement in plaintiff's physical condition the injuries suffered by him and in said findings and judgment particularly described have ceased to be permanent and no longer wholly and continuously disable him from performing any and every kind of duty pertaining to his occupation as rigger."

The trial court is directed, therefore, to revise its judgment accordingly; and, as thus revised and modified, it will stand affirmed, respondent to recover his costs of appeal.

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136 Cal.App. 393

ROSS v. TITLE GUARANTEE & TRUST CO. et al.

Civ. 1403.

District Court of Appeal, Fourth District, California.
Jan. 25, 1934.

1. Lis pendens 🔑4.

Filing of lis pendens, by one seeking to have trust deed and negotiable note canceled, *held* not constructive notice to holder in due course of maker's equities against payee (Civ. Code, §§ 3137, 3138; Code Civ. Proc. § 409).

2. Lis pendens 🔑18.

Where lis pendens gave notice of action by grantor against beneficiary to cancel trust deed for fraud, one acquiring trust deed from another who acquired it from original beneficiary prior to filing of lis pendens took instrument free from cloud of proceeding to have it declared void (Code Civ. Proc. § 409).

3. Bills and notes ⊂⇒**330.**

Transferee taking negotiable note before maturity without knowledge of defects and for value *held* "holder in due course" as to maker, notwithstanding immediate transferor indorsed without recourse, since such indorsement merely limited liability of indorser and did not affect negotiability of note (Civ. Code, §§ 3119, 3137, 3138, 3141).

[Ed. Note.—For other definitions of "Holder in Due Course," see Words & Phrases.]

4. Bills and notes ⊂⇒**337.**

Holder in due course had no duty to inquire as to possible infirmities of note before he took it (Civ. Code, §§ 3137, 3138).

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Arthur A. Ross against the Title Guarantee & Trust Company, E. D. Beeman, and another. Judgment for plaintiff, and named defendants appeal.

Reversed.

Haight, Mathes & Sheppard and William A. Bassett, Jr., all of Los Angeles (Arthur L. Syvertson, of Los Angeles, of counsel), for appellants.

J. J. Hughes, of Los Angeles, for respondent.

JENNINGS, Justice.

Plaintiff instituted this action on July 19, 1928, seeking cancellation of a certain promissory note executed by him in the amount of $1,250 and a trust deed covering real property in Riverside county which was given to secure payment of the note. Both instruments were dated April 18, 1928. The note was made payable one year after date. The payee named in the note was Charles H. Weygint. The grounds alleged in the complaint for cancellation were entire lack of consideration and fraud on the part of the payee. The original complaint named no defendant other than the payee, Charles H. Weygint. At the time the original complaint was filed, a notice of lis pendens was filed in the office of the county recorder of Riverside county. This notice stated that an action had been commenced in the superior court of said county for the purpose of obtaining a decree declaring that the trust deed was void and for its cancellation. A correct legal description of the land, title to which was alleged to be affected, was set out in the notice. On January 20, 1930, a second amended complaint and supplemental complaint was filed in the action. This pleading named as defendants in the action Title Guarantee & Trust Company, Sidney C. J. Feder, Edward J. Feder, and E. D. Beeman, in addition to the single defendant named in the original complaint. The relief sought by the latter pleading was the same relief which was sought by the original complaint. The cause of action was the same, but the latter pleading alleged that Charles H. Weygint and the two Feders had planned, connived, and confederated together to defraud the plaintiff and in pursuance of their common design and to accomplish its consummation had made certain specified false and fraudulent representations. The pleading entitled "Supplemental Complaint" alleged that the Title Guarantee & Trust Company named as trustee in the trust deed had given notice of default in the payment of the indebtedness secured by said deed and had advertised the property described in said trust deed for sale. It was also therein alleged on information and belief that the promissory note had been assigned to the defendant E. D. Beeman, that the plaintiff had no information or belief as to the date of the assignment and, lacking such information, that the assignment was made after the date of maturity of the note, without consideration therefor, and that Beeman, at the time of the assignment, knew that no consideration had been received by plaintiff for the execution of the note and had full knowledge of the pendency of the action for cancellation. The defendant Sidney C. J. Feder was served with process and made no appearance in the action. The defendants Charles H. Weygint and Edward J. Feder were not served with process and the action was accordingly dismissed as to them. The defendants Title Guarantee & Trust Company and E. D. Beeman filed a joint answer. The action proceeded to trial on the issues framed by the second amended complaint and supplemental complaint and the answer filed by the aforesaid defendants. Upon the conclusion of the trial the court rendered judgment in favor of plaintiff, decreeing cancellation of the promissory note and adjudging that the trust deed given to secure its payment is void and ordering the trustee, Title Guarantee & Trust Company, to reconvey the real property described in the trust deed to the plaintiff. From the judgment so rendered the defendants Title Guarantee & Trust Company and E. D. Beeman have appealed.

The trial court found "that on or about the 15th day of February, 1930, defendant, E. D.

Beeman purchased the said promissory note and trust deed from Edward J. Feder for a valuable consideration, and that at said time said defendant acted in good faith and had no knowledge of any kind whatsoever of any fraud, or failure of consideration, or any defect whatsoever, in the said instrument other than such constructive notice as may have been effected by the lis pendens hereinabove referred to." With respect to the notice given to appellant E. D. Beeman by the filing of the notice of lis pendens, the court made the following findings: "The court further finds that the lis pendens notice filed on the 19th day of July, 1928, was sufficient notice to the world of the infirmity claimed by the plaintiff to the note and trust deed in controversy herein and that the title to the property was being questioned, and that persons taking title thereto subsequent to the filing of the lis pendens notice did so with constructive notice of the infirmities claimed by plaintiff as to said note and trust deed. * * * The court further finds that said E. D. Beeman was a stranger to this action when instituted by the plaintiff and that he acquired the authority of his claim during the pendency of said action and while said lis pendens notice was of record in Riverside county, California, and could not be an innocent purchaser, for value, under said conditions, and that said E. D. Beeman took the note and any rights under said trust deed with constructive notice of the infirmity of the note and trust deed prior to his acquiring the same or parting with anything of value therefor."

[1] Appellants' principal contention on this appeal is that the trial court incorrectly concluded that the notice of lis pendens filed by respondent at the time the action was instituted afforded constructive notice to appellant E. D. Beeman of the infirmities attaching to the promissory note and trust deed and that said appellant could not therefore occupy the favored position of a bona fide purchaser for value before maturity. It may be observed that the original notice of lis pendens was not amended and that no new notice was recorded after the original complaint was amended and additional parties were joined as defendants in the action. With respect to this fact the court found that the failure to amend the notice of lis pendens or to file a new notice after the amendment of the original complaint and additional parties were joined as defendants did not nullify the effect of the notice as affording constructive notice to any one dealing with the property. It may also be observed that the court's finding that appellant E. D. Beeman purchased the note and trust deed prior to maturity of the note for a valuable consideration in good faith and without actual notice of any defect is not attacked by respondent. Careful consideration of the record presented through the medium of a bill of exceptions impels the conclusion that this finding is not lacking in evidentiary support, although we are not prepared to say that a finding that appellant Beeman did not act in good faith would not have been justified under the somewhat peculiar circumstances which surrounded his purchase of the note. The facts that appellant Beeman was the employer of E. J. Feder from whom he purchased the note and trust deed and that E. J. Feder is the brother of Sidney C. J. Feder, who was employed by Charles H. Weygint at the time respondent executed the note and trust deed and that Sidney C. J. Feder prepared the note and trust deed and on June 1, 1928, received these instruments from his employer Weygint as part payment of wages due him from Weygint and that Weygint and his wife indorsed the note, "Without recourse," on June 1, 1928, and that Sidney C. J. Feder subsequently delivered the note and trust deed to Edward J. Feder and that Edward J. Feder on February 15, 1929, transferred the note and trust deed to his employer, Beeman, receiving therefor Beeman's check for $400 and a credit of $850 on his account with Beeman, to whom he was then admittedly indebted in an amount in excess of $1,250, and that Edward J. Feder also assigned the note to Beeman, "Without recourse," are circumstances which might conceivably have an important bearing on the question of the good faith of appellant Beeman.

However, in the face of the court's express finding that appellant Beeman was a bona fide purchaser of the note and trust deed for a valuable consideration prior to maturity of the note and that he had no actual notice of any defect or infirmity in the instruments, which finding is not attacked and which we cannot declare is lacking in evidentiary support, we cannot bring ourselves to agree with the court's conclusion that the notice of lis pendens afforded to appellant Beeman constructive notice of those infirmities in the note which respondent alleged in his complaint as grounds entitling him to the remedy of cancellation of that instrument.

The promissory note executed by respondent was made payable to the payee "or order," and there can be no doubt that it is a negotiable instrument. The court's conclusion that the filing of the lis pendens notice operated to give to a bona fide purchaser of the note for value before maturity constructive notice of respondent's equities is therefore contrary to the language of section 57 of the Uniform Negotiable Instruments Law, which was adopted by the state of California and made a part of the California Civil Code in 1917. Section 3138 of the Civil Code contains the exact language which appears in section 57 of the Negotiable Instruments Law. This language is as follows: "*Rights of holder in due course.* A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Although no California case has been called to our attention which specifically holds that the filing of a notice of lis pendens does not afford constructive notice of infirmities to a holder in due course of a negotiable instrument, it is obvious that application of the doctrine of constructive notice would be destructive of the spirit and purpose of the above-cited section of the Code and directly contrary to the legislative intent therein clearly expressed. It would also be in direct conflict with the provisions of section 3137 of the Civil Code which declares that "to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same (instrument), the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Goodale v. Thorn, 199 Cal. 307, 249 P. 211; Merced Security Sav. Bank v. Bent Bros., 207 Cal. 652, 279 P. 765; Robb v. Cardoza, 110 Cal. App. 116, 293 P. 851. Authorities from other jurisdictions are not lacking to support the principle that the doctrine of lis pendens is not applicable to the holder in due course of a negotiable instrument. A leading case in the United States which unequivocally announces the rule is the early case of Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278. This case was later followed in Mayberry & Co. v. Morris, 62 Ala. 115. It was followed in Mims v. West, 38 Ga. 18, 95 Am. Dec. 379. It was cited with approval in Holbrook v. New Jersey Zinc Co., 57 N. Y. 616, and in Warren County v. Marcy, 97 U. S. 96, 24 L. Ed. 977. In Enfield v. Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523, the Supreme Court of the United States announced that the doctrine of constructive notice arising from the pendency of an action is not applicable to the purchaser of negotiable securities before maturity. In MacDermot v. Hayes, 175 Cal. 95, 170 P. 616, 622, the Supreme Court of California decided that the doctrine of lis pendens is inapplicable to the purchaser of shares of stock in a corporation who paid full value therefor without actual notice of the pendency of an action instituted for the purpose of having it declared that the stock was held in trust. The court observed that the injustice which is sometimes accomplished through the application of the doctrine of lis pendens to innocent purchasers of real property would be increased and rendered of more frequent occurrence if the doctrine were extended to specific personal property, "the possession or evidence of title whereof may be passed from hand to hand without public or written evidence of its transfer." It is also pointed out that section 409 of the Code of Civil Procedure, which is the statute permitting a plaintiff in an action affecting the title or right of possession of real property to file a notice of lis pendens, is limited in its application to cases affecting real property. Since it is settled that a promissory note is personal property (19 Cal. Jur., p. 798; Hoxie v. Bryant, 131 Cal. 85, 63 P. 153), it follows that section 409 of the Code of Civil Procedure is not applicable and that the filing of the lis pendens notice by respondent did not convey to appellant Beeman, the holder in due course of the note, constructive notice of the maker's equities against the payee. What is here said with respect to the application of the doctrine of constructive notice to the holder in due course of a negotiable instrument relates solely to the promissory note which the record shows was purchased by appellant Beeman for value, in good faith, before maturity, and without actual knowledge of any infirmity or defect attaching thereto. It has no reference to the fact that payment of the note was secured by a trust deed on real property, and we are not to be understood as expressing the opinion that a notice of lis pendens properly prepared and recorded in compliance with the provisions of section 409 of the Code of Civil Procedure may not operate to convey to the purchaser of a trust deed given to secure payment of a negotiable promissory note constructive notice of equities of the trustor against the beneficiary named in the trust deed.

[2] It is the principal contention advanced by the respondent that the judgment in his favor should be affirmed for the reason that the action was instituted not only for the purpose of having the note canceled, but also

for the purpose of having the trust deed which was given to secure payment of the note declared void. Since the action attacked the trust deed whereby title to real property was conveyed to a trustee for the benefit of the payee of the note, it is said that the action was one which affected the title to real property, and therefore it is argued that the filing of the notice of lis pendens operated to give constructive notice to appellant Beeman of infirmities attaching to the trust deed, and the trial court's conclusion that Beeman was not and could not be a holder in due course of the trust deed is correct and must be sustained. It is apparent that the corner stone of this contention is that the filing of the lis pendens notice at the time the original complaint in the action was filed afforded constructive notice of the pendency of the action to all future purchasers or encumbrancers of the property. It is likewise apparent that the judgment of the trial court in respondent's favor can be sustained only on the theory of constructive notice afforded by the medium of the lis pendens notice in the face of the court's finding that appellant Beeman purchased the note and trust deed in good faith prior to maturity of the note, that he paid a valuable consideration therefor, and that at the time he purchased the instruments he had no actual notice of any infirmities or defects attaching to them or of any equities of the maker against the person who was named as the payee of the note and the beneficiary designated in the trust deed.

In the final analysis the correctness or incorrectness of this contention depends upon the construction of the statute which provides that the filing of a notice of lis pendens shall convey constructive notice of the pendency of an action. This statute, to which reference has heretofore been made, is section 409 of the Code of Civil Procedure. It is in the following language: "*Notice of the pendency of an action affecting the title to real property.* In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

The language of the concluding sentence of the statute is significant. It is therein expressly stated that a purchaser or incumbrancer of the property affected by the notice shall be deemed to have constructive notice only of the pendency of an action against parties designated by their real names. When, therefore, an action is instituted against a single defendant, a subsequent purchaser or incumbrancer of real property, the title to which will be affected by the action, can be charged with knowledge of the pendency of the action only as to the defendant named in the complaint. Application of the statute upon which respondent relies to the facts shown by the record discloses the following situation: Appellant Beeman at the time he purchased the trust deed from Edward J. Feder was charged with knowledge of the fact that an action was then pending wherein respondent was seeking to obtain a decree that a trust deed on the land described in the lis pendens notice executed by respondent in which Charles H. Weygint was named as the beneficiary was void on the grounds of fraud and total lack of consideration. However, since appellant Beeman was not purchasing the trust deed from Weygint, the sole defendant mentioned in the lis pendens notice and in the original complaint, he was not charged with knowledge that his vendor, Edward J. Feder, was in any manner implicated in the fraud or that the trust deed in Feder's hands was subject to any equity or defense on the part of respondent against Feder. In other words, appellant Beeman was entitled to assume that Feder was the rightful owner of the promissory note and the rightful holder of the trust deed given to secure it and that respondent could not successfully challenge Feder's ownership of the instruments or set up any defense or equity that would prevail against Feder. The record further shows that prior to the filing of the original complaint and the notice of lis pendens, Charles H. Weygint, the sole defendant named in the complaint and notice, had transferred the note and trust deed. The filing of the notice was not, therefore, sufficient to put appellant Beeman on notice, and he accordingly took the instruments free from the cloud of the proceedings which had been instituted by respondent for the purpose of having the note canceled and the trust deed declared void. City Properties Co. v. Fitzmaurice, 42 Cal. App. 16, 19, 183 P. 267.

[3] In an effort to sustain the judgment, respondent contends that the effect of the indorsement by which appellant Beeman acquired title to the note was to make Beeman a mere assignee of the instrument which he took subject to such equities as were available to respondent against Beeman's assignor. The indorsement to Beeman is in the following language: "For value received, I, the undersigned, do hereby transfer and assign to E. D. Beeman the within note, together with all rights accrued, or to accrue, under the deed of trust or contract securing the same, as far as the same relates to this note, and without recourse. [Signed] Edward J. Feder." It may be observed incidentally that the language of the indorsement to Edward J. Feder by the payee named in the note is identical with the above-quoted language except as to the names appearing therein. It may be conceded that the language of the indorsement to appellant Beeman indicates that the indorsement was a qualified indorsement within the meaning of section 3119 of the Civil Code. This section is in the following language: "Qualified indorsement. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument." The last sentence of the section would appear to furnish a complete answer to respondent's argument. If a qualified indorsement does not impair the negotiability of an instrument which is otherwise negotiable, no reason suggests itself why one who takes such an instrument before maturity, without knowledge of defects, and pays value therefor should not, as to the maker of the instrument, occupy the position of a holder in due course. The effect of a qualified indorsement is merely to limit the liability of the indorser who makes it. This limitation specifically attached to the indorsement giving notice to all future takers that such an indorser will not be liable in case of nonpayment by the maker has, however, no effect upon the engagement of the maker which is that he will pay the instrument according to its tenor. Civ. Code, § 3141. This rule is clearly established by the great weight of authority in the United States and is in conformity with reason and principle. 1 Daniel on Negotiable Instruments (6th Ed.) p. 778; Brannan's Negotiable Instruments Law (4th Ed.) p. 323; 8 C. J. p. 517; 3 R. C. L., p. 1078; Hamilton v. Fowler (C. C. A.) 99 F. 18, 23; Beach v. Bennett, 16 Colo. App. 459, 66 P. 567; Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089, 33 L. R. A. [N. S.] 587, 592; Stevenson v. O'Neal, 71 Ill. 314; Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003; Neely v. Black, 80 Ark. 212, 96 S. W. 984; Mayes v. Robinson, 93 Mo. 114, 5 S. W. 611.

[4] The trial court inferentially concluded that a duty rested upon appellant Beeman to make inquiry regarding the possible existence of infirmities in the note before he took it. In this the court was mistaken. As hereinabove noted, the court specifically found that appellant Beeman was a holder in due course of the instrument, and it is settled that no duty to inquire as to possible infirmities rests upon the holder in due course of a negotiable instrument. Smith v. Armstrong, 85 Cal. App. 624, 631, 260 P. 347.

For the reasons stated, the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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136 Cal.App. 349

CHARLEVILLE v. METROPOLITAN TRUST CO. OF CALIFORNIA et al.

Civ. 1414.

District Court of Appeal, Fourth District. California.

Jan. 23, 1934.

Rehearing Denied Feb. 21, 1934.

1. Appeal and error 🔑1170(7).

Where plaintiff in personal injury action was nonsuited, any error in admitting cross-examination of plaintiff tending to establish retraxit *held* not reversible (Const. art. 6, § 4½).

2. Release 🔑29(1).

Injured party cannot accept payment of damage from one joint tort-feasor and press action against another.

3. Release 🔑58(1).

In personal injury action, nonsuit based on retraxit shown on cross-examination of plaintiff *held* error, where documents signed by plaintiff after receiving payments were not before court, nor was there any clear evidence of their contents.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

4. Landlord and tenant 🔑164(1).
In renting furnished apartments, there is implied warranty that furniture is fit for use, and owner is liable for damages caused by patent defects.

5. Judgment 🔑630.
Injured person is permitted but one recovery for injuries, though he may join joint tort-feasors in one suit or file separate suits against them.

6. Release 🔑15.
Injured person may avoid results of release by proving rescission or that it was obtained by undue influence, fraud, oppression, duress, mistake, or through mental weakness or incapacity.

7. Trial 🔑64.
Under usual procedure, plaintiff would not be required to rebut or attempt to avoid effect of release until defendant rested case.

8. Judgment 🔑654.
Dismissal of personal injury action as to certain defendants of itself would not bar subsequent action.

9. Release 🔑37.
Covenant not to sue for personal injuries would not bar another action.

> In such case, the covenant not to sue does not operate as release of either covenantee or the other tort-feasors, but covenantee must resort to his suit for breach of the covenant, and other tort-feasors cannot invoke the covenant as a bar to the action against them.

10. Trial 🔑165.
On motion for nonsuit, evidence is construed most favorably to plaintiff.

11. Landlord and tenant 🔑164(1).
Actual ownership of bed in leased apartment is not necessary to attach liability for tenant's injury from collapse of bed, if defendant had lawful possession with right to rent it to tenant.

12. Landlord and tenant 🔑169(6).
Where owner transferred apartment building to trustee for creditors and tenant in building was subsequently injured, evidence *held* to make prima facie case that defendant was party to declaration of trust, where defendant wrote letter to trustee advising that person signing his name to declaration of trust was authorized to do so.

13. Trial 🔑139(1).
As against motion for nonsuit, plaintiff is only required to make out prima facie case.

14. Corporations 🔑432(12).
Where owner transferred apartment building to trustee for creditors and tenant in building was subsequently injured, evidence *held* insufficient to show any authority on part of corporation's agent to sign declaration of trust for it, so that it was not liable for tenant's injuries.

15. Pleading 🔑36(2).
Where owner transferred apartment building to trustee for creditors, and tenant in building was injured, pleadings of corporation creditor *held* not to estop it from denying due execution of declaration of trust.

> Pleading alleged that name of corporation was written by one who was not its agent or representative and who was employed by it only to collect accounts and notes receivable, and that, in so affixing name of corporation to declaration of trust, such person was entirely without any authority from corporation, and was acting wholly beyond scope of his employment.

16. Landlord and tenant 🔑169(6).
Where owner transferred apartment building to trustee for creditors, evidence showing creditor's attorney signed creditor's name on declaration of trust without special authority *held* insufficient to show due execution of trust agreement as regards creditor's liability for injury to tenant in apartment (Civ. Code, § 2349).

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Oliver M. Charleville against the Metropolitan Trust Company of California and others to recover damages for personal injuries. From a judgment of nonsuit, plaintiff appeals.

Affirmed as to defendants B. W. Allen and another, and reversed as to other defendants.

Duckworth & Harrison, of San Bernardino, and Lloyd W. Robinson, Jr., of Los Angeles, for appellant.

Swing & Swing, of San Bernardino, and Hiram T. Kellogg, of Los Angeles, for respondent Metropolitan Trust Co.

Leslie E. Still, of Long Beach, for respondents Hickman Bros., Inc., and Long Beach Marble & Tile Co.

Allard & Stead, of Pomona, for respondent Joseph A. Allard, Jr.

H. A. Savage, of Fresno, for respondents P. M. and H. H. Savage and Louis Pokress.

Walter A. Hewicker, of Los Angeles, for respondent Frank A. Meline Co.

Craig & Weller and M. L. Granger, all of Los Angeles, and Charles Bagg, of San Bernardino, for respondent Los Angeles Wholesalers' Board of Trade.

E. C. Gridley, of San Bernardino, for respondent Crown Paint & Color Works.

Surr & Hellyer, of San Bernardino, for respondent B. W. Allen.

MARKS, Justice.

Appellant was very seriously injured when a wall bed in which he was sleeping collapsed. He brought his action to recover damages, and has appealed from a judgment entered for respondents following the granting of their motions for nonsuit. He does not question the correctness of this judgment in favor of certain defendants who are not named as respondents here.

Earle C. Dingwell was the owner of a number of apartment houses in Los Angeles and San Bernardino counties, among them the Norman Manor Apartments in the city of San Bernardino. He was in financial difficulties in the summer of 1930, and entered into an agreement with many of his creditors whereby he sought to secure their claims and provide for payment. He transferred the properties to the Metropolitan Trust Company of California in trust under the terms of a duly executed declaration of trust wherein he was designated as trustor and the Metropolitan Trust Company of California the trustee. Herbert M. Goddard and Louis Pokress, who had advanced $104,295.36 to be used in paying taxes and assessments and placing in good standing certain trust deeds upon the properties and to be applied on the claims of laborers and materialmen, were designated class A beneficiaries. The large list of unsecured creditors, including all of the respondents not named in this paragraph, were designated class B beneficiaries, and Janet W. Goddard and Sophia Dingwell residuary beneficiaries. In the declaration of trust the trustor, class A, class B, and the residuary beneficiaries appointed Earle C. Dingwell and Thomas Waddell "a committee to operate, manage and conduct the Trust Estate as and for apartment house uses and purposes, which committee shall manage and have complete charge of said Trust property, and each and every part thereof, employing such house managers, janitors, and other help as shall, in the opinion of the committee, be needed for the proper maintenance and operation of the Trust property; and the power of the Trustee to operate, manage, and conduct said Trust Estate as and for apartment house uses and purposes shall be abridged and suspended until and unless class B beneficiaries, representing at least thirty-three and one-third per cent (33⅓%) of the then unpaid balances of the Trustee's Certificates then outstanding, shall terminate the rights, powers, duties and employment hereunder of Earle C. Dingwell and said Thomas Waddell for good and sufficient cause." During the times material to this action Margaret Wilkinson was manager of the Norman Manor Apartments.

On October 13, 1930, appellant rented a furnished apartment, No. 114, in the Norman Manor Apartments for occupancy by himself and wife. The apartment was equipped with a Holmes wall bed, manufactured by the Holmes Bed Manufacturing Company, and sold and installed by Barker Bros., Incorporated. Appellant and his wife occupied the apartment until January 28, 1931. The rents for the months of November and December, 1930, and January, 1931, were paid to the trust and became a part of its assets.

The wall bed fitted into a recess about eighteen inches deep when not in use, and was lowered into the room when it was to be occupied. It had three powerful coil springs on each side to hold it in position and to assist in raising it. Its head was fastened to the floor by eight one and one-quarter inch screws which passed through holes in angle irons which were part of the bed, through the carpet and filler under it and into the floor boards.

On the night of January 28, 1931, after appellant and his wife had retired, the screws holding the bed to the floor gave way. The springs pulled the head of the bed onto appellant, doubling his head onto his body, fracturing his sixth and seventh cervical vertebræ, and injuring his spinal cord in the neighborhood of his sixth, seventh, and eighth cervical segments. The amount of appellant's damage is not now in issue, so it is not necessary to further describe his injuries.

There were a number of other similar wall beds in the Norman Manor Apartments. While the bed in apartment No. 114 had not given trouble before January 28, 1931, a number of the other wall beds had loosened the screws with which they were held to the floor. A repair man employed by Dingwell to refasten the loosened beds told him and Margaret Wilkinson several times before the accident here in question that the Holmes wall beds were not properly installed, and that, unless they were more securely fastened to the floor, some one would be injured or killed.

The general question of the liability of the class A, class B, and residuary beneficiaries under the terms of the trust is not argued in any of the briefs filed in their behalf. Nor is the question of the liability under the trust of the Metropolitan Trust Company of California in its individual, as distinguished from its trust, capacity, considered in its brief. We have not considered these questions, and nothing said here should be construed as bearing upon them.

Appellant urges the following grounds for a reversal of the judgment:

"An affirmative defense must be pleaded and proven and defendants who have failed to plead such affirmative defense cannot rely on the same.

"Defendants cannot develop an affirmative defense by improper cross-examination and then predicate a judgment of nonsuit on such improperly admitted testimony.

"The question of whether sums of money received by plaintiffs from former defendants were received by plaintiff as compensation for his injuries or as consideration for certain covenants not to sue presented a question of fact to be determined by the jury, and it was not proper for the Court to determine this issue on a motion for nonsuit.

"The execution of a covenant not to sue one joint tort-feasor is not a bar to a further prosecution of this action."

The first and second of these contentions will be considered together.

[1, 2] Appellant filed a complaint, a first amended complaint, and a second amended complaint. Several defendants named in the first two pleadings were not named in the third. While he was on the witness stand it was developed on cross-examination, over the strenuous objection of his counsel, that he had received approximately $6,700 from certain defendants. Some of the defendants alleged that appellant had been paid money in settlement of his claim for damages by other defendants. Other defendants did not plead this defense.

For the purpose of this opinion we may assume that the trial court erred in overruling the objection to the questions eliciting information concerning these payments, and that retraxit is an affirmative defense which must be pleaded and proved by a defendant before he can avail himself of it. These errors do not require a reversal of the judgment. If we should reverse the judgment solely because of them the case would return to the court below for a new trial. A request to amend the answers to plead the payments, if made in proper time, would have to be granted. The fact of the payments could then be proved by the defendants as part of their cases. If it should develop that the payments did in fact release one or more of the joint tort-feasors, the final judgment would have to go against appellant, for an injured party cannot accept payment of his claim for damage from one joint tort-feasor and press his action against another. Unless we conclude that the evidence supports the theory that the payments were made for covenants not to sue and not as payments of damages we should not reverse the judgment solely because of the technical errors presented by the two assignments we are considering. A reversal under such circumstances is prohibited by section 4½ of article 6 of the Constitution.

[3-6] In approaching appellant's third assignment of error it must be admitted that, if any liability attaches to respondents, at least those other than the Metropolitan Trust Company of California, it is upon the theory of their being joint tort-feasors engaged in renting furnished apartments for their mutual benefit. In renting furnished apartments there is an implied warranty that the furniture is fit for use. The owner is liable for damages caused by patent defects. Fisher v. Pennington, 116 Cal. App. 248, 2 P.(2d) 518.

It is well settled in California that an injured person is permitted but one recovery for his injuries. He may join several joint tort-feasors in one suit or may file separate suits against them, but payment of his damage by one releases the others. Urton v. Price, 57 Cal. 270; Tompkins v. Clay Street Ry. Co., 66 Cal. 163, 4 P. 1165; Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704; Bee v. Cooper, 217 Cal. 96, 17 P.(2d) 740; Flynn v. Manson, 19 Cal. App. 400, 126 P. 181; Bogardus v. O'Dea, 105 Cal. App. 189, 287 P. 149. This rule is subject to the well-recognized exception that the injured person may avoid the results of his release by proving rescission or that it was obtained by undue influence, fraud, oppression, duress, mistake, or through his mental weakness, incapacity, or other similar causes. Baird v. Pacific Electric R. Co., 39 Cal. App. 512, 179 P. 449, 450; Wilson v. San Francisco-Oakland Terminal Railways, 48 Cal. App. 343, 191 P. 975, 977; Edmunds v. Southern Pacific Co., 18 Cal. App. 532, 123 P. 811; Hawber v. Raley, 92 Cal. App. 701, 268 P. 943, 944; Winstanley v. Ackerman, 110 Cal. App. 641, 294 P. 449; Montes v. Peck, 112 Cal. App. 333, 296 P. 624; Tyner v. Axt, 113 Cal. App. 408, 298 P. 537; Raynale v. Yellow Cab Co., 115 Cal. App. 90, 300 P. 991; Meyer v. Haas, 126 Cal. 560, 58 P. 1042; O'Meara v. Haiden, 204 Cal. 354, 268 P. 334,

60 A. L. R. 1381; Weddle v. Heath, 211 Cal. 445, 295 P. 832. In Mairo v. Yellow Cab Co., 208 Cal. 350, 281 P. 66, 67, it was said: "If the said three releases were obtained by taking advantage of plaintiff's ignorance and necessities, and if their true character was misrepresented to him so that he did not know what he was really signing, they are, of course, void. But under the conflicting evidence here it is impossible to tell whether such was the fact. This also was an issue which should have gone to the jury, and it was therefore erroneous for the trial court to direct said verdict for defendant."

The case of Baird v. Pacific Electric R. Co., supra, in which a petition for hearing in the Supreme Court was denied, presents a legal question similar to the one before us. It was there said:

"Prior to the date of trial, the plaintiff demanded a jury, which demand was by the court denied, on the ground that the issues made and presented by the pleadings were not cognizable before a jury, and presented equitable issues alone. Upon the calling of the case for trial, a witness for the plaintiff was sworn and called to the stand; but thereupon defendant's counsel objected to the introduction of any evidence for plaintiff, on the ground that it appeared from the pleadings that said plaintiff had no cause of action against defendant, and upon the failure of plaintiff to make a tender of the sums of money admitted in open court to have been received from defendant at the time of the execution and delivery of the three releases pleaded in the answer, after an adjournment from 11:30 a. m. until 2 o'clock p. m., granted to enable plaintiff to make such tender, and, the court having refused further time to procure the money for such tender, the court sustained defendant's objection to the introduction of evidence, and gave judgment for the defendant. The plaintiff alleges error of the trial court in refusing him a jury trial, and in denying the admission of any evidence for plaintiff.

"We will consider first plaintiff's right to introduce evidence, as it will be immaterial whether he had a jury or not, if he could not offer his evidence. It is clear that, under the state of the pleadings at the time the trial was called, the burden was upon plaintiff to rebut the presumption of full payment and satisfaction of his demands, raised by the releases set forth in defendant's answer, the due execution and genuineness of which were admitted by failure to file the affidavit provided by section 448 of the Code of Civil Procedure. It is equally clear that he was not estopped from attacking these releases by any valid defense, other than such as involved the genuineness or due execution thereof. He could controvert them by evidence of fraud, mistake, undue influence, * * * mental incompetency, and like defenses. Moore v. Copp, 119 Cal. 432, 51 P. 630. As has been stated, there is nothing in the pleadings to indicate what, if any, defense the plaintiff might have interposed to the admitted execution of these releases set forth in the answer. Under our system of pleading, no such showing is required. The provision of section 462 of the Code of Civil Procedure that 'the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party,' entitles the plaintiff to introduce, without further pleading, evidence to sustain any legitimate defense to the new matter in the answer. Brooks v. Johnson, 122 Cal. 569, 55 P. 423. In this particular case the court seems to have assumed that the plaintiff was relying upon some defense which he could not be permitted to maintain without first tendering back to the defendant the money he had received in consideration of the settlement agreements. We find nothing in the record to justify such assumption. It may perhaps be inferred that mental incompetency on the part of the plaintiff would be the defense. The action here was brought for plaintiff through a guardian ad litem; the complaint alleges that by reason of injury to his skull, in his expulsion from the car, his brain and mind were permanently injured; the bill of exceptions, in stating the ground of defendant's objection to a jury trial, puts it on the ground that the action under the pleadings has become essentially an action to avoid said releases upon the ground of mental incompetency. But conceding that these facts committed the plaintiff to the defense of mental incompetency, there is nothing whatever to indicate whether he would rely upon a partial or total incompetency. If his evidence would have disclosed a total incompetency to enter into a settlement, and a continuing and permanent disability in that respect, these releases became mere 'scraps of paper' (Civ. Code, § 38); and it is well settled that no obligation to repay money advanced on the settlement as a condition of controverting the agreements would exist. Or, even if the disability was only partial and temporary, and it should be shown in evidence that the settlement was obtained by fraud and deceit as to the contents of the agreements and their legal effect, or, again, if a state of facts existed where, in his weakened mental state, the plaintiff was induced by fraudulent representations to sign these releases, in the belief that he was being paid so much on account, he could not be required to tender back the payments as a condition of offering evidence to defeat the agreed settlement. Meyer v. Haas, 126 Cal. 562, 58 P. 1042; St. Louis, etc., Ry. Co. v. Brown, 73 Ark. 42, 3 Ann. Cas. 573, 83 S. W. 332; Mullen v. Old Colony Ry. Co., 127 Mass. 86, 34 Am. Rep. 349.

"Other similar conditions, consistent with the facts shown in this record, might be shown in evidence to exist; but it is unnecessary to multiply illustrations. It is sufficient if any single line of attack upon these releases was open to the plaintiff, which he might have pleaded where circumstances required it. He was entitled to the presumption that he had evidence to offer in that behalf. It is quite probable that he might have been required by the court, as a condition of being allowed to introduce evidence, to state what he expected to prove, and to show that he was relying upon a state of facts that would excuse a tender back of the money received, but nothing of the kind was demanded of or volunteered by him, so far as the record shows. Under the circumstances it was error for the court to deny plaintiff the privilege of introducing evidence."

The case of Wilson v. San Francisco-Oakland Terminal Rys., supra, is also authority for the conclusion that in the instant case the trial court should not have granted the nonsuit until appellant had an opportunity to introduce evidence avoiding his releases, if such they were, assuming that he had such evidence. In the Wilson Case it was said:

"In fact, all evidence offered by plaintiff tending to show the activities of Norwood and the statements made by him to plaintiff was excluded.

"We are of the opinion that the rulings of the court in this respect constituted error. We are of the opinion also that, had plaintiff been successful in establishing the truth of the facts asserted by her in her written offer, the question of the fraudulent procurement of said release should have been submitted to the jury together with the main issues of the case. The trial court, in excluding this evidence, was evidently acting upon the theory that plaintiff was required to show a direct connection between the supposed agent, Norwood, and the recognized agent of the defendant corporation, Mills. By the adoption of such a rule, however, plaintiff was deprived of the right accorded her by the law, of proving fraud and conspiracy by circumstantial evidence. (Citing cases.)

"In brief, the substance of plaintiff's proffered proof was that she had been led to believe by trickery that her attorneys had abandoned her case; that through falsehood and deception she had been frightened into the belief that if she did not settle her case that day she could not be allowed to settle it afterwards; that, if she did not settle that day, she would on the following day be subjected to the rigors of severe examination by opposing counsel and perhaps be required to submit to X-ray examination as to her physical condition; and that while she was in that condition of mind she was persuaded to go before the claims agent of the company, where, without the aid of counsel or friend, she was induced to settle for an inadequate and trifling sum.

"If the release relied upon by the defendant corporation to defeat plaintiff's action was the product of such methods, plaintiff should have been allowed to prove it."

All the competent evidence before us on the question of whether appellant executed releases and received payments for his injuries, or signed covenants not to sue, and accepted money for these promises, may be thus summarized: (1) He sued numerous defendants as joint tort-feasors; (2) he received money from several of them; (3) he dismissed his action without prejudice against those paying; (4) he had neither filed a new suit nor otherwise attempted to collect further moneys from any of those paying; (5) he signed documents, copies of which are neither in the record nor was the substance of any of them proven.

[7] Appellant made no proffer of proof of fraud, and did not upon other grounds attempt to offer evidence to avoid the so-called releases. He contended that the documents were not releases and that the money had not been paid to compensate him for his injuries. The giving of releases, if such they were, to part of the joint tort-feasors, and the accepting of money from them, was properly a matter of defense to be set up in the answer and proved by the defendants. Under usual procedure the plaintiff would not be required to rebut or attempt to avoid the effect of releases until the defendants had rested their cases. Under ordinary procedure his evidence of fraud, or such other matter of defense, would have been offered in rebuttal of the affirmative evidence of defendants of a retraxit.

[8, 9] As we have observed, all the evidence concerning the payments to appellant was

brought out on his cross-examination. He strenuously maintained that he had received no payments for his injuries and had given no releases—only covenants not to sue. He did dismiss his action without prejudice against certain defendants. He testified that he did not expect to sue them. This was not inconsistent with either a release or a covenant not to sue. He said that he did not think he could sue them. This was merely his opinion and legal conclusion. The releases or covenants not to sue, whichever they were, are not in the record. The written instruments should be before the court in order that they may be properly construed. The dismissals, of themselves, would not bar subsequent actions, for an injured person can sue each or all of several tort-feasors. Heath v. Manson, 147 Cal. 694, 82 P. 331. Nor would a covenant not to sue bar another action for "'in such case the covenant does not operate as a release of either the covenantee or the other tort-feasors, but the former must resort to his suit for breach of the covenant, and the latter cannot invoke the covenant as a bar to the action against them.'" Hawber v. Raley, supra.

[10] The rule governing construction of the evidence on a motion for nonsuit is stated in Berger v. Lane, 190 Cal. 443, 213 P. 45, 49, as follows: "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. Estate of Arnold, 147 Cal. 583, 82 P. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in the light most favorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381. Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and, if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint, the motion, if made upon the close of the case, should be denied." Under the record before us it is our conclusion that the motion for nonsuit should have been denied upon the grounds we are considering. The trial court should have had the documents signed by appellant before it, or at least some clear evidence of their contents, if they could not be produced, so that their legal effect might be established.

Respondents cite the case of Bee v. Cooper, supra, in which a judgment of nonsuit, granted because the plaintiff had accepted compensation from and released two of three joint tort-feasors, was sustained by the Supreme Court. There the document signed by the plaintiff was before the court. It unquestionably constituted a release upon payment of damages. The plaintiff did not suggest in her briefs to the Supreme Court that the release might be avoided for fraud or upon any other kindred ground. This question was not before the court and was not considered in the opinion. It should not be construed as conflicting with Baird v. Pacific Electric Railway Co., supra, and the numerous cases we have cited following the rule there announced.

[11] The Metropolitan Trust Company of California urges a ground for sustaining the judgment in its favor which is not joined in by the other respondents. It may be stated as follows: The bed in question was personal property (Fisher v. Pennington, supra); it was owned by Dingwell, who executed a chattel mortgage upon it and other personal property to a stranger to this action; there is no evidence that title ever passed to this respondent. The foregoing facts are all supported by the record. We cannot conclude that actual ownership of the bed is necessary to attach liability to this respondent. Lawful possession, with the right to rent it to a tenant, should be sufficient. The apartment with its furnishings, including the bed, was rented to appellant, and he paid rent on both the real and personal property. This was done with the knowledge and at least the implied consent of Dingwell. The money paid by appellant as rent was deposited in the trust account of the trustee. If, under the terms of the trust when it is finally construed, a liability be held to attach to the class B beneficiaries, at least the income of the trust in the possession of the trustee which would otherwise have gone to those beneficiaries should be subjected to any judgment which appellant might recover. Of course, it might well be urged that no personal judgment should be rendered against the trustee and that only the assets of the trust in its possession should be subjected to the judgment if one be recovered. This question is not presented on appeal, and we are not deciding it.

[12, 13] Respondents Joseph A. Allard, Jr., B. W. Allen, and Los Angeles Wholesalers'

Board of Trade each present a ground for affirmance of the judgment in their favor which is common to them and is not urged by the other respondents. They urge that it is admittedly true that the liability, if any, of the class B beneficiaries, within which class they fall, depends upon their being a party to the declaration of trust, and that there is no evidence that any of them executed that instrument. The arguments of each vary and must be separately considered.

The only signature of J. A. Allard, Jr., attached to the declaration of trust appears as follows: "J. A. Allard by Paul D. Walker." No point is made that "Jr." does not follow the word "Allard." On October 23, 1930, this respondent wrote a letter to the trustee which contained the following: "I wish to advise that Mr. Walker was authorized to sign my name to this instrument in so far as my interests are affected as a creditor." He also received a certificate of beneficial interest under the trust. We believe this evidence sufficient to make out a prima facie case against this respondent, which is all that is necessary on a motion for nonsuit.

[14, 15] The Los Angeles Wholesalers' Board of Trade, which is a corporation, had its name attached to the declaration of trust as follows: "L. A. Wholesalers' Board of Trade by Geo. H. Beeman." The evidence shows that Beeman was a minor employee of the corporation with no authority to execute instruments for it; that no responsible officer or agent of the corporation had any knowledge of his signing the declaration of trust until after the service of the summons and complaint and did not know of the receipt of a certificate of beneficial interest if one was delivered to the corporation. Appellant urges that the pleadings of this respondent estop it from denying the due execution of the declaration of trust. A copy of that document is attached to its answer. That pleading contains the following: "That thereafter and on a date unknown to this defendant but which it alleges was subsequent to October 23rd, 1930, the name of Los Angeles Wholesalers' Board of Trade was written and affixed to said consent then in the possession of said Metropolitan Trust Company of California, a corporation, as Trustee, by one George H. Beeman. * * * This defendant alleges that in affixing the signature of the Los Angeles Wholesalers' Board of Trade to said consent, said George H. Beeman was not an agent or representative of said Los Angeles Wholesalers' Board of Trade, and was employed by the said Los Angeles Wholesalers' Board of Trade only for the purpose of collecting accounts and notes receivable, for cash, and in so affixing said name to said consent, said George H. Beeman was entirely without any authority from said Los Angeles Wholesalers' Board of Trade, and was acting wholly beyond the scope of his employment by said Los Angeles Wholesalers' Board of Trade." With these allegations before us we have concluded that there is no sufficient admission of the due execution of the declaration of trust to bind this respondent. The evidence fails to show any authority on the part of Beeman to execute the instrument. The judgment in favor of this respondent must be affirmed.

[16] B. W. Allen was conducting his business under the fictitious name of Allen & Son. His name appears on the declaration of trust signed by an attorney at law who then represented him. Allen received a certificate of beneficial interest in the trust which he did not have at the time of the trial. There was no evidence of the exact contents of this particular certificate nor what had become of it. Allen testified that he did not know of the declaration of trust until after the suit was filed and that he had given his attorney no special authority to sign it. This respondent urges that, as the declaration of trust provided for the appointment of agents with large powers for the class B beneficiaries, of which Allen was supposed to be one, his attorney could not delegate his authority and appoint a subagent without special authority so to do. Section 2349, Civ. Code; Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 35 P. 1000; 1 Cal. Jur. 725, 726. The appointment of agents to operate and rent the trust property was, from the point of view of class B beneficiaries, a principal object of the trust, for the success of the activities of these agents furnished about the only hope these beneficiaries could entertain of collecting any part of the indebtedness due them. As the attorney had no special authority from Allen, the evidence fails to show due execution of the trust agreement by him, and the judgment in his favor must be affirmed.

As the case must be retried, respondents who may be so advised, should be granted permission to amend their pleadings.

The judgment in favor of Los Angeles Wholesalers' Board of Trade, a corporation, and B. W. Allen is affirmed.

The judgment in favor of the other respondents is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 590

In re HOPKINS' ESTATE.

HOPKINS v. HOPKINS et al.

Civ. 1277.

District Court of Appeal, Fourth District, California.

Feb. 5, 1934.

Rehearing Denied March 6, 1934.

1. Wills ⇨55(5).

Evidence *held* not to sustain jury's finding that deceased, who was sick, highly nervous, and greatly depressed when making will, was of unsound mind, either in that he lacked testamentary capacity in general or suffered from delusions nullifying ability to make will.

2. Wills ⇨38(1).

Testator's fear that he would die and that designing persons would defraud widow out of property, inducing testator to revoke will leaving entire property to her and execute new will giving her merely income of life trust, *held* not to show insane delusion affecting testamentary capacity.

3. Wills ⇨166(1).

Evidence, though showing that testator had high regard for brother's business judgment, *held* not to support jury's finding that testator was unduly influenced by brother in revoking will leaving all property to wife and executing new will making wife mere life beneficiary with remainder to brother and sister.

4. Wills ⇨166(1).

Evidence *held* not to support jury's finding that testator in revoking old will and making new will which made wife only life beneficiary was actuated by any alleged fraudulent representations of brother.

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

In the matter of the estate of W. S. Hopkins, deceased. Action to revoke probate of decedent's will by Carrie Hopkins, contestant, against E. L. Hopkins, as executor of the last will and testament of W. S. Hopkins, deceased, and E. L. Hopkins and another, proponents. From a judgment in favor of contestant and an order denying proponents' motion for judgment notwithstanding the verdict, proponents appeal.

Reversed.

Harris & Hayhurst, L. B. Hayhurst, and Rue C. Gibson, all of Fresno, for appellants.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for respondent.

BARNARD, Presiding Justice.

W. S. Hopkins, usually called Earl Hopkins, died on August 4, 1931, leaving a will executed on July 18, 1931, which was duly admitted to probate on August 21, 1931. On February 3, 1932, the contestant filed a petition asking that the probate of this will be revoked on three grounds, to wit: That the deceased was of unsound mind on the day the will was executed; that the will was procured by the undue influence of Dr. E. L. Hopkins; and that the will was procured by false and fraudulent representations made by Dr. E. L. Hopkins. A jury found in favor of the contestant on each of the grounds named. The proponents moved for judgment in their favor notwithstanding the verdict. This appeal is from an order denying that motion and from the judgment entered, and is based entirely on the insufficiency of the evidence. This contention will be considered in connection with the several grounds of contest in the order named.

The deceased, who was about 60 years of age at the time of his death, had lived for many years in a small house owned by his brother, Dr. E. L. Hopkins, on the rear of the lot on which his brother's home was situated. He was married to the contestant in 1925, and from that time until his death they occupied the same house; the deceased paying his brother $15 a month rent. The two families were on terms of intimacy and went on frequent trips and picnics together. In 1926 the deceased made a will leaving all of his property to the contestant and appointing her executrix without bond. This will also provided that, in the event the contestant did not survive him, the property should go to Dr. Hopkins and another brother, and that, in the event the contestant was unable to act as executrix, Dr. Hopkins should act as executor without bond. On July 18, 1931, the deceased made the will here in question, under the terms of which $1,000 was left to a nephew on a certain condition, $5,000 in cash to the contestant, and the rest of the estate given to Dr. Hopkins in trust, all of the net income to be paid to the contestant during her lifetime, and at her death the remainder to go to Dr. Hopkins and a sister of the deceased. Dr. Hopkins was appointed executor without bond.

We will first summarize the evidence relied upon by the contestant as showing that the deceased was of unsound mind at the time the will was executed. The deceased quit his job about the middle of May, 1931, on account of his health and all of the witnesses are agreed that he was very much concerned over his physical condition and that he thought he was going to die. The contestant testified that her husband always had great affection for her; that he had been failing for over a year and gradually grew worse; that he thought he had cancer and heart trouble; that before they were married she went with him to see a doctor who told him he had a nervous heart; that she first noticed him failing mentally during the last three or four days of April when, after turning a handspring, he remarked, "I am all shot"; that he was very restless and could not sleep; that he would beat his head with his hands until it was black and blue; that he once remarked that he could not do anything but think; that at one time he threatened to commit suicide; that he became very nervous when any one came around and did not talk very much; that during the last few months he objected to going out with her friends, saying he did not want any one to know he was so nervous and was failing in health; that once while they were riding in an automobile he insisted on getting out and running until he was exhausted; that he did not want to see a doctor, thought they could do him no good, and did not believe what they told him as to his condition; that she called in one doctor without his consent; that Dr. Hopkins took him to another doctor; that he had recently had his upper teeth pulled and a temporary plate put in which was causing him much annoyance; and that he was very nervous on July 18 and was having his teeth fitted about that time.

The doctor called in by the contestant, an osteopath, testified that he treated the deceased on June 29 and on July 1, 1931; that the deceased told him he was having difficulty with his heart and his digestive apparatus and that the only way he could get any sleep was to get out and walk until he was exhausted; that the deceased was very depressed and complained of an inability to swallow; that he diagnosed the trouble as melancholia; and that the inability to swallow was characteristic of such a nervous condition. He concluded that he was unable to say whether or not the deceased could have transacted ordinary business. The doctor to whom the deceased was taken by his brother testified that he made a thorough physical examination on July 14, 1931, and visited him on July 16 and again on July 23; that the deceased thought he had something growing in his stomach which he thought was cancer and also thought there was something wrong with his lungs; that he had previously treated him for a peculiar growth on the back of his hand which resembled a skin cancer, about which the deceased was very much worried; that at the time of the examination the deceased thought he had another cancer growing in his stomach; that this examination revealed nothing wrong of a pathological nature, but indicated that his condition was the result of nervous tension; that he did have indigestion and a pressure on his lungs which extended into the esophagus; that this pressure was not due to a growth, but was due to nervous tension and to gas formation; that he was suffering physically, but this suffering was caused by the nervous tension which in turn was caused by worry; that the patient told him he had worried over the depreciation of stocks and bonds to the extent that he could not eat or sleep; that he had the idea he was going to die, and asked if he better make his will; that the worry and nervousness produced the feeling which made him think he had cancer of the stomach, cancer of the throat, and lung trouble; and that his talk indicated that he understood everything perfectly and that there was nothing in his attitude outside of extreme nervousness.

Other witnesses who testified as to the mental condition of the deceased during this period include the following: One witness testified that he observed a difference in his mental capacity about the time he stopped working; that one day he came to his office and wanted to sell a mortgage at a discount of $400 in order to invest the money in San Joaquin Light & Power stock; that he considered him crazy because he wanted to discount such a mortgage to that extent; and that toward the last he had a way of winking his eyes, was very nervous and could not sit still. Another witness testified that she had always found him very friendly, that he was all right except for being nervous until a few months before his death, but that on July 18, 1931, she thought his mind was unsound. As a reason for this belief she stated that shortly before he went to Santa Cruz he would sit on the floor, instead of on a chair, and tear up pieces of paper; that at other times he would roll up and unroll his belt; that he told her he was not going to live, that he was all shot to pieces, that he could not sleep, that the doctors could do him no good, that he had heart trouble, a cancer, and a big lump in his throat, and that he could not get his breath good; that he would hit his fingers upon his head and run his fingers back and forth on his head and continually blink his eyes; that he was in a very nervous condition; that he told her that he would not care to live if he could know that his wife was taken care of; that he talked a great deal about his financial affairs and was worried about money losses; that sometimes when she talked to him he answered and sometimes he did not; and that on one occasion she found him outdoors talking to himself. Another witness testified that he thought he was of unsound mind in June and July, 1931, because when he attempted to converse with him he would be twitching his hands, tearing papers in small pieces and laying them on the ground, and because sometimes he would leave in the midst of a conversation and after being gone about five minutes would return and resume the conversation; that at times he seemed to be in a study and would leave after making a few general remarks. Another witness testified that she noticed a change about May 30, 1931; that he was then very nervous and had very little to say; that he would sit on the floor, play with his belt, and only answer the questions she put to him; that during the latter part of June, while they were at a picnic, he was very nervous and after he ate went over and laid down under a tree and did not talk with the others; and that she saw him on July 20, at which time he did not speak at all, just walked around with his face twitching and his eyes snapping and was very nervous. For these reasons she thought he was of unsound mind. Another witness testified that he changed during the last year; that he did not have much to say; that he was always in a hurry; that he could not relax; and that just before he went to Santa Cruz he did not return her greeting when she spoke to him. Another witness testified that, while she could not say whether he was of sound or unsound mind, she had noticed that he would drum his head, would sometimes not complete a sentence, would answer sometimes when spoken to and sometimes not; that his face would twitch and his eyes blink; that he was always worrying about his investments, especially about stocks going up and down; and that he told her he was so weak and ill he could not eat, that he was all shot, and that he did not want to have his teeth pulled but was forced to do so. Another witness testified that she thought he was of unsound mind during the last three weeks of July, 1931, because he was cast down and not a bit sociable; that she had seen him mumbling to himself, sitting on the floor, and tearing papers; and that he had a great fear of having a stroke as his mother had had one. Another witness testified that she had seen a great change in his mental capacity during the last year of his life, and that she thought he was insane during the last two months. As reasons for this opinion she stated that one day before he quit work you could tell he was nervous by the way he ate; that once at a picnic he went off and laid down under some trees and would not talk to the others; that later that evening he would not eat, saying he was not hungry; that on one occasion he would not speak to her; and that she had seen him sit and rub his head.

Other witnesses testified that he complained of being sick and constantly was worried over the decline in value of stock and other securities; that he frequently expressed a willingness to die if he could be sure that his wife would be taken care of; that he was more preoccupied and his face twitched more than formerly; that he had aways blinked his eyes, but this grew worse during the last few months; and that he had always preferred to sit on the floor even when chairs were available.

A few days after the will was signed the deceased and his wife went to Santa Cruz for a vacation. The deceased drove his own car, but they were accompanied by Dr. Hopkins and his wife in another automobile. The four stopped for lunch at Gilroy, and while they were eating lunch the deceased spoke of his mother who was buried in their family plot near that city. At this time he broke down and cried and told the others that, if he should die, they would not have far to take him to bury him.

The contestant also relies on the fact that the deceased may have committed suicide. While on the vacation at Santa Cruz and on Friday morning, July 31, the deceased disappeared. After an intense search his cap was found one evening, and the next morning, August 4, he was found in the hills back of Santa Cruz at the foot of a rather steep incline and lying among some rocks; this place being about seven hundred feet from where his cap was found. He was still alive and recognized his brother, but died that afternoon. Whether his death was the result of an accident or by suicidal intent has never been determined.

There was evidence on behalf of the proponents to the effect that the deceased continued to take care of his private business up to the time he left for Santa Cruz, a few days before his death; that he anxiously read market reports in the papers until the last; that he kept a book in which he systematically recorded all of his investments and in which he carefully entered all changes and all interest and dividends received; and that this contained a number of entries during June and July, including one on July 17 and two on July 15. These entries were all in his writing, although his wife testified that she assisted him during the last few months, although he usually held the book on his knee and did the writing. He had a lock box in the bank which he entered on July 10, July 18, July 22, and July 23. Before making a new will he talked to several people about making a will, and told a number of people that his only concern was to see that his wife was taken care of for life. He consulted Dr. Cooper about the best way to leave an estate, asked his advice, and told him, "I want my wife taken care of but I am afraid if I leave it all to her somebody will get it away from her." Dr. Cooper advised him to create a trust for the benefit of his wife. The contestant testified that the deceased continually told her that he was afraid that crooks would take the money away from her, that he did not think she would be able to handle it, and that he wanted to have things fixed so she would have everything, and that he was trying to fix it so she would get everything and so no one would be able to take it away from her. More than once he spoke of another woman, a Mrs. Swift, who had had an unfortunate experience of that nature.

The deceased's attorney had offices adjoining his brother, Dr. Hopkins. At his request his brother made an appointment with this attorney. On the morning of July 15 or July 16, 1931, the deceased went alone to the office of this attorney and gave him the data for drawing this will. This attorney testified that no one else was present, and that the deceased told him what he wanted put in the will, that everything contained in the will was suggested by the deceased, with the one exception that will be noted, and that the deceased told him that he wanted to give $1,000 to his brother's son on condition that the nephew take care of his own father, that he wanted to give the household furniture, his automobile, and $5,000 to his wife, and that as to the remainder he wanted to create a trust in favor of his wife. The attorney asked him if he also wanted to give his home to his wife and he replied that he did not own his home. While they were talking about the terms of the will, the deceased's brother, Dr. Hopkins, came to the door of the room for a moment, and, having heard them talk about $5,000, suggested that some time should be allowed in which to raise that amount in cash. This suggestion was followed, and the will provided that it need not be paid for two years. This attorney further testified:

"I discussed each and all of the provisions of the will with him and told him at that time that it would be necessary for me to include in the will a number of things relative to the handling of the property, such as loaning, buying, and selling, etc. I told him I would include those provisions in the will and he could read it and execute it if it met with his approval. I tried to state the substance of what I would put in the will. I told him I would telephone him when I had the paper prepared, and he says, 'I have no telephone—you can send word by the Doctor.' I think I went in the Doctor's office the afternoon before Earl signed it and told Dr. Hopkins to tell Earl I had the will prepared and left a copy of the will and asked the Doctor to take it to Earl so that he might read it over at his leisure and see whether it was satisfactory. Earl came in the office next morning. I told him I had the will prepared and said 'now you better sit down here and I will read it over to you.' He sat there and I read the will from beginning to end. He asked me some questions about some parts of it and I remember particularly of explaining the spendthrift clause which is the ninth paragraph of the will to him. I told him that provision was for the protection of Mrs. Hopkins; that it prevented attachments and incursions into the estate prior to its payment to her and he seemed to think it was a good provision. He seemed to understand the will thoroughly and I says, 'Is the will satisfactory to you Earl in every respect.' He said it was, and I asked him if he was ready to execute it and he said yes, and I said, 'If you will call your witness we will execute it.' He went out of the office and came back pretty soon with Mr. Baird. I spoke to Mr. Baird and says, 'Earl is making his will—and he wants you and me to act as witnesses.' Mr. Baird said 'All right,' and I says to Earl, 'Do you declare this to be your last will and testament,' and he said he did, and I asked him if he requested Mr. Baird and myself to attest it as witnesses and he said he did. He signed it and Mr. Baird signed it next and I signed it last, although my name appears above Mr. Baird's on the will. No one other than those whom I have just mentioned were present in my office at the time of the execution of the will.

"I folded the will and put it in an envelope on which I had written 'last will of W. S.

Hopkins, dated July 18, 1931', and sealed it and handed it to him. Mr. Baird went out and Earl and I went into my reception room and sat down and I asked him about his health or asked him what was the matter with him, and he said, 'Well my nerves are all shot to pieces.' I asked him if he had consulted a Doctor and he said 'Yes, Dr. Ingram has been treating me.' We talked on that way for quite a little while and he left and took the will with him. As he arose to go out he says, 'Well what shall I do with the other will? Shall I destroy it, burn it, tear it up?' I asked him if he had another will and he said yes and my recollection is that he said it was in his safety deposit box. I told him it made no difference inasmuch as this will revoked all former wills, but I think I said, 'It isn't always well to have too many wills hanging around.' But he was on his way out and made no response.

"I had occasion to observe Earl Hopkins rather closely during those last two visits to my office; I had considerable conversation with him and had occasion to observe his actions and general demeanor and I think he was of sound mind on the 18th day of July, 1931. There isn't any doubt in my mind on that point.

"I think he executed the power of attorney on June 23rd, 1931, and the only difference that I noticed in W. S. Hopkins on either of those last three visits was that he seemed somewhat depressed and was not as voluble, as jocose as usual. He wasn't laughing as he had done before. He seemed to be depressed as a man might if he had a bilious attack or something of that sort. But he manifested no particular nervousness on the day the will was executed. He sat in the chair as quietly as I am sitting here. There was no shuffling or nervous demonstration such as has been described by witness—nothing that attracted my attention in any respect."

The other witness to the will testified as follows: "I have known Earl Hopkins for 10 or 12 years and saw him quite often. I saw him on the 18th day of July, 1931. Met him at the Cooper Building. He telephoned me and asked me to come to the Cooper Building. Said he wanted me up there for a few minutes. He was waiting for me at the head of the stairs, and we went into Mr. George W. Jones' office. Only the three of us were there and Mr. Jones asked Earl if this 'was his last will and testament', and he said 'yes' and walked up and signed it, and we both signed it and I left. When I first went up Earl told me he wanted me to witness a will. Mr. Hopkins signed, and then Mr. Jones and I. We all signed at the same time in the presence of the testator and in the presence of each of us. In my opinion he was of sound mind when he signed that will."

No other evidence was offered as to the mental condition of the testator at the exact time the will was executed. There was also evidence that he had his home newspapers forwarded to Santa Cruz and read them; that he had his automobile reinsured just before leaving for Santa Cruz; that he requested his brother, Dr. Hopkins, to get the bill for this insurance when the latter returned to Fresno and pay the same for him; that he asked his brother to forward his mail and also to look at his home for his glasses; and that he was able to drive his automobile before, during, and after the trip to Santa Cruz. That the contestant did not consider the deceased incompetent after the will was executed is indicated by her testimony concerning the occasion when he later explained the provisions of the new will to her and she expressed her dissatisfaction therewith, at which time she plainly indicated an intention to have him change the same. She testified that around the 1st of July, 1931, she tried to get him to go East for his health, and that he made several trips down town alone around July 18.

[1, 2] While it appears that the deceased at the time of making this will was a sick man and that he was highly nervous and much depressed, the evidence is far from sufficient to show general mental incompetency or that he was not then possessed of sufficient mental capacity to be able to understand the nature of the act he was doing, or that he did not have an understanding and recollection of the nature and situation of his property and of his relations to the persons who had a natural claim upon his bounty. Estate of Sexton, 199 Cal. 759, 251 P. 778; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Clark, 100 Cal. App. 357, 280 P. 204.

The contestant practically concedes that the evidence is not sufficient to indicate general mental incompetency on the part of the deceased, but insists that it discloses the presence of certain delusions which so affected his mind as to make it impossible for him to make a valid will. It is urged that this situation appears because certain marked changes in the actions and deportment of the deceased came about in the last few months of his life, because he changed completely the provisions of his former will, and because the will last executed was unnatural, unfair, and unjust.

The delusions referred to are that he was afflicted with heart disease; that he was afflicted with cancer; that he was about to have a stroke; that he was going to die; and that in the event of his death some crook or designing person would defraud his widow out of the property which he might leave to her. It is practically conceded, as it must be, that the first three of these are not such delusions as, in themselves, could affect the terms of a will, but it is earnestly insisted that the last two, taken together, constituted a delusion which not only affected the will, but deprived the testator of all testamentary capacity. It is argued that before he became thus incompetent the testator entertained the deepest affection for his wife; that in 1926 he made a will giving all of his property to her; that his later fear that his widow might be defrauded was entirely groundless; that as a result of this delusion he executed the second will; and that the terms of this last will are such as to deprive the contestant of all that naturally and normally would have been given her by the testator, and in effect to cut her off with a mere pittance.

We are unable to agree with the contention made that this will was so unnatural and so clearly based upon a groundless fear as to have been the result of an insane delusion. There is no evidence in the record justifying the view that this fear was entirely groundless. There is evidence that the deceased knew or believed that a certain Mrs. Swift had had such an experience. The situation he feared is one that frequently occurs, and in the light of common experience this fear cannot, of itself, be considered as sufficient evidence of an insane delusion. At the time the will was drawn, the deceased was about 60 years of age and his wife was about 45. They had no children, and they married late in life. It conclusively appears that the deceased had great affection for his wife and that his biggest concern in the face of his own illness was that she be adequately cared for as long as she lived. In view of this object and of the reasonable basis that existed for his fear that designing persons might mislead her in the matter of investments, the method he adopted, of creating a trust, was not only natural and reasonable, but one that might well be considered the wisest course by minds well above the line of testamentary incapacity. And after making provision for his wife for the term of her lifetime it was neither unnatural nor unreasonable that the remainder of his property, which was apparently his separate estate, should be given to members of his own family, who were natural claimants on his bounty, and especially to those who had been closest to him. While the last will is different from the first, the only difference, so far as the contestant is concerned is one that was well calculated to more certainly protect her welfare and to insure the object which was uppermost in the mind of the testator.

In our opinion, the evidence does not sustain the finding of the jury that the deceased was of unsound mind, either as lacking testamentary capacity in general or as suffering from such a delusion as would affect and nullify his ability to make a will.

[3] With respect to undue influence, the contestant alleged in her petition that the testator was so afflicted in mind and body that he was unable to understand or transact business; that because of this fact he relied upon and followed implicitly the directions of his brother, Dr. Hopkins, in all business transactions; that thereby Dr. Hopkins acquired and had a controlling influence over him; that Dr. Hopkins exercised this influence and control by telling him that his wife could not take care of the property of his estate but would waste and squander the same; and that Dr. Hopkins demanded that the testator devise all of his property to him in trust, for the purposes set forth in the will. We are unable to find any evidence establishing the facts thus alleged. In Estate of Bryson, 191 Cal. 521, 217 P. 525, 533, the court said: "'In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator, by which the will which he executes is not the expression of his own desires.' Estate of Calkins, 112 Cal. 296, 44 P. 577. * * * Proof to establish undue influence must be had of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. Estate of Carithers, 156 Cal. 422, 105 P. 127. It consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating upon it, some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment."

In Estate of Clark, 170 Cal. 418, 149 P. 828, 831, it is said: "The fact that advice was offered to Mr. Clark, taken in connection with the activity of Mrs. Straus in securing counsel for him, fails to establish that sort of undue influence which must be shown before a court will overthrow a solemnly executed will. The evidence utterly fails to reach the dignity of proof of that sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of the testamentary act. Without such proof, no will should be held invalid on the ground of undue influence. (Citing cases.)"

Again from the Estate of Anderson, 185 Cal. 700, 198 P. 407, 410: "It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person, taken in response to the pressure, does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another. As was said in Estate of Donovan, 140 Cal. 390, 394, 73 P. 1081, quoting from Chaplin: 'The true test of undue influence is that it overcomes the will without convincing the judgment.'"

The contestant maintains that undue influence was here established because the will last executed was unnatural, because it conclusively appears that it was at variance with the decedent's real testamentary intentions, and because the brother had an opportunity to control the decedent's testamentary act. It is argued that the prior will disclosed the testator's real intentions; that the influence acquired by Dr. Hopkins over his brother is shown by the fact that the testator gave to Dr. Hopkins a general power of attorney; that Dr. Hopkins' testimony that he had not read the will and did not know what was in it is not to be believed, since he carried the will home to his brother, since he had his office next door to the attorney's office, and since friendly relations existed between him and his brother. It is further argued that the use of undue influence is positively shown by the testimony of one Chamberlain, who testified that he took a ride with Dr. Hopkins about the middle of May, 1931, and during the ride Dr. Hopkins said to him: "Harry, you have a lot of influence with Carrie; why don't you see her and get her to persuade Earl to change that will? That is too much money for her to have." That witness further testified that he did not reply to this, and that nothing further was said, and the contestant testified that Chamberlain did not tell her of this until some time after her husband's death. With reference to the power of attorney, it appears that about the 30th of June, 1931, the testator was intending to go back East, and asked his attorney to prepare this power of attorney in order that his brother might look after his business while he was gone. He decided not to go East, and the power of attorney was never used. We have already expressed our opinion on the claim that the will was unnatural. While the last will is somewhat at variance with the terms of the prior will, that fact does not establish that the prior will expressed the real intentions of the testator at the later date. It fully appears that the testator considered making a new will for some considerable time; that he talked of it to a number of people; that he expressed his dissatisfaction with the terms of the old will on more than one occasion; that he was worried because of what he considered the unfortunate experience of Mrs. Swift; that he asked Dr. Cooper as to the best way to provide with certainty for his wife; that he not only gave the data to his attorney for drawing the will, but expressed satisfaction with it after it was drawn; and that thereafter he told his doctor that the matter was all fixed up and seemed to feel relieved. Although his wife strenuously objected to the arrangement when he told her about the contents of the new will, the evidence indicates that he remained of the same opinion, and it is certain that he made no change, although he had ample time to do so. Under these circumstances, it cannot be said that the prior will expressed his real intentions at the time here in question. It is true that the contestant testified that the deceased told her that Dr. Hopkins and Dr. Cooper had told him that they had fixed their wills in this way and that they had advised him to do the same. These statements, if made by Dr. Hopkins, are far from any indication that undue influence was used. They indicate neither pressure nor coercion, especially in the light of all of the other evidence indicating that the testator had firmly made up his mind to accomplish a certain result; namely, to make provision for his wife's support during the remainder of her life. The only activity on the part of Dr. Hopkins in connection with the execution of the will appears to have been that, at the request of his brother, the testator, he made an appointment with the attorney, that while the testator was consulting with the attorney he entered the room and made one suggestion, and that later he carried a copy of the instrument home to his brother. It fully appears that Dr. Hopkins was not present during most of the time the terms of the will were being discussed and that he was not present when it was executed. The testimony as to what occurred at the time of the execution of the will plainly indicates that the deceased knew exactly what he was doing; that he was thinking and acting for himself; that he had a reasonable purpose in mind; and that he proceeded directly to that end. The most that can be said of the evidence relied upon by the contestant is that it shows an opportunity and possibly a motive, but there is nothing to indicate either that the doctor ever sought to control the making of this will or that anything done by him had the effect of overpowering the mind of the deceased and of substituting his will for that of the testator. It should be borne in mind that undue influence, as invalidating a will, is a very different thing from the general influence that naturally comes from intimate relationships and those mutual confidences which people repose in each other after long association. It may also be observed that even such evidence of opportunity and motive loses much of its effectiveness where, as here, the party charged with undue influence had so little to gain. The remaindermen named in this will were considerably older than the contestant, and under ordinary circumstances could not expect to profit by the will during their lifetime. Prior to the stock market crash in 1929, this estate would have been worth between $40,000 and $50,000. After that crash it was appraised at $26,347.98, and even under the adverse conditions existing at that time the income was approximately $100 a month, an amount equaling the income earned by the testator in the last years of his life. In our opinion, the provision made for the contestant in this will, in itself, negatives the idea that undue influence was used to poison the mind of her husband against her. While the contestant testified as to ways in which she thought Dr. Hopkins had influenced her husband, the incidents recited merely show that the testator had a high regard for the doctor's judgment on business matters. The contestant apparently realized the weakness of this evidence, as she finally stated that her idea that Dr. Hopkins had exercised undue influence over her husband was based, in part, upon her "woman's intuition." So far as undue influence is concerned, we find nothing in the evidence that is inconsistent with the voluntary execution of the will by the testator. Some of the general rules applicable are thus set forth in Estate of Carson, 74 Cal. App. 48, 239 P. 364, 370: "Undue influence may be established by circumstantial evidence, but—' "it must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here." ' Estate of Anderson, 185 Cal. at page 709, 198 P. 407, 411, quoting from Estate of McDevitt [95 Cal. 17, 30 P. 101]. 'There is no proof. Circumstances have been proven which accord with the theory of undue influence, *none of which are inconsistent with the hypothesis that the will was the free act of an intelligent mind.* This does not amount to proof, and many circumstances are shown which are wholly inconsistent with the hypothesis of undue influence, and the presumption of law, in the absence of all proof in a contest, is in favor of the will.' (Italics ours.) In re Calkins, 112 Cal. 304, 44 P. 577, quoting from the Estate of McDevitt. We also quote the following from notes in Re Hess, at pages 687 and 688 [of 31 Am. St. Rep.]: 'To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that the party benefited by the will had the motive or the opportunity to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by deception, fraud, or other improper means, that the instrument is not really the will of the testator. * * * The burden of proof being on those who attack a will on the ground of undue influence, it is not sufficient that they barely show that the circumstances of the will are consistent with the hypothesis of undue influence; for this would be but to create an equipoise in the testimony, and the onus being on the party attacking the will, he must go a step further, and show by any suitable evidence the inconsistency between circumstances of the execution of the will, and its being executed without the interposition of undue influence.' "

The following language used in Estate of Jones, 117 Cal. App. 163, 4 P.(2d) 251, 258, might well have been written for this case: "The contention of respondents, when thoroughly sifted, seems to be about this: That there is evidence to the point that appellant had a *general* influence over the deceased, which ought to be classified as 'undue,' and that, therefore, although when he made his will, under the circumstances above stated, he was apparently free to act as he pleased, yet it must be inferred that this general influence of appellant accompanied him, subverting his volition, and coercing him to act against his real wishes. To maintain such a strained and difficult theory would require evidence very different from that presented in the record."

[4] The claim that fraud was practiced upon the deceased by Dr. Hopkins is based upon the testimony of the contestant to the effect that her husband told her a few days before they went to Santa Cruz that the will of July 18, 1931, was just the same as the old will except that he had appointed Dr. Hopkins as executor and afterwards as trustee, and that he further told her that Dr. Hopkins had told him that the new will did not change the devises and bequests to her as provided in the old will, but merely provided that the doctor should have the management of the estate. It is argued from this that it conclusively appears that the deceased believed a representation made by his brother to the effect that the new will was substantially like the old one, and that this representation was false, fraudulent, and resulted in the making of the new will. We think it sufficiently appears from the entire evidence that the testator fully realized the differences in the two wills and that he had a full knowledge and comprehension of just what change was made by the second will. He had worried about the best way to protect his wife from designing persons, had definitely planned to create a trust for her benefit, and told his lawyer exactly what he had in mind. Although she had never seen the new will, his explanation of the changes made was sufficiently lucid to arouse her strenuous objections, and it fully appears that he thoroughly understood the reasons for her disapproval and still believed he had taken the best course. The evidence not only fails to show that the testator was induced to execute the will by the misrepresentations charged, but it conclusively shows that, even if made, the representation was not believed by him.

The judgment and order appealed from are reversed.

We concur: MARKS, J.; JENNINGS, J.

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136 Cal.App. 544

WOODMAN et al. v. HEMET UNION HIGH SCHOOL DIST. OF RIVERSIDE COUNTY et al.

Civ. 1440.

District Court of Appeal, Fourth District, California.

Feb. 1, 1934.

Rehearing Denied Feb. 21, 1934.

Hearing Denied by Supreme Court April 3, 1934.

1. Negligence ⚷84.

Minor child is not required to exercise same degree of care as adult, but is only required to exercise that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion.

2. Automobiles ⚷245(87).

Whether twelve year old boy riding on bed of dilapidated truck was contributorily negligent at time driver was caused to jerk steering wheel, resulting in truck going off road, *held* question for jury (St. 1929, p. 1580, § 141¾; Code Civ. Proc. § 1963, subd. 4).

3. Automobiles ⚷181(2).

Boy who applied for membership in scout troop, paid dues, and was attending meetings and functions, *held* not "guest" in truck operated by another boy scout on trip to procure rock and sand for fireplace at scout barracks, within rule requiring proof of gross negligence or willful misconduct as basis for recovery of damages for injury sustained (St. 1929, p. 1580, § 141¾).

[Ed. Note.—For other definitions of "Guest," see Words & Phrases.]

4. Schools and school districts ⚷89.

Scout master and teacher who permitted boys to use dilapidated truck, without any instruction as to its operation, or warning for avoiding its dangers, including danger from hot shot battery, *held* negligent, rendering him liable for injuries to boy when truck went off road at curve.

5. Municipal corporations ⚷724, 745½.

Right of action against public agency, or its officers, performing governmental function, arises only where authorized by law (School Code, § 2.801; Civ. Code, § 1714½; St. 1923, p. 675).

6. Schools and school districts ⚷89.

Teacher employed in automobile repair and machine shop operated by union high school district *held* "employee," and not "officer," of district, within statute making district liable for negligence of officers or employees (School Code, § 2.801).

[Ed. Note.—For other definitions of "Employee" and "Officer," see Words & Phrases.]

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

7. Master and servant 🔑302(1).

To render employer liable for negligent act of employee, latter must be acting within scope of employment and on master's business.

8. Schools and school districts 🔑89.

School district, to be liable for damages resulting from dangerous or defective condition of public property, must have had sufficient notice of such dangerous condition (St. 1923, p. 675).

9. Schools and school districts 🔑89.

Board of trustees of union high school district, in view of dilapidated condition of truck for many months, *held* to have had notice of dangerous condition of such truck (St. 1923, p. 675).

10. Municipal corporations 🔑724.

Public agency should only be held liable for damages resulting from defective condition of its property in its ordinary, usual, and customary use (St. 1923, p. 675).

11. Schools and school districts 🔑89.

Where teacher in charge of automobile repair and machine shop of high school permitted boy scouts to use dilapidated school truck, in dangerous condition, for other than school purpose, resulting in injuries to one of boys, school district *held* not liable on ground teacher, in permitting use of truck, acted beyond scope of employment (School Code, § 2.-801; Civ. Code, § 1714½; St. 1923, p. 675).

12. Appeal and error 🔑1066.

In action against school district for injuries sustained by boy through use of school truck in connection with activities of boy scouts, instruction requiring teacher to exercise general inspection over pupils going to and returning from school, although inapplicable to facts, *held* not reversible error.

13. Appeal and error 🔑108.

Attempted appeal from verdict of jury was dismissed.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Rena Woodman and Donald Woodman, a minor, by Rena Woodman, his guardian ad litem, against the Hemet Union High School District of Riverside County and W. J. Austin, and others. From a judgment in favor of the plaintiffs and against the defendants named, the defendants named appeal.

Judgment against the defendant W. J. Austin affirmed, and judgment against the Hemet Union High School District of Riverside County reversed, and attempted appeal from the verdict dismissed.

Joe Crider, Jr., and Elber H. Tilson, both of Los Angeles, and Sarau & Thompson, of Riverside, for appellants.

Fred L. Hamblin and Albert H. Ford, both of Riverside, for respondents.

MARKS, Justice.

This action was instituted by Donald Woodman, a minor, by his guardian ad litem, and by Rena Woodman, his mother, to recover damages sustained by them because of injuries to Donald resulting from the alleged negligence of all of the defendants. A verdict was returned and judgment rendered in favor of the Riverside County Council of Boy Scouts of America and the Troop Committee of Hemet Troop No. 47; and in favor of plaintiffs and against appellants in the sum of $2,500 for the injuries suffered by Donald, and $1,113.30 for expenses of his mother in his care and medical treatment.

For brevity we will refer to the Hemet Union High School district of Riverside county, as the district; the Riverside County Council of Boy Scouts of America, as the county council; and the Troop Committee of Hemet Troop No. 47, Boy Scouts of America, as the troop committee.

The district was a duly organized union high school district of Riverside county. It conducted a junior high school in the city of Hemet in which a course in automobile repair and machine shop work was given. W. J. Austin had been employed as a teacher of the district for about seven and one-half years prior to February 9, 1931, and was head of the shop work department. He testified that among his duties he had "the maintenance, upkeep of transportation and general supervision of our shop work." He had in his department a 1918 model Ford truck.

Hemet Troop No. 47 of the Boy Scouts of America was under the direct charge of the troop committee and under the general supervision of the county council. W. J. Austin was its scout master and in charge of the troop activities. Bob Ogleby, James McClellan, and Ernest Pabst, aged about sixteen, thirteen, and thirteen years, respectively, at the time of the accident in question, were members of Hemet Troop No. 47, and students in the junior high school of the district. Ogleby was in the shop class of Austin. Donald Woodman, who was twelve years of age, was a student in the junior high school. He attended the meetings and activities of, and paid dues to, Troop No. 47, though not a member, as he had not passed his scout examinations.

The district owned the 1918 model Ford truck above mentioned, which in 1931 was in a most dilapidated condition. It was part of the equipment of the automobile shop, and was under the control of Austin. It had no hood. Part of the windshield was gone, as were most of the floor boards in the driver's compartment. The bed had no stakes or sideboards. It had no battery, and was started by the use of a crank. Its emergency brake was useless. It had other defects which were not connected with the accident in question. To assist in starting the engine, Austin used a four-cell "hot shot" battery, which he placed on the floor of the truck bed immediately back of the driver's seat. A ground wire connected one pole of the battery to the frame of the truck. A wire about five feet long having clips on both ends connected the other pole of the battery to a post on the coil box situated on the front of the dash. After the engine was started, Austin would detach the clip from the coil box post and wind the wire around the battery.

At a meeting of Troop 47, held several days prior to February 9, 1931, Austin asked for volunteers to go to a river bed about eight miles from Hemet to get rock to be used in the construction of a fireplace at the "Scout Barracks." No one volunteered. On Friday, February 6, 1931, Ogleby volunteered to make the trip. Austin loaned him the Ford truck and helped start it. He knew that other boys would go, but did not know which ones would make the trip. This journey was completed without accident. On Monday, February 9, Ogleby offered to make another trip to the river bed. Austin again permitted him to use the truck, filled it with gasoline, and assisted in starting it. He knew that other boys were going on the trip, but denied knowledge of their identity. Donald Woodman, James McClellan, and Ernest Pabst, who were on the school grounds, joined Ogleby on the truck. Donald had accompanied him on the trip made on the previous Friday. Ogleby drove by the home of Donald Woodman, where his mother gave him her permission to make the journey. The boys went to the river bed, filled three sacks and one box, placed them on the truck, and started the return journey. Ogleby drove, with James McClellan sitting with him, and the other boys riding on the truck bed.

The battery had been connected when the engine was started. One end of the wire was disconnected from the coil box post. James McClellan held this end in his hand to prevent it from coming into contact with the metal of the truck and "shorting the engine." The other end remained connected to the battery.

The engine "pumped oil," which sprayed through the broken windshield onto the boys on the front seat. To keep their shirts clean, they removed them and placed them in the corner of the seat behind James McClellan. On the return journey, as they approached an "S" curve in the road, with a sloping bank of about five feet on the left, the wind blew the shirts from the seat. James McClellan turned to catch them, and in so doing brought the end of the live wire in contact with the bare flesh of Ogleby's hand. The shock caused him to jump and jerk the steering wheel so that the truck went off the road and down this bank. Donald Woodman slid off the bed of the truck and was seriously injured.

[1, 2] The legal principles involved in the consideration of the liability of the district and of Austin are entirely distinct, except the contentions that Donald Woodman was guilty of contributory negligence, and that he was a passenger and could only recover upon proof of gross negligence or willful misconduct. Section 141¾, California Vehicle Act (St. 1923, p. 517), as then in effect (St. 1929, p. 1580). Appellants, without admitting that the truck was in a dangerous or defective condition, urge that, if its condition made it a dangerous instrumentality, it was in the same condition when Donald Woodman rode on it on the previous Friday, that he had knowledge of such condition, and that he was guilty of contributory negligence in riding on it a second time. The answer to this contention is found in the tender years of the boy. In Barrett v. Harman, 115 Cal. App. 283, 1 P.(2d) 458, 459, a boy of the age of eleven years was injured. The court there said: "The defense of contributory negligence may be invoked in an action by or on behalf of a child where the latter was of an age sufficient to exercise discretion for the avoidance of injury; but a child is not held to the same degree of care as an adult, and is only required to exercise that degree of care which is ordinarily exercised by minors of like age, mental capacity, and discretion. There is no precise age at which as a matter of law a child is to be held accountable for his actions to the same extent as one of full age, and the question as to the capacity of a child at a particular time to exercise care to avoid a particular

danger is one of fact for the jury. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712. And the rule has been applied where the child sought to be charged with contributory negligence was considerably older than the plaintiff in the present case. (Citing cases.) The presumption is that the child was at all times exercising due care for its own safety (Code Civ. Proc. § 1963, subd. 4). Until overcome, the presumption was evidence in accordance with which the jury was bound to decide. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 41 A. L. R. 1027, 239 P. 709; Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529." The jury by its verdict having absolved Donald Woodman from the charge of contributory negligence, the record furnishes no evidence upon which we can disturb this finding. No question of the contributory negligence on the part of Mrs. Woodman in permitting Donald to ride on the truck is raised.

[3] Section 141¾ of the California Vehicle Act, in effect at the time of the accident, defined a guest as follows: "For the purpose of this section the term 'guest' is hereby defined as being a person who accepts a ride in any vehicle without giving compensation therefor." While Donald was not a member of Troop No. 47, he had applied for membership, was paying his dues, and was attending meetings and functions of the troop, presumably as a matter of right. The boys were on a trip to procure rock and sand with which to build a fireplace at the scout barracks which would be used for the mutual benefit of the boy scouts and Donald. This fact removes him from the status of a guest under the rule announced in Crawford v. Foster, 110 Cal. App. 81, 293 P. 841.

[4] The truck was in the possession of Austin, and he was responsible for keeping it in a condition to be operated with safety. He knew all of its defects, and had provided the quite unusual battery installation to aid in starting the motor. He did not instruct the children in the safe way to start the Ford or warn them of any of the dangers incident to its use. He did not tell them to disconnect both ends of the wire and coil it around the battery after starting the engine. The live wire presented a danger to inexperienced children which should have been apparent to any ordinarily prudent adult and especially to a skilled automobile mechanic. The truck in its condition was a dangerous instrumentality when placed in the hands of immature and inexperienced children.

In 20 Ruling Case Law, 15, it is said: "All persons are bound to take certain measures to discover and inform themselves of perils that may constitute a menace to person or property. Those who own, operate and maintain instrumentalities and places owe this duty in favor of persons who come into contact therewith; and a reciprocal duty is owed by the persons menaced to be vigilant for their own protection. And in certain situations, when peril has been discovered the person responsible therefor is bound to give warning of its existence and otherwise guard against a possible injury. Nor is it any excuse that one who has created a peril did not intend or expect an injury to result therefrom; every person is held to a knowledge of the natural consequence of his acts. * * * Said Mr. Justice Holmes, while a judge of the Massachusetts court: 'Knowledge of the dangerous character of a thing is only the equivalent of foresight of the way in which it will act. We admit that if the thing is generally supposed to be universally harmless, and only a specialist would foresee that in a given case it would do damage, a person who did not foresee it and who had no warning would not be held liable for the harm. If men were held answerable for everything they did which was dangerous in fact, they would be held for all their acts from which harm in fact ensued. The use of the thing must be dangerous according to common experience, at least to the extent that there is a manifest and appreciable chance of harm from what is done, in view either of the actor's knowledge or of his conscious ignorance.'" Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264.

Allowing the use of the dilapidated truck by four boys without any instruction as to its operation or warning as to the best way to avoid its dangers is sufficient evidence of the negligence of Austin to support the judgment against him.

[5-11] It is not questioned by counsel that in this case the liability of the district, if any, arises under its governmental, as distinguished from its proprietary, capacity. The three statutes permitting suits in such cases are discussed in Bates v. Escondido Union High School District of San Diego County (Cal. App.) 24 P.(2d) 884, 885, where it is said: "In considering the question here presented we should keep before us three acts of the Legislature, each of which waive the immunity of a public agency against suit for damages when such agency is acting in its governmental capacity and is exercising

a governmental function. These acts are the act approved June 13, 1923 (St. 1923, p. 675), which we will call the Public Liability Act, section 1714½ of the Civil Code, and section 2.801, article 4, part 2, of the School Code (as amended by St. 1931, p. 2487). A right of action against a public agency, or its officers, performing a governmental function, only arises in those instances where it is authorized by law. Pittam v. City of Riverside, 128 Cal. App. 57, 16 P.(2d) 768.

"The Public Liability Act gives such a right of action: (1) (section 2) Against the public agency for damages to person or property 'resulting from the dangerous or defective condition of public * * * property.' * * *

"Section 1714½ of the Civil Code provides a liability on the part of a school district owning a motor vehicle for damages by reason of death or injury to person or property resulting from the negligent operation of such motor vehicle by its officer, agent, or employee when acting within the scope of his office, agency or employment. This section would seem to restrict actions brought under it to those cases where the injury was caused by a motor vehicle owned by the defendant district and negligently operated by an officer, agent, or employee of the district owning the vehicle and acting within the scope of his office, agency or employment. The phrase 'operation of any said motor vehicle' in this section is used 'in its popular and ordinary sense as applied to motor vehicles.' Chilcote v. San Bernardino County (Cal. Sup.) 23 P.(2d) 748, 749."

Section 2.801 of the School Code in force at the time of the accident created a liability on the part of a school district "for any judgment against the district on account of injury to any pupil arising because of the negligence of the district, or its officers or employees." This has been held to create a liability on the part of a school district for the negligence of its employees. Ahern v. Livermore Union High School District, 208 Cal. 770, 284 P. 1105; Damgaard v. Oakland High School District, 212 Cal. 316, 298 P. 983; Maede v. Oakland High School District, 212 Cal. 419, 298 P. 987; Henry v. Garden Grove Union High School District, 119 Cal. App. 638, 7 P.(2d) 192. Austin was an employee, not an officer of the district. Leymel v. Johnson, 105 Cal. App. 694, 288 P. 858. We can see no reason why we should not apply the familiar rule that, to fasten responsibility upon an employer for the negligent acts of the employee, the latter must be acting within the scope of his employment and on the master's business. Hanchett v. Wiseley, 107 Cal. App. 230, 290 P. 311.

The district had no connection with the Boy Scouts of America, Troop No. 47, or the scout barracks. The truck was not used for any school purpose or activity when it was taken on the two trips to collect rock and sand with which to construct the fireplace at the scout barracks. The evidence fails to disclose that any responsible officer of the district had any knowledge that the truck had ever been or was being used for any activity not connected with the school. Austin did not have any express or implied authority to permit the use of the truck for the benefit of an organization not connected with the school, assuming, but not holding, that authority could be given to use public property for private purposes. We have concluded that, as far as the record shows, Austin acted entirely beyond the scope of his employment and upon business of his own in permitting the use of the truck for the benefit of an activity in no way connected with the district.

The terms of the Public Liability Act (St. 1923, p. 675) are very broad in providing for the liability of a public agency for injury resulting from the defective or dangerous condition of its public property, but there is the limitation that it must have had sufficient notice of such dangerous condition. In this case the board of trustees must be held to have had notice of the condition of the truck, which condition had not been changed in many months. Boyce v. San Diego High School District, 215 Cal. 293, 10 P.(2d) 62; Hook v. City of Sacramento, 118 Cal. App. 547, 5 P.(2d) 643. From the point of view of the district, under the evidence before us, Austin and the four boys were in the position of trespassers in their unauthorized use of the truck. Austin was responsible for its use. It is our conclusion that, under the terms of the Public Liability Act (St. 1923, p. 675), a public agency should only be held liable for damages resulting from the defective condition of its property in its ordinary, usual, and customary use, and not from the unauthorized and unusual use shown in the instant case. Beeson v. City of Los Angeles, 115 Cal. App. 122, 300 P. 993.

Respondents seek to escape the effect of these conclusions by urging that the district and its teachers must exercise a general supervision over children going to and returning from schools, and that the trip for the sand and rock was a continuous undertaking from the time the boys left the school grounds to the time of the accident. This is answered by the fact that Donald Woodman returned to his home and secured his mother's consent to go for the materials. His participation in the undertaking would have ended had Mrs. Woodman withheld her permission for him to continue the journey. Under this theory his return to his home ended the responsibility of the district.

[12] Appellants urge that the trial court misdirected the jury when it gave an instruction that teachers must exercise a general inspection over the conduct of pupils going to and returning from school. While this instruction should not have been given as it was not applicable to the facts of the case, we cannot regard it as reversible error. Ward v. Read (Cal. Sup.) 25 P.(2d) 821; Ying v. Pickwick Stages System, 117 Cal. App. 312, 3 P.(2d) 597.

[13] Included in the notice of appeal from the judgment is a notice of appeal "from the verdict of the jury." The attempted appeal from the verdict is dismissed.

The judgment against W. J. Austin is affirmed.

The judgment against Hemet Union High School district of Riverside county is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 616

FOWLER v. PEOPLE'S FINANCE & THRIFT CO. OF BAKERSFIELD.

Civ. 1319.

District Court of Appeal, Fourth District, California.

Feb. 6, 1934.

Appeal and error ⚷627(2).

Where appellant failed to file printed transcript within prescribed time, or to request preparation of transcript in accordance with procedural code, or to file transcript of any kind, appeal must be dismissed (Code Civ. Proc. § 953a; Rules of District Court of Appeal, Fourth Appellate District, Rule 1, § 1).

Appeal from Superior Court, Kern County.

Action by W. S. Fowler against People's Finance & Thrift Company of Bakersfield. From a judgment for defendant, plaintiff appeals. On respondent's motion to dismiss appeal.

Appeal dismissed.

Burton Briggs Crane, of Los Angeles, and Rowen Irwin, of Bakersfield, for appellant.

Brittan & Mack, of Bakersfield, for respondent.

JENNINGS, Justice.

This is a motion by respondent to dismiss an appeal, for the reason that the printed transcript of the record has not been served and filed within the time required by the provisions of section 1, rule 1, of the rules of this court. From the affidavit of respondent's counsel and from the certificate of the county clerk of Kern county made pursuant to rule 6 of the rules of this court, it appears that a bill of exceptions was settled by the trial judge on January 18, 1933, and that it was thereafter stipulated in writing between counsel for the respective parties that appellant might have until and including March 26, 1933, for the preparation, service, and filing of the printed transcript. The records of this court show that no printed bill of exceptions has been filed in connection with the appeal. It also appears from the above-mentioned certificate that no request for the preparation of a transcript in accordance with the provisions of section 953a of the Code of Civil Procedure has been made, and the records of this court show that no such transcript has been filed. It follows, therefore, that the motion for dismissal must be granted. Raisch Improvement Co. v. Arata, 193 Cal. 573, 226 P. 399; Feinstein v. Blum, 128 Cal. App. 340, 16 P.(2d) 1003.

The appeal is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

136 Cal.App. 472

MAGGINI v. WEST COAST LIFE INS. CO.

Civ. 9097.

District Court of Appeal, First District, Division 2, California.

Jan. 29, 1934.

Rehearing Denied Feb. 28, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Insurance 🔑291(1).

Representations as to health, in application for life policy, *held* "material," as regards insurer's right to escape liability because of false answers.

2. Insurance 🔑665(3).

Evidence *held* to show that insurer relied on representations as to health made in application for life policy in issuing such policy.

3. Insurance 🔑646(3).

Where false answers were made respecting applicant's health, in application for life policy, presumption is always against fraud of medical examiner.

4. Trial 🔑243.

In action on life policy, it was error to give conflicting instructions respecting insurer's waiver of fraud when having knowledge of some misrepresentations by insured.

5. Insurance 🔑390.

Though insurer may rescind insurance contract on discovery of false representations in application, it is under no obligation to do so, and may elect to await action by beneficiary and defend on that ground.

6. Trial 🔑295(1).

Rule that instructions must be read together does not aid, when instructions are directly conflicting on essential matters of law and record compels conclusion that jury followed erroneous instructions.

7. Insurance 🔑291(3).

Under statute, intent to deceive on part of insured in making false answers respecting health in application for life policy is immaterial, and such intent is presumed when insured has knowledge of falsity of statements (Civ. Code, § 2562).

8. Estoppel 🔑54, 55.

Party pleading estoppel must be ignorant of true state of facts, and must have been intentionally led to alter his course to his injury by the act of the other.

9. Insurance 🔑377(2).

Insurer's knowledge of falsity of some of insured's statements respecting prior health did not raise estoppel preventing insurer from setting up fraud in other representations as to health by way of defense to action on policy, though such knowledge may have been sufficient to raise suspicion as to truth of other representations relied on.

10. Judgment 🔑199(3).

Where there is no evidence supporting verdict, motion for judgment non obstante veredicto should be granted.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Ernest Maggini against the West Coast Life Insurance Company to recover on policies of life insurance. From an adverse judgment defendant appeals.

Reversed, with directions.

Hearing denied by Supreme Court; SHENK and PRESTON, JJ., dissenting.

C. C. Baker, of Salinas, and Francis V. Keesling and C. A. S. Frost, both of San Francisco, for appellant.

J. A. Bardin and J. T. Harrington, both of Salinas, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued upon two separate policies of insurance issued by the defendant upon the life of one Adolpho Maggini. The first policy was dated May 9, 1932, and the second May 19, 1932. The insured died on June 18, 1932, his death resulting from bronchial pneumonia.

Preliminary to the issuance of the policy, the insured signed an application and a report of a medical examiner designated for that purpose by the insurer. Inquiries were put to the insured by the medical examiner in the usual form, and those to which attention is directed in this proceeding follow:

"Q. Have you ever been under observation or treatment in any hospital, asylum or sanitarium? A. No."

"Q. Have you ever consulted a physician or practitioner for or have you ever had symptoms pertaining to or disease of: * * * the lungs? A. No."

"Q. Have you ever raised or spat blood? A. No."

"Q. Have you ever suffered from or consulted a physician or anyone else for any ailment or disease not included in your above answer? A. No."

"Q. What physician or practitioner or any other person not named above have you consulted or been treated by, within the last five years and for what illness or ailment? A. None."

Pleading the materiality of all the answers given to the medical examiner, the defendant assigned as untrue and fraudulent those statements of the insured denying that he had consulted a physician for, or had symptoms pertaining to, a disease of the lungs; that he had raised or spat blood; that he had suffered from an ailment of the lungs; that he had consulted or been treated by a physician for any ailment within the last five years; and stating that at the time of making the application he was in good health. It was alleged that, these statements of the insured were all false, and known by the insured to be false at the time they were made; that for several years next prior to the date of application the insured had been in poor health and was afflicted with pulmonary ailments which caused a shortening of breath and the spitting of blood; that in the month of June, 1927, the insured suffered an attack of acute bronchitis and was treated by a physician therefor; that from the 31st day of July to the 8th day of August, 1928, inclusive, the insured was subject to medical treatment by a physician and to hospitalization by reason of an attack of bronchial pneumonia affecting both lungs; and that in the month of July, 1929, the insured was again subject to medical treatment by reason of illness.

At the trial these allegations of the answer were all proved by competent evidence which was not controverted nor qualified in any degree. The materiality of the statement of the insured and the reliance of the insurer upon those statements was proved by competent evidence which was not controverted, and the trial judge properly instructed the jury that the statements were material. Evidence was offered by the plaintiff disclosing that, after the first policy was issued by the insurer and before the second policy was issued, the insurer received a written report from a retail credit company in response to its inquiry as to the desirability of the risk. This report stated that the insured "has not been seriously ill for five years at which time he had pneumonia and was under the care of Dr. Elmer Bingaman. He is reported to have fully recovered from this. * * *" Upon this showing the respondent rests his case that the insurer had knowledge of the falsity of the statements of the insured prior to the execution of the policy, and therefore must be deemed to have waived the fraud and must be held estopped to defend on that ground.

At the close of the evidence, the defendant moved for a directed verdict upon the ground that there was no evidence to sustain a verdict for the plaintiff. This motion was denied, and the jury brought in a verdict for the plaintiff on both policies. Thereupon the defendant duly made a motion for judgment notwithstanding the verdict. This motion was denied, and, after judgment had been entered in accordance with the verdict, the defendant moved for a new trial, which motion was also denied.

[1, 2] The materiality of the representations cannot be doubted; these being in the form of written answers made to written questions which the parties themselves thus indicated they deemed material. 14 Cal. Jur. pp. 502, 636; McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 697, 139 P. 242. Likewise there can be no controversy that these representations were relied upon by the insurer in issuing the policies. Evidence to this effect was received without objection, as was also evidence that, if the insurer had known that these representations were false, the policies would not have been issued. There was no evidence to the contrary.

[3] Respondent endeavors to bring his case within Weiss v. Policy Holders' Ins. Ass'n (Cal. App.) 23 P.(2d) 38. The case was decided after this cause was tried. For this purpose respondent frequently refers to the insured as an ignorant and illiterate Swiss milker who was induced to give the false answers by the fraud of the medical examiner. The evidence does not support respondent's characterization of the insured. To the contrary, it shows that he was engaged in the farming and dairy business, sometimes with a partner; that he conducted his own business affairs with banks and other business houses without the aid of an interpreter, and was able to speak, read, and write in the English language. To bring the case within the Weiss opinion, the respondent urges that the court must presume that the medical examiner committed a fraud upon the insured, and that in face of the evidence the court should presume that the insured would not intend to commit a fraud. No authority need be cited to the point that the presumption is always against fraud. Here there is not a word of evidence in the record which would support an inference of fraud on the part of the medical examiner, and, in the absence of such evidence, he must be presumed to have acted in good faith. In the Weiss Case there was direct evidence of the fraud of the insurer's agent.

[4-6] The real issue presented by the record is this: When the insurer has knowledge of some misrepresentation on the part of the insured and elects to waive that fraud, is the insurer thereby estopped from raising other frauds of which it had no knowledge? The trial judge instructed the jury both ways, and these instructions are the burden of the appellant's principal attack upon the proceed-

ings. In one set of instructions the jury was told that the insurance company waived or is estopped to assert a violation of the terms of a policy if it fails to cancel or rescind the contract within a reasonable time after notice of the violation. This element was emphasized in instruction No. 39 in order which, after advising the jury that the company could have canceled the policies upon knowledge of the fact that the insured had willfully made false answers to the questions, stated that, "if said defendant had such knowledge and could allow it to thus cancel the policies, and that it did not do so, then you are instructed that you may find that such action on the part of the defendant insurance company constituted a waiver or forfeiture of their right to cancel the policies." Again in instruction No. 42 in order the jury was told "that an insurance company waives or is estopped to assert a violation of the terms of an insurance contract if the company, after receiving notice of the violation, remains silent and fails to object or to declare a forfeiture, or cancel or rescind the contract, within a reasonable time. * * * This rule is applicable in all cases where the facts brought to the insurer's knowledge show some violation of the terms of the policy, which, either by law or because of some provision of the policy itself, operates to avoid or forfeit the policy." But in instruction No. 45 in order the jury was told that "the defendant in this case was not bound to rescind the contracts of insurance in order to defend under its terms against any liability thereupon by reason of the misrepresentations by the insured as to material matters. * * *" And again in instruction number 46 in order the jury was told that though the insurer had the right to rescind the contracts of insurance upon discovery of false representations, it was under no obligation to do so, but might elect to await action upon the part of the beneficiary and defend upon that ground.

The latter two instructions correctly state the law applicable to the doctrine of waiver and estoppel. The instructions given at the request of the respondent on these questions are contrary to all the authorities. Respondent's only answer to this attack upon the instructions is that all the instructions must be read together. This is an accepted rule, but it does not aid when instructions are directly conflicting and antagonistic on essential matters of law and the record compels the conclusion that the jury must have followed the erroneous instructions in order to arrive at the verdict which was returned.

[7] One other assignment of error requires but brief consideration. At the request of the respondent, the jury was instructed that it was incumbent upon the defendant to prove by the preponderance of evidence not only that the answers of the insured were untrue but also that they were made with the intention of concealing his true state of health so that he might deceive the insurance company. Upon the same issue the jury was instructed that a presumption of intent to deceive is only made when statements are made with knowledge of their falsity, and that the burden was upon the insurer to show that the misrepresentations were willfully made, and that, if the jury found that the insured "did not make wilfully false statements to the questions asked of him by the medical examiner for the defendant insurance company, then you are instructed that said defendant has no right to cancel or rescind the policies sued upon." The rule in this respect is statutory. Section 2562, Civil Code, reads: "*Effect of concealment.* A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance." Under this section an intent to deceive on the part of the insured is immaterial, and such intent is presumed when the insured had knowledge of the falsity of the statements. Whitney v. West Coast Life Ins. Co., 177 Cal. 74, 80, 169 P. 997. Hence to instruct the jury that it was incumbent upon the insurer to prove that the concealment was made with intent to deceive the insurance company placed upon the company a burden which the law does not impose. Furthermore, when the jury was told that, unless it found that the insured willfully made these false statements with intent to deceive the insurance company, then the company had no right to cancel or rescind the policies, a rule of law was announced which is not in accord with the provisions of section 2562, Civil Code. The decisions following that section hold that rescission is not the exclusive remedy, but that the insurer may, because of that section, set up the fraud by way of defense to an action brought to enforce the policy. California Reclamation Co. v. New Zealand Ins. Co., 23 Cal. App. 611, 615, 138 P. 960; General Accident, Fire & Life Assurance Corp. v. Industrial Acc. Comm., 196 Cal. 179, 189, 237 P. 33. These authorities emphasize the error of the instructions heretofore discussed relating to the issue of waiver through failure to rescind.

[8] Respondent's argument on the issue of estoppel is founded on the premise that, when the insured, in good faith, makes truthful an-

swers which are incorrectly transcribed through the fraud or negligence of the insurer's agent, the insurer is estopped to set up their falsity. This premise is not available to respondent—the statute eliminates the element of good faith and the evidence dispels the assumption of fraud or negligence. The defense of estoppel arises from section 1962, Code of Civil Procedure: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." It is essential that the party pleading an estoppel must be ignorant of the true state of facts, and must have been intentionally led to alter his course to his injury by the act of the other. 10 Cal. Jur., p. 626. Hence there can be no estoppel of one who has no knowledge of the facts as there can be no claim of estoppel by one who knows his representations are false and knows that the other party is ignorant of their falsity.

[9, 10] But the evidence is clear that the appellant did not have any knowledge of the falsity of any of these misrepresentations except that relating to the illness of the insured five years prior to the date of the policies. This may have been sufficient to raise a suspicion as to the truth of other representations relied on; but cause for suspicion does not constitute knowledge. Hence there could be no estoppel of the insurer's right to "set up the fraud by way of defense to an action brought to enforce the apparent liability." Cal. Reclamation Co. v. New Zealand Ins. Co., 23 Cal. App. 611, 615, 138 P. 960, 961; General Accident, Fire & Life Assurance Corp. v. Industrial Acc. Comm., 196 Cal. 179, 189, 190, 237 P. 33. If the cause had been tried by the court without a jury, the defendant would have been entitled to an express finding that the representations were false, that they were material, and that the insurer was not estopped to set up the fraud. The evidence compels implied findings by the jury to the same effect. As there is no evidence direct or inferential which supports the verdict, the defendant's motion for a judgment notwithstanding the verdict should have been granted.

The judgment is reversed, with directions to enter judgment for the appellant as herein indicated.

We concur: STURTEVANT, J.; SPENCE, J.

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136 Cal.App. 423

DAVISON et al. v. GENTRY et al.

Civ. 1422.

District Court of Appeal, Fourth District, California.

Jan. 26, 1934.

1. Appeal and error ⟹912.

Where defendants, unless they did not use due diligence, were entitled to change of venue, and trial court, in denying motion, failed to indicate grounds, appellate court must assume that trial court denied motion because defendants had not acted diligently.

2. Appeal and error ⟹965.
Venue ⟹77.

Question of diligence in presenting application for change of venue is for trial court, whose action will not be interfered with except for abuse of discretion.

3. Venue ⟹61.

Where there was delay of 2½ months in bringing application for change of venue to court's attention, denying application for lack of diligence was not error, unless delay was satisfactorily explained.

4. Venue ⟹77.

Motion for change of venue to county of defendants' residence, being dilatory in character, must be diligently prosecuted.

5. Venue ⟹77.

Where defendants' counsel, because busy with other matters, failed to bring motion for change of venue to court's attention from September 19 to October 31, but did not show other counsel could not have been secured to present the matter sooner, denial of motion because of lack of diligence *held* not error.

6. Venue ⟹77.

Under record, conduct of plaintiffs' counsel in delaying answer to defendants' letter for stipulation to change venue, in alleged failure to object to continuance of hearing of motion to change venue, objecting to motion that time of notice be appreciably shortened, and allegedly not objecting to fixing of late date for finally hearing motion, *held* not waiver of claim, or to estop plaintiffs from claiming, that defendants were not diligent (Code Civ. Proc. § 1005).

7. Venue ⟹77.

That plaintiffs' counsel resisted defendants' application for order appreciably shortening time for giving notice of motion to change venue *held* not waiver of future delay in bringing matter to court's attention or indication of willingness that hearing of motion be unduly delayed (Code Civ. Proc. § 1005).

8. Venue ⚿77.

Failure of plaintiffs' counsel to request earlier hearing of motion for change of venue made by defendants *held* not waiver of defendants' lack of diligence in bringing matter to court's attention.

9. Appeal and error ⚿641.

On appeal from denial of change of venue, on typewritten transcript without bill of exceptions, record *held* not properly authenticated as required by Code section or court rule, justifying affirmance of order (Code Civ. Proc. § 953a; Rules for Supreme Court and District Courts of Appeal, Rule 29).

> Record was presented in form of typewritten transcript denominated "clerk's transcript on appeal," having attached thereto a certificate of county clerk as to correctness of various documents appearing in transcript, and there was certificate of trial judge certifying that transcript was a full, true, fair, and correct transcript of proceedings had at hearing of motion for change of venue, including evidence offered or received and acts of court, and that such transcript was settled, allowed, and approved.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Walter C. Davison and another, as trustees, against I. H. Gentry, P. B. Gentry, Ruth Powell, as guardian of the person and estate of P. B. Gentry, an incompetent, and others. From an order denying the motion for a change of place of trial of defendants second and third named, such defendants appeal.

Affirmed.

Raymond J. Kirkpatrick, of Long Beach, for appellants.

Walter C. Davison and Sarau & Thompson, all of Riverside, for respondents.

JENNINGS, Justice.

On July 12, 1932, the plaintiffs instituted this action to recover from the defendants the sum of $2,100 representing the principal amount of a certain promissory note alleged to have been executed by four of said defendants. On August 15, 1932, the defendants P. B. Gentry and Ruth Powell filed a demurrer to the complaint, a demand for a change of venue, an affidavit of merits, and a notice of motion for a change of the place of trial. The notice specified that the motion would be heard on August 26, 1932. The demand for change of venue stated that the defendants therein named were residents of the county of Los Angeles, and they therefore demanded that the action be removed to said county of Los Angeles for trial. On August 25, 1932, counsel for the moving defendants learned that the court was on vacation and would not be in session on August 26, 1932, and that the day of the week appointed for the hearing of motions by the rules of court was Monday. A second notice of motion for change of place of trial was accordingly filed on September 13, 1932. This notice stated that the motion for change of venue "heretofore set for the 26th day of August, 1932, has been continued to and will be heard on Monday, the 19th day of September, 1932." On the last-mentioned date counsel for plaintiffs objected to the hearing of the motion on the ground that sufficient notice of the hearing to fulfill the requirements of section 1005 of the Code of Civil Procedure had not been given. In support of the objection counsel presented his affidavit, which alleged that on September 13, 1932, he had received through the mail a notice of the hearing of the motion, that the envelope containing the notice was postmarked showing that it was mailed at Long Beach, Cal., on September 12, 1932; that the distance between Long Beach and Riverside, the city wherein the court was held, is not less than 55 miles by the nearest traveled route; that no notice of the hearing other than that which was sent by mail had been served upon affiant. The court sustained the objection thus presented to the hearing of the motion, and it was stricken from the calendar. Thereafter counsel for the moving defendants served by mail upon counsel for plaintiffs a notice stating that the motion for change of place of trial had been set for hearing and would be heard on Monday, October 31, 1932. This notice was dated October 4, 1932, and the affidavit of service alleged that it was mailed at Long Beach on October 4, 1932, in an envelope addressed to counsel for plaintiffs at Riverside. On October 31, 1932, the motion was presented to the court and was denied. From the court's order denying the motion for change of place of trial, this appeal has been prosecuted.

The appellants contend that they were entitled to a change of venue as a matter of law on their showing that they were residents of Los Angeles county; that the record shows that they exercised due diligence in bringing their application for a change of the place of trial to the court's attention; that the delay in presenting the motion to the court was satisfactorily explained; that respondents were estopped to urge the delay in bringing the application to the court's attention as a defense to the motion and had waived such defense; that the trial court erred in denying the motion for change of venue.

The single question presented upon this appeal is whether or not the trial court abused the discretion reposed in it in denying the motion for a change of the place of trial upon the showing made before it as indicated by the record. Respondents do not deny that, on the showing of residence, appellants were entitled as a matter of law to a removal of the cause for trial if they had used due diligence in bringing their application to the court's attention.

[1-4] The record fails to indicate the grounds upon which the court's denial of the motion was based. We must therefore assume, in support of the order denying the motion, that the court concluded that appellants had not acted with due diligence in making the motion and that it should be denied for this reason. Hart v. Forgeus, 184 Cal. 327, 329, 193 P. 764. The question of diligence in presenting an application for a change of venue is a matter that is confided to the discretion of the trial court, and it is incumbent upon appellants to show that the court abused its discretion. Pascoe v. Baker, 158 Cal. 232, 110 P. 815. Since the record shows that there was a delay of 2½ months in bringing the application for a removal of the cause to the court's attention, we cannot declare that the court abused its discretion in denying the application for lack of diligence unless it appears that there was presented to the court a satisfactory explanation for the delay. Hart v. Forgeus, supra. It is settled that a motion for change of venue, being dilatory in character, must be diligently prosecuted. Cook v. Pendergast, 61 Cal. 72, 79.

Appellants contend that the delay in bringing the matter to the court's attention was satisfactorily explained by the following facts which were made to appear at the time the application was considered: Appellants moved promptly in making the application on August 15, 1932, and in giving notice that the motion would be heard on August 26, 1932; the facts that the superior court of Riverside county hears motions only on Mondays and that the court was on vacation on August 26, 1932, were facts of which appellants had no knowledge; the motion was not heard on September 19, 1932, because counsel for appellants was mistaken in his estimate of the distance between Long Beach and Riverside, for which reason he failed to mail the notice in sufficient time to meet the requirements of section 1005 of the Code of Civil Procedure; upon the sustaining of the objection to the hearing of the motion on September 19, 1932, on the ground of insufficient notice, counsel for appellants moved the court to shorten the time so that the motion might be heard at 2 p. m. of September 19, 1932, and in making the application for prescribing a shorter time counsel stated that his reason for desiring the matter to be heard on that day was because he had matters set for hearing in other courts which would require his attendance in such courts on each Monday until October 31, 1932; that, before leaving the courtroom on September 19, 1932, counsel for appellants secured from the clerk of the court a new date for hearing the motion for change of venue, and that this new date was the first date subsequent to September 19, 1932, that was acceptable both to court and counsel; that subsequent to September 19, 1932, counsel for appellants was engaged on matters previously calendared in other courts on each Monday until October 31, 1932.

[5] We find ourselves impelled to observe that the above-narrated facts do not so clearly and satisfactorily explain the delay of 2½ months that intervened between the filing of the demand for change of place of trial and the hearing of the application therefor that we must declare that the trial court abused its discretion in denying the motion for lack of diligence in its prosecution. In the first place, counsel for appellants, whose office is in Long Beach, Cal., does not strengthen his excuse for the obvious delay by admitting that he so misjudged the distance between Long Beach and Riverside that he failed to give a notice sufficient to meet the requirements of section 1005 of the Code of Civil Procedure. More important than this miscalculation, however, is the failure to disclose why, if counsel for appellants was so busily engaged with other matters on each Monday subsequent to September 19, 1932, until October 31, 1932, some other counsel could not have been secured to present the not too difficult motion for change of venue, supported as it was by the affidavits of appellants to the effect that they were residents of a county other than that in which the action was filed. In the absence of any showing that, under the circumstances presented, some other counsel could not have been secured to bring the matter sooner to the court's attention, we cannot declare

that satisfactory excuse for the obvious delay has been shown and that the trial court abused its discretion in denying the application for lack of diligence.

[6, 7] Appellants further contend that respondents, by reason of the conduct of their counsel, must be held to have waived the delay in prosecuting the motion for change of venue, and that they were estopped from urging it in opposition to the motion. The following acts are said to constitute waiver and estoppel on the part of counsel for respondents: On July 29th, counsel for appellants mailed a letter to counsel for respondents, inclosing therewith a stipulation providing that the place of trial of the action might be changed to Los Angeles county, to which letter counsel for respondents did not reply until August 9, 1932. Counsel for respondents made no objection to the continuance of the hearing of the motion from August 26, 1932, to September 19, 1932. Although counsel for respondents admitted that on September 13, 1932, he received a notice of the hearing of the motion set for September 19, 1932, he made no objection to the hearing until the motion was called on September 19, 1932. Counsel for respondents objected to the motion of counsel for appellants that the time of giving notice be shortened so that the motion might be heard at 2 p. m. of September 19, 1932. Counsel for respondents acquiesced in the setting of the hearing of the motion for October 31, 1932, by failing to object to the proposed date which was fixed by the clerk of the court in the presence of the court and counsel for the respective parties. Counsel for respondents at no time requested an earlier hearing of the motion for change of venue.

The bare recital of the above facts would seem to convey a sufficient answer to the contention that they constituted a waiver of the defense of lack of diligence or that thereby respondents became estopped to rely upon such defense.

In the first place, counsel for respondents was under no duty to reply to the letter of July 29, 1932, with which was inclosed a stipulation providing that the place of trial might be changed. It is, however, shown by the record that he did reply to the letter on August 9, 1932, and that his reply contained the following very pertinent statement: "Answering your favor of the 29th ultimo, beg to advise that according to information furnished the plaintiffs the defendant, P. B. Gentry, has no good or valid defense. The only stipulation we would be willing to enter into would be one whereby the defendant P. B. Gentry would stipulate through his guardian that judgment be entered against him as demanded in the Complaint." The foregoing language should have been sufficient to advise appellants' counsel that any effort to change the place of trial or to present any defense to the action would be opposed and contested by respondents.

With respect to the statement that, although counsel for respondents admitted that on September 13, 1932, he received the notice that the motion would be heard on September 19, 1932, he nevertheless made no objection to the hearing until the motion was called, it may be observed, first, that he was under no duty to make an earlier objection; second, that counsel for appellants was apprised by the letter of August 9, 1932, that any move other than a confession of judgment would meet with opposition; third, the record shows that, in a telephone conversation which took place between counsel on August 25, 1932, counsel for appellants stated that he would present the motion on September 19, 1932, to which counsel for respondents replied that he did not agree and was not stipulating that the motion might be heard on the date suggested, but that he would be present on said date to resist any action that might be taken by counsel for appellants in support of his effort to secure a change of venue. This last-mentioned information was sufficient to advise counsel for appellants that the motion for change of venue would be contested, and entirely negatives any possibility that opposing counsel was acquiescing in the selection of the suggested date for the hearing of the motion or that, by failing to object to the hearing of the motion prior to the date specified in the notice of motion, he misled appellants' counsel to his prejudice and thereby became estopped from urging the objection of insufficiency of notice.

The objection to the application by appellants' counsel for an order shortening time is likewise a circumstance which entirely fails to indicate waiver or estoppel. Section 1005 of the Code of Civil Procedure provides that the court "may prescribe a shorter time" for giving notice of the hearing of a motion. The language of the statute indicates that the court is vested with the discretion to provide that the time for giving notice may be shortened. To declare, however, that counsel for respondents, by resisting the application for an order prescribing a shorter time, thereby waived future delay in bringing the matter to the court's attention, or that thereby he indicated a willingness that the hearing of the motion should be delayed, would be absurd. Counsel for respondents was entirely within his legal rights in resisting the application for an order so appreciably shortening the time, and his action in resisting the application did not in the least indicate that he intended to waive further delay or that he acquiesced in it. He had successfully opposed the hearing of the motion on the date specified in the notice on the ground of insufficiency of notice, and was entitled to insist that he be given a notice that would fully comply with the statutory provisions.

The contention that counsel for respondents acquiesced in the setting of the motion for hearing on October 31, 1932, by failing to object to the proposed date which it is said was fixed by the court clerk in the presence of the court and counsel for the parties is negatived by facts which are alleged in the supplemental affidavit of respondents' counsel, Walter C. Davison, filed with the court's permission on October 31, 1932. It is therein stated that, upon sustaining the objection of insufficiency of the notice on September 19, 1932, the court stated to appellants' counsel that he should re-notice the motion for change of venue so that it might be heard on October 3, 1932, to which suggestion appellants' counsel replied that he would be busy throughout the month of October until the end of the month, and for this reason would be unable to present the matter at the time indicated by the court, and that the court thereupon stated that, if counsel were so busy, he could secure some other counsel to present the motion on October 3, 1932, after giving due notice of the hearing. This testimony not only effectually rebuts any intimation of acquiescence on the part of counsel for respondents in the selection of October 31, 1932, as the date on which the motion might be heard, but also indicates that counsel for appellants utterly ignored the court's pointed suggestion that the motion be noticed for hearing on October 3, 1932, and that he persisted in his determination to bring a matter, which had then been pending for at least a month, before the court at a date six weeks later.

[8] The statement that counsel for respondents at no time requested an earlier hearing of the motion and the implied intimation that thereby a waiver of the defense of lack of diligence was accomplished deserves slight consideration. Counsel for respondents had unequivocally announced in the letter of August 9, 1932, that he was interested solely in the rendition of a judgment in favor of his clients on a claim of whose validity he was fully satisfied. Obviously, since he had filed the action in Riverside county, he was interested in its retention for trial in that county. The motion for change of place was a proceeding dilatory in character which was being urged by appellants. Counsel for respondents had plainly stated that he would oppose the granting of it. He was entirely within his rights in presenting his repeated objections to its being heard and the argument that he waived a valid defense of lack of diligence by failing to request an earlier hearing of the motion is entirely without merit.

It may therefore be remarked that, viewing the record as a proper record, it plainly shows that appellants' counsel was guilty of lack of diligence in prosecuting the motion for change of place of trial; that there was no satisfactory explanation for the delay in bringing the matter to the attention of the trial court; that appellants have entirely failed to show that the trial court abused its discretion in denying the motion for lack of diligence.

[9] An additional reason for affirming the order, however, exists in the failure of appellant to present a properly authenticated record. The record is presented in the form of a typewritten transcript which is denominated "clerk's transcript on appeal." Attached to this transcript is a certificate of the county clerk as to the correctness of the various documents appearing in the transcript. There is also a certificate of the trial judge which is in the following language: "I do hereby certify that the foregoing transcript is a full, true, fair and correct transcript of the proceedings had at the hearing of said motion for change of venue, including evidence offered or received and acts of the court; and the said foregoing transcript is, therefore, now settled, allowed and approved." It is manifest that no attempt was made to comply with rule XXIX of the Rules for the Supreme Court and District Courts of Appeal or with the procedure authorized by section 953a of the Code of Civil Procedure, and this defect alone amply justifies the affirmance of the order. Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748; Harrison v. Cousins, 16 Cal. App. 515, 117 P. 564; Patterson v. Rutherford, 39 Cal. App. 647, 179 P. 704; Guyot v. Cassab, 118 Cal. App. 742, 5 P.(2d) 912; Salinas v. Riverside Finance Co., 126 Cal. App. 675,

14 P.(2d) 1025; Johnson v. Johnson (Cal. App.) 23 P.(2d) 780.

The order from which this appeal has been taken is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

136 Cal.App. 448

GELFAND v. GELFAND.

Civ. 5037.

District Court of Appeal, Third District, California.

Jan. 27, 1934.

1. Appeal and error ⚷110.

No appeal lies from order denying motion for new trial.

2. Insurance ⚷123.

Wife no longer has insurable interest on life of husband when marriage relation is dissolved.

3. Divorce ⚷249(1).

Court, on granting divorce, may require husband to compensate wife out of his separate property where premiums were paid from community property on husband's life policy not payable to wife.

4. Divorce ⚷252.

Compensation should be made to community if community funds are used for separate purpose by one of spouses.

5. Divorce ⚷252.

Court, on granting wife divorce, should require that wife, whose community rights were impaired by husband's payment from his salary, during residence in California, of premiums on life policies not payable to wife, be reimbursed from husband's separate funds, though spouses had previously lived and accumulated property in state not having community property rule (Civ. Code, § 164).

6. Divorce ⚷252.

Wife on obtaining divorce need not be reimbursed for community funds withdrawn to pay premiums on husband's life policy made payable to wife.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action for divorce by Esther B. Gelfand against Simon Gelfand. From that portion of the divorce decree in which court found there was no community property and from the order denying her motion for new trial plaintiff appeals.

Affirmed in part and reversed in part, and cause remanded, and appeal from order denying motion for new trial dismissed.

Sigmund S'Renco, of Los Angeles, for appellant.

Charles C. Montgomery, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

[1] In this action, prosecuted by the plaintiff to obtain an interlocutory decree of divorce and an award of community property, the plaintiff had judgment granting the prayer of her complaint in so far as the marriage relation theretofore existing between the plaintiff and the defendant was dissolved, but in its decree the court found that there was no community property, and from this portion of the decree the appellant's argument is directed. The appellant also presents an appeal from the order of the court denying her motion for a new trial. As no appeal lies from such an order, that portion of the appeal is hereby dismissed.

The notice of appeal also purports to include that portion of the decree awarding an interlocutory judgment of divorce. As no reason is presented for setting aside or annulling that portion of the decree, an examination of the record discloses no reason for disturbing the same, and the interlocutory decree of divorce, in so far as it purports to dissolve the marriage relation theretofore existing between the plaintiff and the defendant, is hereby affirmed.

The record shows that the plaintiff and defendant intermarried on or about the 5th day of April, 1914, in the city of Baltimore; that at the time of the marriage neither the plaintiff nor the defendant possessed any property; that the plaintiff and defendant, save and except for a short sojourn in the northwest, made their home in the city of Baltimore from the date of their marriage until some time during the year 1927. The record does not disclose the exact date when the parties hereto established their residence in the state of California. It is, however, admitted that they were residents of the state of California in December, 1927, and that this residence continued as to both parties until the latter part of June, 1931, when the defendant left the state of California and established his residence in the city of New York.

While residents of the city of Baltimore, the plaintiff and defendant accumulated considerable property, estimated in the record to be of the value of approximately $1,000,000. A large portion of this property was and is represented by the capital stock in a corporation organized under the laws of the state of Maryland, known as the "Gelfand Manufacturing Company." The testimony discloses that both the plaintiff and the defendant devoted a considerable portion of their time to the conduct of the business before it was taken over by the Gelfand Manufacturing Company, and that the accumulations of the property which finally became merged in the Gelfand Manufacturing Company, had been mostly acquired prior to the organization of the company.

Under the laws of the state of Maryland, personal property acquired by husband and wife during the continuance of their marriage relation becomes and constitutes a separate property of the husband, subject only to dower rights.

It further appears from the record that the defendant, owing to ill health, from 1924 until 1926, resided in the state of California, though our attention has not been called to any testimony indicating that the defendant had become domiciled within this state, or that a matrimonial domicile was established here prior to the month of December, 1927.

While the attack of the plaintiff is directed to several of the findings, only one is vital and requires our serious attention. Finding No. 3 is in the following words: "That there is no community property of the parties." This finding the appellant holds merely to be a conclusion of law. Whether this contention is correct or incorrect is not really material, because if a conclusion of law, it would not necessitate a reversal if an examination of the record satisfied us that a finding should be inserted establishing a basis for the conclusion that there is no community property. On the other hand, if the above-quoted language of the court is considered as a finding of fact and not as a conclusion of law, if the testimony in the record shows that there is community property, then a reversal must be ordered in so far as the judgment refers to the absence of community property.

On the 2d day of May, 1927, the defendant, pursuant to the laws of the state of Maryland, proceeded to establish a trust in which he placed all of the stock owned by him in the Gelfand Manufacturing Company in the possession, control, and dominion of certain trustees therein named, reserving to himself during his lifetime whatever income there might be upon said stock, and providing for the payment of the income thereof after his death, to the three children therein named, and also making some provision for the plaintiff in this action.

It also appears that during the continuance of the marriage relation, the defendant obtained life insurance policies upon his life in the sum of $310,000, payable to beneficiaries therein named, not including the plaintiff.

On the theory that the defendant still retained an interest, to wit, his right to receive the income of the trust established by him, and also of the insurance policies being choses in action, it is contended that upon the coming to this state and the establishment of a residence and domicile therein during the month of December, 1927, all of the property referred to became the community assets of the plaintiff and the defendant, section 164 of the Civil Code being relied upon, which provides that "all other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state is community property."

The record also presents the fact that no income was received from the trust property by the defendant during the time that the matrimonial domicile existed in this state, but during said period the respondent did receive several thousand dollars by way of salary.

The exact amount cannot be ascertained from the record. His own testimony is that for two years he received $20,000 a year; that for one year he received approximately $13,000; and for a portion of another year, between $7,000 and $8,000. Out of the sums of money so received by the defendant, it appears that during each of the years of the existence of the domicile in this state the defendant paid or had paid for him on the insurance policies referred to herein, as premiums, the sum of $8,175.17 per annum. Whether the defendant paid four premium installments or only three cannot be definitely determined from the record. However, it is correct to say that the defendant paid in such premiums a sum in excess of $24,000.

Being apparently conceded that the situs of personal property follows the person of the owner, we cite no authorities in support of such statement. Under this rule of personal property under the control and dominion of the defendant, it would be held to have been brought to California in December, 1927, the date of the establishment here of the matrimonial domicile by the plaintiff and the defendant. In this particular it may be mentioned that the insurance policies prior to this date had been pledged by the defendant as security for loans aggregating between $37,000 and $38,000, and were held in possession of the company advancing the loans, or placed under their control and dominion.

In support of her contention that the insurance policies being choses in action, in legal effect came to California with the coming of the defendant, and under the provisions of section 164, Civil Code, became community property, the case of In re Thornton's Estate (Cal. Sup.) 19 P.(2d) 778, is called to our attention. Whatever persuasive effect may be the result of the reasoning contained in the opinion in that case, it cannot be considered as authority, for the simple reason that a rehearing has been granted therein. If established as the law of this state, it would result in a holding that a considerable portion of the estate vested in the defendant by the laws of Maryland, became community property when the parties established a residence here. But if not finally held to set forth the true rule that should be applied to property acquired in a foreign state when the parties acquiring the same come to this state, there nevertheless exists several thousand dollars of property which became community assets while the plaintiff and the defendant were residents of this state.

In the instant case we have an additional complication. The corpus of the personal property was acquired in the state of Maryland, and while the parties to this action were there domiciled. Subsequently the domicile was removed to the state of California, and existed there for a period of at least three and one-half years, when the defendant established his residence in the state of New York, where, under the laws of the state of New York, his right of ownership and control to the personal property are the same as under the laws of the state of Maryland, where the property was acquired. During the time of the existence of the matrimonial domicile in this state, several thousand dollars in premiums were paid on the insurance policies referred to, which payments were made out of the salary earned by the defendant during the period of residence in California, which earnings would be community property.

The rule contended for by the respondent is set forth in the text found in 31 C. J. 15, to wit: "Property rights already acquired are not changed by a change of domicile. Accordingly, vested rights of property acquired in a foreign state, or country, by married persons there domiciled will not be divested by a change of domicile to a community property state, for the latter state will recognize and protect the rights of married persons acquired under the foreign laws. Conversely, where married persons residing in a community-law state move to a common-law state, their property rights acquired under the community will be protected. And the same rule prevails as between two community-law states. These (rules) do not admit the controlling force of foreign laws within the state, but merely recognize rights vested under such laws, treating the foreign laws as evidentiary facts necessary to be proved and making part of the chain of title to the right asserted or claimed. Hence, where the foreign law is not proved, the court will proceed under the local laws. Where there is a conflict, and it is doubtful which law should prevail, the law of the forum will be applied. These rules are subject to these limitations, that the forum must be provided with the necessary remedies and processes to protect and enforce the rights involved, and their assertion must not be contrary to the laws or policies of the state of the forum, nor violate the rights of its citizens, nor create unknown or prohibited tenures." Numerous authorities are cited in the footnotes elaborating the text which we have quoted, but from what we are about to say, we think an analysis thereof unnecessary.

If the rule announced in Corpus Juris, supra, be the correct statement of the law as applicable to the instant case, the corpus of the personal property referred to never became community property. On the other hand, if section 164, Civil Code, is constitutional as applied to the circumstances involved herein, and the character of the property changes with the change of domicile when the parties came to this state, the community status was established, and when the matrimonial domicile in this state was dissolved, the separate property rule became effective upon the defendant becoming a resident of the state of New York. We are also confronted with the proposition that the law of the forum, as stated in Corpus Juris, cannot reach out and lay hold of the corpus of the personal property involved in this action.

[2] There is another distinctive fact with which we have to deal. The premiums paid

upon the insurance policies were taken out in the state where the common-law rule prevails as to personal property. The premiums were in part paid out of separate property. However, during the three and one-half year period that the matrimonial domicile existed in this state, the premiums were paid out of community funds. Thus, the rule announced in the case of New York Life Insurance Company v. Bank of Italy, 60 Cal. App. 602, 214 P. 61, and also in the case of Union Mutual Life Insurance Company v. Broderick, 196 Cal. 497, 238 P. 1034, where it is said that, if the premiums on an insurance policy issued on the life of the husband are paid entirely from community funds, the policy is a community asset, cannot be strictly applied, nor could it be strictly applied if we were dealing with the proceeds of the policies when matured, if the policies were so paid as to render the proceeds within the reach of processes issued by the courts of this state. In actions for divorce the court, in dealing with property rights, is not concerned with what may be the ultimate results upon the death of one of the parties, but has before it the settlement of the property rights as existing at the time of the beginning of the action and the trial thereof. Upon the dissolution of the marriage relation the law is well settled that the insurable interest of the wife on the life of the former husband does not exist. This, however, does not foreclose her right or claim to her interest in any property which may have been used in the payment of premiums, which right we think the court is empowered to determine and may cause a defendant to make compensation out of his separate property for the benefit of the wife to the extent that her community right has been invaded by the payment of premiums upon a policy where she would have no right to share in the proceeds in the event of the policy having matured.

[3-6] The rule which we think applicable, and which the trial court should have followed is found in the second edition of "McKay on Community Property," page 325, § 488. It is there said (referring to the state of Louisiana, where the community property rule is similar to that of our own): "In Louisiana the question of accounting has been before the Supreme Court in several cases. In that state it is a general rule that if community funds are used for a separate purpose, or separate funds for a community purpose, compensation must be made. In Succession of Bofenschen, 29 La. Ann. 711, where the husband had insured his own life for the benefit of his wife, the court said: 'The premiums were paid by the husband out of community funds, over which he had control as head and master thereof. The most that could be claimed would be the reimbursement of the premiums to the community, but we do not think that claim well founded.' In the latter case where the husband had used community funds to pay the premiums on a separate policy in his own favor, the court used this language: 'We are of opinion, however, that the community is entitled to reimbursement of the amount of the several premiums which were paid, after marriage, out of its funds. We are aware that, in the case of insurance by the husband for the benefit of the wife, it has been held that the latter takes the fund without liability to reimburse the community the premiums paid by it. * * * Hence, the premiums paid by the community fall under the common rule entitling it to reimbursement out of the separate estate of all expenditures made by it for the separate benefit of the latter.'"

Applying the rule here stated as the circumstances may require, if the policy is made out in favor of the wife, then the community funds applied in payment of the premiums would not necessitate reimbursement, but if the policy is taken out in favor of the husband, or any other person except the wife is made the beneficiary, and community funds are used in the payment of premiums, then upon the dissolution of the marriage relation the court should require reimbursement to be made out of the separate funds of the husband in order that the community rights of the wife may not be allowed to be impaired by reason of the husband having applied community funds to his separate interests.

To the same effect in principle is the case of Whiteselle v. Northwestern Mutual Life Insurance Co. (Tex. Com. App.) 221 S. W. 575, where it is said that the adjustment of the property rights, if existent, should have been made in the divorce action. See, also, 31 C. J., p. 35, § 1124.

Respondent further contends that the questions involved herein have heretofore been decided adversely to the plaintiff in an action prosecuted in the state of Maryland. A review of the record, however, discloses clearly that no property rights were involved, contested, or adjudicated in that action, and that nothing appears in the judgment roll of the Maryland action involving any of the questions which we have herein discussed.

It follows from what we have said that the interlocutory decree of divorce entered in this action should be affirmed in all particulars, save and except as to the settlement of the property rights of the parties to this action.

It is therefore ordered that save and except as to the community property rights of the parties, the decree of the trial court heretofore entered in this cause is affirmed. As to the community rights involved in this action, the decree is reversed and the cause remanded to the trial court for further proceedings to determine the community rights of the parties hereto, in accordance with the views expressed in this opinion.

Appellant is awarded costs.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

136 Cal.App. 521

CLARKE v. BRYSON et al.

Civ. 9249.

District Court of Appeal, Second District, Division 2, California.

Jan. 30, 1934.

Hearing Denied by Supreme Court March 30, 1934.

Death ⚷6.

Where husband and wife were found shot in home, finding that wife survived husband *held* supported by evidence that officer found body of husband colder than that of wife, and hence awarding insurance money to wife's estate was proper (Code Civ. Proc. § 1963).

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by William T. Clarke, as executor of the estate of Edwin H. Clarke, deceased, against Frank Bryson, public administrator, as administrator of the Estate of Kendace H. Clarke, deceased, and another. Judgment for named defendant, and plaintiff appeals.

Affirmed.

Pace, Smith & Purdue, of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondent.

CRAIG, Justice.

Husband and wife having died at approximately the same time, a controversy as to disposition of insurance moneys was determined in favor of the estate of the latter, from which judgment an appeal was perfected, the sole question involving the sufficiency of the evidence.

It appeared that both of the spouses were discovered in their home, each having expired as a result of gunshot wounds. The autopsy surgeon testified that Edwin H. Clarke had received a bullet in the back of the head, and that Kendace H. Clarke, his wife, had been shot in the front and posterior parts of the head and had received wounds and lacerations by some other instrument. In each instance he attributed the cause of demise to gunshot wound, and swore that "a person shot the way these people were would drop down on the floor and expire, but they would not have to do that immediately; * * * they might breathe for a minute or so." An officer who was first to arrive at the scene testified: "I observed that Clarke's body was colder than that of Mrs. Kendace H. Clarke."

Section 1963 of the Code of Civil Procedure provides that when two persons perish in the same calamity and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from strength, age, and sex, and that if both be over fifteen and under sixty years of age and the sexes are different, the male is presumed to have survived. Such particular circumstances have been held to mean those from which a rational conclusion may be drawn as distinguished from probability. Estate of Wallace, 64 Cal. App. 107, 220 P. 682. It appears from appellant's brief that circumstances existed here to support the court's finding that the wife survived the husband. We need only mention one of them. Officer Condaffer, referring to the time when he found the bodies, testified: "Clarke's body was colder than that of Mrs. Kendace H. Clarke"; yet appellant, in his brief, repeatedly misstates this testimony and says that the officer testified that "the body of the wife was colder than that of the husband." Of course, this circumstance supports the conclusion of the trial court, and, as above indicated, there are other circumstances of like import. When circumstances are shown, as to a fact solely within the province of the trial court to determine, and it has observed the demeanor of the witnesses on the stand and their manner of testifying, it cannot be said upon the whole record upon appeal that its conclusion was unfounded or contrary to

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

the Code presumption, which latter assumes the nonexistence of direct or circumstantial evidence.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

136 Cal.App. 480

HOLLIDAY v. PORTER.

Civ. 7839.

District Court of Appeal, Second District, Division 1, California.

Jan. 29, 1934.

Rehearing Denied Feb. 27, 1934.

Hearing Denied by Supreme Court March 30, 1934.

Evidence ⚿413.

Parol evidence as to prior oral negotiations *held* inadmissible to show that written contract, requiring well driller to bring in well absolutely clean and ready for pump, related to water produced from well (Code Civ. Proc. §§ 1856–1858, 1860, 1861).

HOUSER, J., dissenting.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by J. R. Holliday against A. A. Porter. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied by Supreme Court; PRESTON, J., dissenting.

Blackstock & Rogers, of Ventura, for appellant.

Harry William Elliott, of Los Angeles, for respondent.

CONREY, Presiding Justice.

Plaintiff and the defendant entered into a written contract whereby the plaintiff agreed to drill a well for water on certain described land of the defendant, and the defendant agreed to pay therefor at a prescribed rate measured by the number of miner's inches of water produced from the well. A well was drilled to the depth of approximately 840 feet, from which 90 inches of water was produced. Defendant having refused payment, the plaintiff brought this action, which was tried by jury and resulted in verdict and judgment in favor of plaintiff. Defendant appeals from the judgment.

Among the terms of the contract which describe the obligations assumed by the contractor, we find that the contractor agreed "at his sole cost and expense, to furnish all necessary drilling equipment of whatever nature; all material such as casing, gravel, etc.; all labor, and to drill in a workmanlike manner to a depth to be determined by him, and to perforate, and blow the well with compressed air, and to bring the well in, and leave it absolutely clean and ready for a pump." The present controversy arose out of certain contentions of the defendant concerning the meaning of the above-quoted paragraph. The position taken by appellant is indicated by the statement of his counsel in their brief that "a well was drilled and about ninety miner's inches of water was produced, but the water was so highly impregnated with sand that it was not available to the appellant for purposes of irrigation or for any purpose at all."

The nature of the defense is shown in the answer, wherein the defendant alleged "that at the time the said agreement referred to in plaintiff's complaint herein was executed, it was thoroughly understood and agreed between the parties thereto that the expression 'and leave it absolutely clean and ready for the pump' meant that the plaintiff would leave the well and the water produced therefrom absolutely free of sand and clean and ready for the pump, and at the time said agreement was entered into each of the parties thereto, that is the plaintiff and defendant herein, stated each to the other that the said expression 'and leave it absolutely clean and ready for a pump' was intended to mean and did mean that plaintiff would leave said well and the water produced therefrom absolutely clean, free of sand and ready for the pump, and at the time said agreement was executed the following expression contained therein 'and leave it absolutely clean and ready for the pump' was by each of the parties thereto interpreted to mean and in fact did mean that the plaintiff would leave the well and water produced therefrom absolutely clean, free of sand and ready for the pump. And plaintiff alleges that the said well has never at any time been clean and/or ready for a pump; alleges that the water produced from said well has never at any time been clean and/or free of sand, but on the contrary said well has never been clean and said water has never been free of sand, but has been heavily impregnated with sand, in fact, so heavily impregnated with sand that it has never been ready for a pump and that it is not practicable to pump water from said well with any kind of pump for

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

irrigation purposes or for any purpose at all."

Appellant's principal assignments of error relate to the rulings of the court whereby the defendant was prevented from introducing testimony of witnesses to prove that in their oral negotiations prior to the making of the written contract the plaintiff represented to the defendant "that he could and would put down a gravel-packed well for the defendant which would produce a large quantity of water, and which would be free and clear of sand, and in which well the water would be entirely clear and usable for domestic use and irrigation purposes." The plaintiff objected to this testimony on the ground, among others, that it was an attempt to vary a written instrument by parol testimony. The objection was sustained and the offered testimony was excluded. Appellant insists that he should have been permitted to introduce the evidence which was thus excluded. If the court erred in its ruling as to this matter, the judgment should be reversed. If the court did not err in that ruling, the other assignments of error will not be of sufficient importance to require further consideration.

It is claimed by appellant that under the provisions of sections 1856, 1857, 1858, and 1860 of the Code of Civil Procedure, he was entitled to introduce evidence in accordance with his offer; and particularly, testimony showing what was said in conversations between plaintiff and defendant before the contract was written. Appellant admitted that he was not seeking to establish any mistake in the writing or any fraud in the transaction. He himself relied upon the written agreement, but contended that the phrase "bring the well in and leave it absolutely clean and ready for a pump" was by the parties intended to mean that the plaintiff would leave the well *and the water produced therefrom* absolutely clean and ready for the pump.

"The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly." Code Civ. Proc. § 1861. If appellant had offered evidence tending to prove that the words used in the contract, as to this particular matter, "had a local, technical or peculiar signification," it then would have been appropriate to introduce evidence showing that the words were so used and understood in the particular instance. But no attempt was made to introduce evidence to establish such special signification. Without evidence that there was in existence a local, technical, or other peculiar signification of the kind relied upon, the terms of the writing were incapable of the interpretation sought to be put upon them by appellant, and he had no right to vary their meaning by oral evidence of the conversations between the parties. For the terms of the writing, "used in their primary and general acceptation," that is to say, according to their plain and simple meaning, referred solely to the condition in which the well should be left by the contractor, and did not include the condition or quality of the water to be produced by the well. The evidence without conflict shows that after the drilling had been completed, the mud and other débris therein were removed and the well itself was clean and ready for the pump. The only way left for appellant to avoid the effect of this evidence was to show, if he could do so by competent evidence, that under the terms of the contract plaintiff was obligated to see to it that the water as it came into the well was also clean and fit for use. But the contract itself carried no such obligation, and the evidence to which we have referred, which appellant offered to produce and which the court excluded, was not competent or admissible evidence in relation to the matter at issue. This brings us to the conclusion that the rulings of the court were not erroneous.

For the foregoing reasons, the judgment is affirmed.

I concur: YORK, J.

HOUSER, Justice (dissenting).

I dissent. The pivotal question presented is whether the provision in the contract that was entered into by the parties thereto, that the person who drilled the well would "bring the well in and leave it clean and ready for the pump," was of such a nature that the introduction of evidence to determine the intention of the parties with reference to the use of such expression would be in contravention of the general rule which forbids the alteration or modification by parol evidence of a written contract. Section 1856, Code Civ. Proc.; section 1625, Civ. Code.

As a pointed suggestion that the language employed by the parties to the contract was not entirely clear, at an early stage on the trial of the action the remark made by the judge of the trial court with reference thereto is indicative. He said:

"The Court: Of course there might be an ambiguity there to the ordinary person as to the meaning of leaving it absolutely clean and ready for the pump. Now, I myself don't know what that means. What does it mean? I don't know.

"Mr. Elliott (Attorney for Plaintiff): Well, perhaps the evidence would make it clear what it does mean.

"The Court: Then parol evidence would be admissible, if my theory is correct on that. * * *"

But even assuming that the language in question in itself was free from ambiguity, nevertheless if it appear that it was used or understood with a "peculiar signification," the agreement entered into by the interested parties thereto "must be construed accordingly." Section 1861 of the Code of Civil Procedure provides as follows: "The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical, or otherwise *peculiar* signification, and were *so used and understood* in the particular instance, *in which case the agreement must be construed accordingly.*"

It should be clear that in entering into a written agreement, the parties thereto are under no legal obligation to attach either any particular, or generally accepted, significance to any part thereof; but that to the contrary, the parties are privileged to attach such meaning either to a word, a phrase, or any clause or provision in their agreement, as they may agree upon. In other words, in their convention, the parties to any agreement may either adopt, or decline to adopt, either the dictionary meaning, or the generally accepted meaning, of any word which they may use in defining their several rights, duties, or obligations; and in a construction of the terms of an agreement, if it appear that in "the terms of a writing" the parties thereto have departed from the "primary and general acceptation" of words therein used by them, and have given them "peculiar signification," the statute is plain in its declaration that in thus construing the agreement evidence is admissible to show the meaning which the parties themselves attributed to the word so used by them. In 6 California Jurisprudence, page 285, it is said: "Parties have power to define the words which they use, and their definitions may not be attacked on the ground that they are repugnant to the words defined. If the agreed definitions are free from ambiguity, then the only rule necessary to be invoked is the one requiring contracts to be enforced according to the intention of the parties who made them. * * *"

The point is made particularly clear by the language used by the court in the opinion in the case of Morrison v. Wilson, 30 Cal. 344, 348. In part it was there said: "The question then comes to this, have the parties to a written contract the right to set aside the general sense of the words which they use, and for the purposes of the contract to assign to them another and different meaning by convention? That they have both the right and the power to do this there can be no question. The meaning of language depends upon usage and varies with it. If parties should insert a clause in their contract to the effect that the language used by them should be taken in a certain sense which had become provincial, or in the meaning borne by it in a particular trade, and particularly if they should proceed to state the agreed definition in detail, and the definition turned out to be clear and unambiguous, the general meaning would have to give way; and it follows that it must be considered that parties have the power to innovate upon the general meaning of words at large free from all legal restrictions. If they see fit to agree that mile shall stand for league, or grant, bargain and sell for quitclaim, or even black for white, however we might marvel at the caprice, we could not question the power."

In Higgins v. Cal. Petroleum, etc., Co., 120 Cal. 629, 52 P. 1080, 1081, one of the questions involved was what meaning was intended by the expression "gross ton" which the parties had used in their agreement. In passing upon the matter, the court said:

"The contention of appellant is that the statute defines the meaning and use of the word 'ton' (Pol. Code, section 3222 [section 3215]); and that the lease is unambiguous, and cannot be explained or contradicted by parol evidence. Therefore, there could have been no evidence at the trial justifying the finding of the court that the phrase 'gross ton,' used in the lease, meant a long ton of 2,240 pounds. * * * I think the question is entirely settled by section 1861 of the Code of Civil Procedure, which reads as follows: 'The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is nevertheless admissible that they have a local, technical or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly.' I know no reason why this rule would not apply as well to a statutory weight or measure as to any other term used in a writing. * * *

"Of course, appellant would contend that, even under section 1861, such evidence cannot be received, unless the contract expressly indicates a local, technical, or peculiar signification. But the section plainly provides that it may be shown by evidence that the language is used in a technical, local, or peculiar sense, and not merely that evidence may be introduced to show what such meaning is when language is so used.

"This view is somewhat strengthened by the fact, as shown in respondents' brief, that the phrase 'gross ton' is often used in lieu of the phrase 'long ton,' with which we are all familiar in commercial reports, and which always indicates a ton containing 2,240 pounds."

It was held that parol evidence was admissible to show that by the use of the term "gross ton" the parties to the contract had intended a long ton of 2240 pounds, and not the statutory ton of 2000 pounds.

In the case of Shean v. Weeks, 176 Cal. 592, 169 P. 231, 232, the court was called upon to determine what was meant by the expression "general confectionist." In the course of the opinion the court said: "The ordinary meaning of words cannot be changed, except by proof of general usage by those engaged in the particular trade, *or by proof that the parties to the contract used it in the special sense contended for.*"

In Anderson v. Willson, 48 Cal. App. 289, 191 P. 1016, the controversy centered upon the meaning that properly should attach to the expression "right of way for a canal." It was held (syllabus) that it was "purely a question of intention; and the sense in which the words are employed by the contracting parties in any given case will depend upon their intention as disclosed by the language of their contract, aided, when proper, by reference to the attendant circumstances."

As stated in the prevailing opinion herein, by the answer to the complaint defendant pleaded that the questioned provision of the agreement was "thoroughly understood and agreed by the parties thereto" to have a specified meaning or significance. To my mind, he should have been given an opportunity to introduce evidence in that regard; and in that connection, in effect the jury should have been instructed that it was its province to determine what was the fact.

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136 Cal.App. 557

PERRY v. WEST COAST BOND & MORTGAGE CO.

Civ. 9334.

District Court of Appeal, First District,
Division 2, California.
Feb. 2, 1934.

1. Judgment 🔑**217.**

Decree may be partly final and partly interlocutory; final as to determination of all issues, and interlocutory as to mode of execution.

2. Execution 🔑**7.**

Decree completely and finally determining rights of parties in dispute over sale of real property under trust deed but reserving for future consideration independent branch of case in that execution was suspended to give parties opportunity to redeem *held* to have finally adjudged plaintiff's liability and execution was properly issued thereon.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Constance V. L. Perry against the West Coast Bond & Mortgage Company to stay execution and for a decree that no money judgment existed against plaintiff. From an adverse judgment, plaintiff appeals.

Affirmed.

Joseph Harris Brewer, of Los Angeles, for appellant.

Hahn & Hahn and Louis R. Vincenti, all of Pasadena, for respondent.

NOURSE, Presiding Justice.

Plaintiff and her seven associates had defaulted upon their obligation to pay to the defendant a promissory note in the sum of $50,000 and the real property covered by the deed of trust as security for the note was sold pursuant to the terms of the trust deed. Thereafter the defendant herein commenced an action against this plaintiff and her associates to recover the deficiency due after the trustee's sale. The makers of the note then commenced an action against the mortgage company to have an involuntary trust declared in the property because of alleged irregularities in the sale. Soon thereafter the mortgage company commenced an action against the makers of the note in unlawful detainer and for damages for the detention of the property. These three actions were consolidated for trial, whereupon the parties entered into a stipulation in writing agreeing that an interlocutory judgment in all three cases should be entered forthwith decreeing that (a) the mortgage company was the owner of all the real property involved; (b) the makers of the note were guilty of unlawful detainer of said property; by which (c) the mortgage company was damaged in the sum of $2,201.64; (d) the mortgage company have judgment against the makers of the note for $19,080.53, the deficiency due on the promissory note, which sum was to be added to the item of damages and interest and judgment be entered for the full sum of $21,660.59; (e) the makers of the note take nothing by reason of their action; (f) a writ of restitution issue forthwith to the mortgage company; (g) in the event that the makers or any of them should redeem before December 15, 1931, the mortgage company would reconvey and file a satisfaction in full; (h) in the event of their failure to redeem before that date, the mortgage company shall have judgment entered "adjudging that (the makers) have and each of them has failed to pay * * * and * * * has no right, title, claim or interest in or to the said real property * * * and no further right to redeem the same. * * *" A judgment was duly entered in full accord with this stipulation and was styled "interlocutory judgment."

The property was not redeemed by December 15, 1931, and thereafter, on motion of the mortgage company, a final judgment was entered in accordance with this stipulation adjudging that the redemption price had not been paid and that the makers of the note had no further title or interest in the real property and no further right to redeem. After the entry of this second judgment, the mortgage company caused execution to issue on the money judgment, which is referred to as the "interlocutory judgment." The plaintiff, who was one of the makers of the note, then commenced this action to stay the execution and to have it adjudged that no money judgment existed against her because the terms of the interlocutory judgment were not incorporated in the second judgment. A demurrer to this complaint was sustained without leave to amend and the appeal presents the single issue whether the complaint states a cause of action.

[1, 2] "A decree may be partly final and partly interlocutory; final as to its determination of all issues of fact and law, and interlocutory as to its mode of execution." 10 R. C. L., p. 555. Here the so-called interlocutory decree was final as to the determination of all issues of fact and law which were then in controversy. By reason of the stipulation of the parties, its execution was suspended for a period of less than six months to give the parties an opportunity to redeem. But by the terms of the stipulation and the judgment, the course which was to be followed either if redemption was or was not made was fully determined. There was, therefore, no issue of either law or fact left to be determined in the final judgment except the fact of either compliance or noncompliance with the terms of the first decree. This first decree was a complete and final determination of the rights of the parties and is none the less so because it reserved for future consideration some independent branch of the case. Zappettini v. Buckles, 167 Cal. 27, 33, 138 P. 696; Olds v. Thorington, 47 Cal. App. 355, 358, 190 P. 496; Guaranty Trust & Savings Bank v. Los Angeles, 186 Cal. 110, 117, 199 P. 35; Ochoa v. McCush, 213 Cal. 426, 431, 2 P.(2d) 357; Pista v. Resetar, 205 Cal. 197, 199, 270 P. 453. In view of these authorities we are forced to conclude that the two judgments are independent to the extent that the first was a final determination of the issues then presented and, as such, finally adjudged this plaintiff's liability for the deficiency and for damages for retention of the property. The execution was properly issued on that judgment.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

136 Cal.App. 560

LANDON v. HILL et al.

Civ. 4779.

District Court of Appeal, Third District, California.

Feb. 2, 1934.

1. Appeal and error 🔑931(1).

Appellate court must accept as true all evidence and reasonable inferences supporting trial court's findings.

2. Landlord and tenant 🔑172(1).

"Eviction" occurs if landlord, without tenant's consent, enters and takes possession of any part of demised premises during continuance of lease and excludes tenant therefrom.

[Ed. Note.—For other definitions of "Eviction," see Words & Phrases.]

3. Landlord and tenant 🔑180(3).

Evidence *held* to support trial court's finding that lessee of store and bakery equipment was evicted by landlord, entitling lessee to damages.

4. Landlord and tenant 🔑180(6).

In damage action for eviction, general finding as to damages without showing what elements court considered in ascertaining amount *held* sufficient in form to support judgment, in absence of request for more specific finding.

5. Landlord and tenant 🔑180(4).

Eviction entitles tenant to recover any damage sustained.

6. Landlord and tenant 🔑180(4).

General damage of evicted tenant is difference between present rental value and agreed rent, but, independently of general damages, tenant may ordinarily recover special damages naturally and proximately resulting from the eviction.

7. Landlord and tenant 🔑180(4).

In damage action for eviction, damages could not be awarded both for value of lease and for loss of profits; such award being in nature of duplication.

8. Appeal and error 🔑1140(1).

Where court, in damage action for eviction, improperly awarded value of leasehold in addition to loss of profits, error *held* correctable on appeal by remitting leasehold value which could be calculated.

9. Landlord and tenant 🔑180(4).

In damage action for eviction of store lessee, that lessee had possession only two months *held* not to preclude damage award for loss of prospective profits, where bakery had been operated several years and lessee's income was about same as general level for preceding years, giving satisfactory basis for calculation of damages.

10. Landlord and tenant 🔑180(3).

In action for eviction of lessee of store and bakery equipment, burden of proof to show matters in mitigation of damages *held* on landlord.

11. Landlord and tenant 🔑180(4).

In damage action for eviction from leased bakery, it was error, in computing operating expenses for purpose of calculating prospective profits as damages, not to deduct anything by way of salary to lessee who was the baker and carried on business principally through own efforts.

12. Landlord and tenant 🔑180(4).

In damage action for eviction from leased store, the anticipated profits recoverable are net profits, to ascertain which all sums expended in conducting business, including rent and reasonable cost of marketing, are to be considered.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by F. A. Landon against Theo K. Hill and another. From the portion of the judgment awarding damages for eviction from leased premises, named defendant appeals.

Modified, and, as modified, affirmed.

Norman A. Eisner, of San Francisco, and J. A. Pardee, of Susanville, for appellant.

Jesse W. Carter and Glenn D. Newton, both of Redding, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action for damages for eviction brought by a lessee. Theo K. Hill was the owner of certain premises consisting of a store and certain bakery equipment in the town of Anderson, Shasta county, Cal., where he had for some time carried on a bakery business.

On June 1, 1931, he leased the premises and equipment to plaintiff for a period of two years from June 1, 1931, for $40 per month for the purpose of conducting a bakery. On the same day plaintiff executed and delivered to Hill two promissory notes, one payable December 1, 1931, for $120 to cover the first and last two payments of rent under the lease, and a note in the sum of $260 payable in installments of $50 per month to cover the purchase price of certain bakery stock then taken over by plaintiff from defendant.

Plaintiff entered into possession of the bakery on June 1, 1931, and remained in possession until August 24, 1931, at which time defendant again re-entered.

Plaintiff, claiming he was evicted and his stock of merchandise converted, brought this action against his lessor, defendant herein, and recovered a judgment of $4,500 as damages for the eviction and $174 as damages for conversion.

This appeal is from that portion of the judgment only awarding damages for eviction. Appellant, as grounds of his appeal, contends that the facts did not support an eviction and that the damages awarded are excessive. The finding of the trial court as to the eviction was to the effect that, while plaintiff was in the quiet and peaceful possession of the premises and property pursuant to the written agreement, defendant forcibly, maliciously, wrongfully, willfully, and unlawfully evicted plaintiff therefrom and took and withheld possession from plaintiff.

[1] In examining into the sufficiency of the evidence to support a questioned finding, it must be borne in mind, as is stated in Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157, 1158: "An appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding."

Examining the record, then, in the light most favorable to respondent's position, the record discloses that respondent was in possession of the premises on July 24, 1931, under a lease which contained a provision that the lessee had thirty days to pay the rent after it became due before lessor could reenter and take possession. The rent for June had been paid by the note covering the rent for the first and last two months of the lease. The rent for July had been paid July 18th, and it is therefore apparent that respondent was not at any time in default in payment of rent.

[2] It is the claim of appellant, however, that plaintiff voluntarily surrendered the premises and there was not therefore an eviction. "It is an eviction," as defined in 36 Corpus Juris, page 259, "if the landlord without the tenant's consent, enters and takes possession of the demised premises or any part thereof during the continuance of the lease and excludes the tenant therefrom."

[3] To determine whether the court was justified in holding plaintiff was actually evicted, it will be necessary to set forth in some detail the facts adduced at the trial.

After plaintiff took over the control and operation of the bakery in Anderson, defendant moved to Susanville. During the month of July, Mr. Exley, a baker of Chico, came to Anderson at the invitation of Mr. Hill and with Mr. Hill looked over the bakery with a view of leasing it. Mr. Exley was then told by defendant that he (Mr. Hill) would have to do something about the business, as Landon had not been making the payments on the lease and a note, and that he was going to release it, and if he (Exley) wanted it he could have it. On August 23d, Exley again went to Anderson after receiving a telephone message from defendant, saying: "Everything is all right—come ahead and take hold of it (the bakery) to-night." On August 22d, as Mr. Hill was on his way from Susanville to Anderson, he informed Mr. J. M. Layton, a service station operator, that Landon was behind with his rent and that a baker who operated the Queen Ann Bakery in Chico wanted to take over the lease. Upon his arrival in Anderson, defendant called upon the father of plaintiff and told him that plaintiff "is not paying—he won't pay and I have asked him time and time again and he don't; so I will have to take it away from him." About 4 o'clock Sunday, August 23d, plaintiff and defendant had a conversation at the bakery. With Hill at that time was Mr. and Mrs. Exley and Mr. and Mrs. Warren. Mr. Warren was a salesman for a yeast company in San Francisco, who had at one time sold supplies to plaintiff, but plaintiff was not at that time dealing with that company. Mr. Warren testified he was there in response to a telephone request from Hill to be present at that time to witness putting Landon out of the bakery. At that meeting on Sunday, Hill told plaintiff that he was in default of the payment of rent and that he had come to take possession. Plaintiff replied he was not in default and that the lease provided he could have thirty days' grace, but that he was tired and wanted to go home. The next morning plaintiff sent an employee to the bank to make a payment on the note and pay the rent for the current month, but the bank refused to accept the payment without the consent of Hill. Landon then tendered to Hill $40 for the rent and $50 installment on the note, but Hill refused to accept either payment. He then told Landon he was taking possession of the bakery and that he had talked with his attorney and knew what he could do; that he could enter the building at any time even to breaking a door or window to do so. Landon replied that he himself had not seen an attorney, but he certainly would if he were put out. Hill demanded the keys, which Landon refused to surrender. They then at Hill's suggestion went to the bank where a Mr. Black, who had drawn the lease in question, was in charge. Landon asked Black if Hill could put him out of the bakery, and Black said it was O.K. Black then prepared a receipt for the keys and stock in trade which Hill and Landon signed. The keys were at the bakery. Upon their return Landon took the key from the ring and placed it on the desk, saying to Hill: "There they are but I am not giving them to you." Landon then left the bakery. He got his copy of the lease and asked Judge Shanahan of the local justice's court what were his rights under the lease, but Judge Shanahan refused to advise him and told him to consult his attorney. He then went to Red Bluff and visited his wife, who was confined to a hospital on account of illness, and, acting upon her suggestion, returned to the bakery to get his personal belongings and take an inventory of the stock. Upon returning to the shop he there met Mr. Exley, who had returned to Chico the day before but had returned to Anderson upon receiving a telephone call from Hill that afternoon to come to Anderson to take over the bakery. While there, Landon sold to Exley the linoleum and certain of his personal property in the shop.

The foregoing is a résumé of the evidence found in the record tending to support the finding of the trial court that plaintiff was evicted, and an analysis thereof justified the conclusion of the trial court that the surrender was not voluntary, but that plaintiff was evicted. It will be observed that Landon notified defendant at the first meeting on August 23d, when defendant told him he had come to take possession of the bakery, that he could not take possession because he was not in default. On the following day plaintiff attempted to pay the rent for August and remove the objection of the defendant, and, when defendant refused the tender and again hold him he was going to put him out, Landon said, "Well, you can't put me out of here," and further on the same conversation said, "Well I have not had a chance to talk to my attorney yet but if you put me out of here I will certainly talk to an attorney." As a further indication of Landon's unwillingness to surrender the premises, he said to defendant: "I told him it would put me in an awful pickle if I lost the bakery. I was in a pretty bad situation right then and I had to have an income. * * *" At that time Hill demanded the keys, with which request plaintiff refused to comply, and it was not until they had gone to the bank and Mr. Landon had been advised by Mr. Black, the banker who had prepared the lease, that Hill could retake possession, that he signed the receipt for the keys and merchandise. Later in the same evening, as they were taking stock in the bakery, Mr. Hill demanded that certain money in the till be returned, at which time Landon said to him, "Ted, I don't want to hit you but if you don't shut up and leave me alone I will."

It is further argued by respondent that, if the evidence adduced on the part of the respondent does not justify the finding of an actual eviction, it nevertheless justified the finding of a constructive eviction, for "a constructive eviction may arise from the improper conduct of the landlord from interfering with the beneficial enjoyment of the premises, such as threats of explusion, attempts to lease to others, unreasonable demands, insults or assaults." 36 Cor. Jur. p. 267. We are of the opinion, however, that the evidence justified the trial court in construing the acts of defendant as constituting an actual eviction.

[4] The second major point urged by appellant is that the court erred in the measurement of damages, and that the award of $4,500 is excessive. The finding of the trial court was that, as a result of the eviction, plaintiff was prevented from operating the bakery business, that he had lost the custom and patronage of many customers, and had suffered and would continue to suffer the loss of profits from the business which he would have made and earned had he been allowed to continue in possession for the balance of the unexpired term of the lease, to wit, 21 months and 7 days after August 24, 1931, and that by reason of the eviction plaintiff had been deprived of the leasehold rights to which he was entitled under his agreement. Then without segregating the damages, the court finds "that by reason of the premises said plaintiff has been damaged in the sum of $4,500.00."

While true this finding of damages is general and it does not appear what elements the court considered in ascertaining the amount of damages, it is sufficient in form to support a judgment in the absence of a request for a more specific finding. Murphy v. Stelling, 8 Cal. App. 702, 97 P. 672.

[5, 6] An eviction entitles a tenant to recover any damage he may have sustained. Cappucio v. Tufts, 109 Cal. App. 277, 293 P. 91; Schumann v. Karrer, 184 Cal. 50, 192 P. 849; Hamer v. Ellis, 40 Cal. App. 57, 180 P. 30.

The general damage of an evicted tenant is the difference between the actual fair market value of the unexpired term at the time of the eviction, and the rent reserved; in other words, the difference between the present rental value and the agreed rent. The tenant's recovery is not limited, however, to the value of his leasehold interest. Independently of the general damages ordinarily recoverable, the tenant may recover special damages naturally and proximately resulting from the eviction. 36 Cor. Jur. p. 283.

[7] In the instant case it appears from the finding that the court considered damages for good will, loss of profits, and the value of the leasehold. It is apparent that to award damages for the value of the lease and also for the loss of profits while occupying the leased premises is in the nature of a duplication. Poposkey v. Munkwitz, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858. As was said in McCready v. Bullis, 59 Cal. App. 286, 210 P. 638, 641, wherein the lessee sued for damages for loss of profits by reason of breach of covenant on the part of the lessor to supply water: "If he (lessee) was entitled to a recovery as for profit on crops, that profit would mean net profit, to produce which there should be deducted as a charge against the plaintiff all sums expended in the production or attempted production of the same, including rental and the reasonable cost of bringing the crops to maturity and marketing them. To allow to the plaintiff recovery of rental in such a case is to allow him more than a net profit on crops; in other words, it allows to him a net profit plus the rental paid. It requires no argument to show that such a judgment cannot be justified."

[8] Inasmuch, however, as the excess rental value of the premises over the rent reserved is found to be at the rate of $10 per month for the remaining 21 months, that error can be corrected by remitting $210 from the $4,500 awarded by the court. Wendt v. Smith, 50 Cal. App. 234, 194 P. 736.

[9] Appellant also contends that the business here in question was not an established business and it was error for the court to award damages which included loss of prospective profits. It is true, if a business is unestablished, the anticipated profits are held to be remote, uncertain, and speculative, as there is no ground upon which a satisfactory statement of loss can be made (8 Cal. Jur. p. 777), but here the bakery had been operated for several years, and while Landon, the plaintiff herein, had been personally conducting the bakery but a little over two months, still the income for several years previously was before the court, and the record of plaintiff herein during his occupancy was about the general level for the preceding years, and it gave, therefore, a satisfactory basis upon which to calculate the damage. Lambert v. Haskell, 80 Cal. 611, 22 P. 327, Schumann v. Karrer, supra.

[10] Nor is the contention that Landon should establish facts in mitigation of damages tenable. It is true that the record does not establish the fact that the town of Anderson is a small community and that probably the Anderson bakery was the only building in town furnished and equipped to carry on a bakery; yet it is evident that his eviction and the conversion of his stock and equipment would interrupt the course of his business to a material extent. Furthermore, the burden of proof to show matters in mitigation, if any, rested upon defendant. 8 Cal. Jur. p. 897; Marconi W. T. Co. v. North P. S. Co., 36 Cal. App. 653, 173 P. 103; Hancock v. Board of Education, 140 Cal. 554, 74 P. 44.

[11, 12] The last point urged by appellant as to the excessive amount of damage is that plaintiff and the court in computing the expenses of operating the bakery from which to determine the net profits realized did not deduct anything by way of salary to Landon himself, although he was the baker and carried on the business principally through his own efforts.

It seems apparent that this was error. The value of the labor was independent of the lease and formed no part of the profits of the lease. If appellant had employed a baker, his wages would have been deductible as an expense. In other words, the profit to be recovered is the net profit, to ascertain which all sums expended in producing the crop or conducting the business, including rent and reasonable costs of marketing, are to be considered. McCready v. Bullis, supra; Rice v. Whitmore, 74 Cal. 619, 16 P. 501, 5 Am. St. Rep. 479.

Therefore, in order to determine the profits of the business done by plaintiff, the item of labor, whether performed by himself or others, must be taken into consideration. The only evidence in the record as to the value of the services of plaintiff is an offer by defendant to employ him at the rate of $20 per week, which offer plaintiff rejected. We may assume then that defendant considered plaintiff worth that amount. If we may use that as a basis of calculation, the award should be reduced by that amount. It is the claim of the plaintiff that the damages sustained would justify an award even greater than that allowed and contends that, the court not having segregated the damage, it cannot be said that any error was made therein; but in the findings supporting the judgment it is apparent the court gave the elements that made up the amount awarded, and those included loss of good will, loss of patronage, loss of profits, and loss of leasehold.

Eliminating the amount found to be the value of the leasehold, and deducting the value of the services rendered by plaintiff, the judgment can then be upheld.

The judgment is therefore modified by striking therefrom the sum of $210, being the value of the leasehold, and also the value of the personal services of plaintiff at the rate of $20 per week for the period of the lease from the date of eviction to the date of expiration.

As so modified, the judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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136 Cal.App. 508

HILL v. MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N.

Civ. 8786.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Insurance 🔑539(1).

Where insured died from accident occurring March 17, 1927, public administrator, who was only person charged with giving notice, learned of death in October, 1928, and gave notice to insurer November 14, 1928, notice complied with policy requiring that notice be given as soon as reasonably possible.

2. Insurance 🔑559(2).

Insurer, denying liability on accident policy and refusing to furnish forms for proof of loss, waived such proof.

3. Insurance 🔑622(4).

Suit on accident policy brought March 1, 1930, *held* under facts not barred by two-year limitation in policy, though insured died from accident occurring March 17, 1927.

Facts disclosed that accident policy required suit to be brought within two years after time for proof of loss, which was required to be made within ninety days after loss, that the public administrator, who was the only one charged with giving notice, did not learn of death until October, 1928, and did not give notice to insurer until November 14, 1928, whereupon proof of loss was waived by insurer's denial of liability and refusal to furnish forms for proof of loss.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Albert E. Hill, as administrator of the Estate of M. Perata, sometimes known as Martino Perata, deceased, against Mutual Benefit Health & Accident Association. From a judgment for plaintiff, defendant appeals. Affirmed.

Dunn, White & Aiken and Hamilton Wright, all of Oakland, for appellant.

Earl Warren, Dist. Atty., and Nathan Harry Miller, Deputy Dist. Atty., both of Oakland, for respondent.

KNIGHT, Justice.

This is an action to recover on a policy of accident insurance. The demurrer interposed by the defendant insurance company to the second amended complaint was overruled and said company declined to answer; whereupon a default judgment was entered, from which the company appeals.

The points urged in support of the appeal are that it affirmatively appears from said complaint, to which a copy of the policy is attached, that notice of the accidental death of the insured was not given within the time specified in the policy; that no proof of loss was furnished as required by its terms; and that the action was not commenced within the period of time fixed by the policy.

The following are the provisions of the policy involved: "4. Written notice. * * * In the event of accidental death immediate notice thereof must be given to the Association. 5. * * * Failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as reasonably possible. 6. The Association upon receipt of such notice, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not so furnished within fifteen days after the receipt of such notice, the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, character and extent of the loss for which claim is made. 7. Affirmative proof of loss must be furnished to the Association at its said office * * * and in case of claim for any other loss [death] within ninety days after the date of such loss. * * * 14. No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proof of loss has been filed in accordance with the requirements of this policy, nor shall such action be brought at all unless brought within two years from the expiration of the time within which proof of loss is required by the policy."

The facts as they appear from said complaint are as follows: The policy was issued January 4, 1923, to Martino Perata, whereby, among other things, he was insured for $2,000 against loss of life by accident, the amount of the insurance, in case of accidental death, being made payable to his estate. On March 17, 1927, while walking along the railroad tracks in the vicinity of Fruitvale station, Alameda county, he was struck by a "stay-chain" sprung out from one of the cars of a moving train, and thrown under the wheels. As a result of the injuries inflicted, he died the following day, leaving no heirs in this state. Plaintiff is the public administrator of Alameda county and did not learn of the case until about the middle of October, 1928, whereupon he immediately applied for and on October 18, 1928, there were issued to him letters of administration in the matter of the estate of said deceased. On or about November 14, 1928, he gave to said company the requisite notice of the accidental death of Perata, and approximately two weeks later demanded from the company the forms upon which to prepare proof of loss. The company denied all liability for the loss and upon that ground refused to furnish said forms; consequently no proof of loss was made, and on March 1, 1930, well within the two-year period from that time, plaintiff commenced this action. The specific allegations of said complaint from which appear the essential facts above mentioned are as follows: "That plaintiff did not know and was not informed of the aforesaid death of the said decedent, Martino Perata, or of the existence of the aforesaid policy of insurance until on or about the 18th day of October, 1928. That compliance with the provisions of the aforesaid policy requiring the giving of notice and furnishing of proofs was for that reason impossible before said date. That when plaintiff herein was informed of the death of the aforesaid decedent and of the existence of the aforesaid policy, he, with due diligence, secured the appointment of himself as Administrator of the estate of the said Martino Perata, and qualified as such Administrator, and on the said 18th day of October, 1928, as aforesaid, Letters of Administration were issued to him, and he thereafter, to-wit, on or about the 14th day of November, 1928, as aforesaid, gave to defendant notice of the accidental death of the said Martino Perata. That all of the aforesaid things were done with due diligence and as soon as reasonably possible. That after plaintiff gave to said defendant written notice of the death of the said Martino Perata, as aforesaid, and demanded from said defendant such forms as are usually required by it according to the terms of its policy for filing proof of loss as aforesaid, plaintiff was informed by defendant on or about the 27th day of November, 1928, that because immediate notice of death had not been given and proofs had not been submitted within ninety days of death, defendant would not admit liability upon the aforesaid policy of insurance. That when defendant advised plaintiff that defendant would not admit liability upon the aforesaid policy, even though proofs of loss were filed at that time, to-wit, on or about the 27th day of November, 1928, as aforesaid, defendant waived the provision in the aforesaid policy requiring furnishing of such proofs, and for that reason plaintiff did not furnish proofs of loss."

[1-3] In view of the facts and circumstances thus alleged, we are of the opinion that the trial court did not err in holding that said complaint stated a cause of action and that the action was begun within the limitation of time fixed by the terms of the policy. Owing to the peculiar circumstances of the case, plaintiff was evidently the only person charged with giving the notice of the accidental death of the assured; and, obviously, it was not "reasonably possible" for him to give the same until after he had learned of the death. As said in the following case, instances might arise where a very short time would be unreasonable; others where a long period of time would be reasonable: Farrell v. Nebraska Indemnity Co., 183 Minn. 65, 235 N. W. 612. And having given the requisite notice as soon as it was reasonably possible, plaintiff took all subsequent steps necessary to comply

with the provisions of the policy and within the limitation of time fixed thereby. The denial of all liability by said company for the loss, and its refusal to furnish the forms for the proof of loss doubtless operated as a waiver of the condition requiring proof of loss (Paez v. Mutual Indemnity, etc., Ins. Co., 116 Cal. App. 654, 3 P.(2d) 69; Bank of Anderson v. Home Ins. Co., 14 Cal. App. 208, 111 P. 507), and "within two years from the expiration of the time within which proof of loss is required by the policy" (see clause 14 thereof hereinabove quoted) the action was begun.

The trial court's decision on the points raised by the demurrer is fully sustained by the case of Federal Life Ins. Co. v. Holmes' Committee, 232 Ky. 834, 24 S.W.(2d) 906, which is similar in principle and analogous in its facts to the present case. Numerous authorities from other jurisdictions are cited and discussed therein to support the reasoning therein followed; and, although we have given full consideration to the arguments advanced and authorities cited by appellant in opposition to the trial court's ruling, we have found nothing therein to show that the conclusions reached by the trial court are unsound, or that the law declared in the case last above cited is inapplicable here.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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136 Cal.App. 467

ROSSLOW v. JANSSEN.

Civ. 9363.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1934.

Rehearing Denied Feb. 28, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Master and servant 🔑420.

Court had jurisdiction to determine reasonable attorneys' fees in compensation case without hearing testimony, and express finding was unnecessary (St. 1931, p. 1951, § 29 (b).

2. Judgment 🔑194.

When there is jury trial as to some issues and court trial on remaining issues, entry of judgment on previous verdict is premature, since judgment may be entered immediately upon return of verdict only when verdict disposes of entire case.

3. Appeal and error 🔑347(1).

Time for perfecting appeal from judgment did not begin to run until after proper entry was made, since until then judgment was not "final judgment" (Code Civ. Proc. §§ 939, 940).

[Ed. Note.—For other definitions of "Final Decree or Judgment," see Words & Phrases.]

4. Appeal and error 🔑347(1).

Court cannot, by antedating judgment or order or entry thereof, cut off right of appeal (Code Civ. Proc. §§ 939, 940).

5. Appeal and error 🔑347(3).

Where judgment allowing attorneys' fees was filed on October 5, 1933, nunc pro tunc as of September 12, 1933, when clerk erroneously entered judgment for compensation only, appeal taken on November 28, 1933, would not be dismissed, since it was within 60 days following date of "final judgment" (Code Civ. Proc. §§ 939, 940).

6. Appeal and error 🔑345(1).

That defendant filed notice of motion for new trial prior to entry of final judgment did not preclude him from perfecting appeal within 60 days from final judgment, where judgment originally entered was premature (Code Civ. Proc. §§ 660, 939, 940).

7. Appeal and error 🔑345(1).

Where action embraces several issues, some of which are tried by court and some by jury, notice of intention to move for new trial, served and filed after verdict on issues submitted to jury, but before decision on issues by court, is premature, and does not control time within which appeal may be taken (Code Civ. Proc. §§ 660, 939, 940).

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy Judge.

Proceeding under the Workmen's Compensation Act by A. F. Rosslow against E. A. Janssen. Judgment for plaintiff and defendant appeals and plaintiff moves to dismiss the appeal.

Motion denied.

Ivan N. Maroevich and Frank V. Kington, both of San Francisco, for appellant.

H. C. Burnhill and Francis Gill, of San Francisco, for respondent.

TYLER, Presiding Justice.

Motion to dismiss appeal. From the record it appears that on August 3, 1933, a jury rendered a verdict in the above-entitled action in favor of plaintiff and against the defendant in the sum of $8,000 and costs. The action was one brought under the provisions of section 29 (b) of the Workmen's Compensation Act (St. 1917, p. 857, § 29 (b), as amended by St. 1931, p. 1951) for damages for personal injuries and for attorneys' fees as provided for under the act. Entry of judgment upon the verdict was stayed by the trial court pending its disposition of defendant's motion for judgment notwithstanding the verdict. Thereafter, on August 14, 1933, defendant served and filed his notice of intention to move for a new trial. On September 11, 1933, the trial court denied defendant's motion for judgment notwithstanding the verdict, and, acting under section 29 (b) of the act above referred to, granted plaintiff the sum of $1,000 attorneys' fees in addition to the amount of the verdict. A ten days' stay of execution was ordered until after the determination of defendant's motion for a new trial. On the following day, September 12, 1933, the clerk entered judgment for $8,000, together with the sum of $496.25 as costs, in accordance with the verdict, but not in conformity with the order of September 11, 1933, as he failed to include in the judgment the amount of attorneys' fees awarded plaintiff. On October 5, 1933, the court, in order to have the judgment speak the truth, decreed that the proper order be entered nunc pro tunc as of September 12, 1933, so as to include in the judgment the amount allowed as attorneys' fees. This order was made to correct the clerical misprision of the clerk. Thereafter, on September 19, 1933, defendant served and filed a second notice of intention to move for a new trial, alleging therein the same grounds he had previously enumerated in his first notice. On October 13, 1933, no notice of entry of judgment having been served on defendant by plaintiff, the original motion for a new trial filed August 14, 1933, was, by operation of law, denied under the provisions of section 660 of the Code of Civil Procedure. On November 18, 1933, the trial court formally acted on defendant's second motion for a new trial and entered its order denying the same. Thereafter, on November 28, 1933, defendant filed a notice of appeal to this court. Respondent here contends, in support of his motion to dismiss, that the notice of appeal filed November 28, 1933, is ineffectual for the purpose of perfecting an appeal under sections 939 and 940 of the Code of Civil Procedure, for the reason that sixty days from the entry of the judgment lapsed November 13, 1933, judgment therein having been entered on September 12, 1933; that the time was not extended by reason of the pendency of a motion for a new trial, as thirty days had likewise elapsed since the determination in the trial court of defendant's proceedings upon motion for a new trial on November 13, 1933, said motion for a new trial having been filed on August 14, 1933, and, no action thereon having been taken by the court within sixty days as provided by section 660 of the Code of Civil Procedure, it was deemed denied.

It is appellant's contention that his time for appeal has not elapsed, for the reason that, as no finding has ever been made by the court as to the reasonableness of the attorneys' fees, there has never been any judgment thereon, or at least not until October 5, 1933, the date of the nunc pro tunc order, if such order can be considered a finding. The same argument is presented in relation to the original motion for a new trial, it being claimed in this connection that, as no proper judgment had been rendered at the time the notice was given, it was premature and ineffectual and did limit the time for appeal.

[1-7] The trial court's order allowing plaintiff attorneys' fees was made and entered in the minutes simultaneously with the denial of defendant's motion for judgment notwithstanding the verdict on September 11, 1933. Judgment was incorrectly entered as above indicated. The judgment rendered constituted a single judgment. The attorneys' fees were an incident thereto, and the court had power to determine what were reasonable attorneys' fees without hearing any testimony upon the subject, and an express finding was unnecessary. Huber v. Shedoudy, 180 Cal. 311, 314, 181 P. 63. This judgment, however, was not complete or effective until properly entered. When there is a jury trial as to some issues and a court trial on remaining issues, an entry of judgment on a previous verdict is premature and unauthorized. A party is entitled to have judgment entered immediately upon a decision or return of a verdict only when such verdict disposes of the entire case. 34 Cor. Jur. 62, 63; Estate of McKenna, 138 Cal. 439, 440, 71 P. 501; Reclamation District v. Thisby, 131 Cal. 572, 574, 63 P. 918. The statute did not begin to run until after the proper entry was made, since it was not a final judgment until then. Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491; Coon v. Grand Lodge, 76 Cal. 354, 18 P. 384; 2 Hayne on New Trial and Appeal, § 204. Proper entry was not had until October 5, 1933, the date when the order nunc pro tunc was made. This was the actual date of the entry. A

court cannot, by antedating an order or the entry of it, cut off the right of a party to an appeal. This right given by the Code is not lost or affected by such action. Spencer v. Troutt, 133 Cal. 605, 65 P. 1083. The rights of the parties in respect to an appeal being determined by the date of the actual entry of the judgment or order (Code Civ. Proc. § 939), they cannot be affected by the entry of the judgment or order nunc pro tunc as of a prior date. Martin v. Smith, 11 S. D. 437, 78 N. W. 1001. The earliest date, therefore, upon which the time for appeal from the judgment as a whole could start, was October 5, 1933. The appeal taken on November 28, 1933, was well within sixty days following that date. Nor does the fact that defendant filed his notice of motion for a new trial prior to the entry of the final judgment alter or change the situation. The judgment originally entered by the clerk, being premature, was without authority or effect. San Joaquin, etc., Irrigation Co. v. Stevinson, 30 Cal. App. 405, 158 P. 768.

Where an action embraces several issues, some of which are tried by the court and some by the jury, a notice of intention to move for a new trial, served and filed after the verdict on the issues submitted to the jury, but before the decision on the issues tried by the court, is premature and of no effect, and does not in any manner control the time within which an appeal may be taken. Barnes v. Foley, 189 Cal. 226, 207 P. 885.

For the reasons given, the motion to dismiss the appeal is denied.

We concur: KNIGHT, J.; CASHIN, J.

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136 Cal.App. 787

A. F. ROSSLOW, Petitioner, v. H. I. MULCREVY, Clerk of the City and County of San Francisco, and Ex Officio Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, Respondent.

Civ. 9358.

District Court of Appeal, First District, Division 1, California.

Jan. 29, 1934.

Rehearing Denied Feb. 28, 1934.

H. C. Burnhill and Francis Gill, of San Francisco, for petitioner.

Frank V. Kington, of San Francisco, for respondent.

TYLER, Presiding Justice.

Petition for mandate to compel respondent to issue execution on a judgment.

The facts are stated in the opinion in Rosslow v. Janssen (Cal. App.) 29 P.(2d) 287, this day decided. Upon the authority of that case, the petition is denied.

We concur: KNIGHT, J.; CASHIN, J.

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136 Cal.App. 437

DRUKKER v. HOWE & HAUN INV. CO. et al.

Civ. 8933.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1934.

Hearing Denied by Supreme Court March 26, 1934.

1. Payment ⚷21.

Delivery of check is not payment, in absence of agreement, and does not have such effect until check is paid.

2. Payment ⚷21.

Payment by check when latter is paid relates to date of its delivery.

3. Payment ⚷21.

Delivery of check to building contractor for amount of loan installment, agreed to be paid owner by maker, did not constitute performance of such contract, in absence of agreement by contractor or owner to accept check as payment, where it was never paid (Civ. Code, § 1487).

4. Bills and notes ⚷343.

Indorsee's knowledge that note was given in consideration of payee's executory contract does not deprive indorsee of character as holder in due course, if he had no notice of previous breach of contract (Civ. Code, §§ 3137, 3140).

5. Bills and notes ⚷497(2).

Proof by indorsee that note was acquired for value before maturity in usual course of business, without any circumstances creating presumption that he knew of facts impeaching its validity, cast burden on party asserting that instrument was taken with notice of latter's equity to show such fact (Civ. Code, §§ 3136, 3137, 3140).

6. **Mortgages** ⚷258.

Parties purchasing note and trust deed, with knowledge of terms of payee's contract to loan amount thereof to maker in installments and nonpayment of first installment, and relying on payee's promises to pay installments due, were bound to ascertain whether contract had been performed before paying price.

7. **Appeal and error** ⚷1071(6).

Trial court's failure to find on one issue is not reversible error, where evidence and findings made reasonably support but one conclusion against appellant.

8. **Bills and notes** ⚷98.

Borrower *held* not estopped to deny validity of note for sum agreed to be loaned in installments and trust deed securing it or to maintain action to declare them void as to sums exceeding amount paid her by lender by payment of first interest installment to purchasers of such instruments.

9. **Cancellation of instruments** ⚷43.

Maker suing to declare note and trust deed void as to sums exceeding amount paid her by payee under contract to loan amount of note in installments *held* entitled to credit for interest payment to purchaser of instruments, though right thereto was not put in issue by complaint, where defendant alleged such payment as ground for plea of estoppel to deny validity of instruments.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

Action by Hattie M. Drukker against the Howe & Haun Investment Company, John B. Losey, and others. Judgment for plaintiff, and defendants Losey and another appeal.

Modified and affirmed as modified.

E. C. Pyle, of Los Angeles, for appellants.

Earl A. Everett and Robert E. Austin, both of Los Angeles, for respondent.

PER CURIAM.

The plaintiff, who was the owner of lot 625 of tract No. 6380, sometimes known as Beverly Vista, in Los Angeles county, applied to Howe & Haun Investment Company, a corporation, for a loan of $5,000, to be secured by a deed of trust of the property, her purpose being to erect a dwelling thereon. A written application for a loan signed by her recited that the loan was to be used for said purpose, and that the money should be advanced in installments as the building progressed, the installments to be as follows: "$200.00 to the agent above named as a commission for procuring the said loan; $960.00 when the foundation is in and subfloor laid; $960.00 when the side-walls and roof are up and on and the building completely inspected; $960.00 when the building is plastered; $960.00 when the building is completed and notice of completion recorded in proper file; $960.00 thirty days after completion." The commission mentioned was to be paid to H. K. Howe, an officer of the company. The company agreed to make the loan, and on March 17, 1930, plaintiff executed to it her note, negotiable in form, for the above amount, payable three years after date with interest payable quarterly. At the same time she executed the deed of trust, the company being named therein as beneficiary, and the Title Insurance & Trust Company as the trustee. A contract was also made by her with Hermann Johnson, a contractor, for the erection of the dwelling, the contract price being $4,800, to be paid in five installments as provided in the loan application. Plaintiff instructed the company to pay these installments to the contractor as they became due from the amount agreed to be loaned.

Work on the dwelling commenced on or about March 20, 1930, and on April 5th the sum of $864.32 was paid by the company to the contractor on account of the first installment. Some further work was done and on April 10th the company delivered a second check for $960 to the contractor for the second installment. This check, however, was not paid and the dwelling was not completed. The amount of the first check appears to be all that the company paid except certain items which will be hereinafter considered.

Shortly after their execution the company advertised the note and deed of trust for sale, and, after negotiations, which commenced on April 4, 1930, defendants Losey on April 7th agreed to purchase the same for the full face value thereof. On that date they paid the company $4,040, and agreed to pay the balance thirty-five days after the filing of a notice of the completion of the dwelling. The instruments were transferred to said defendants, and on June 17, 1930, plaintiff paid them $100, this being the first quarterly installment of interest. On July 5, 1930, plaintiff filed her complaint, asking that the note and deed be declared void as to all sums in excess of $864.

Defendants in their answer averred that

they acquired the note and deed in good faith for value and without notice or knowledge of the terms of the contract between the plaintiff and the company except the terms and conditions of the note and mortgage. Further, that by the payment of the interest installment mentioned plaintiff was estopped from denying the validity of the instruments or maintaining the action.

The court concluded that the plaintiff was not estopped by the interest payment, and entered a decree in her favor, adjudging her to be the owner of the lot described subject only to a lien thereon in the sum of $864, with interest at the rate of 8 per cent. per annum from April 7, 1930, evidenced by said note and deed of trust, less a credit of said interest payment as of June 17, 1930. No findings on the questions of good faith or notice were made except that defendants Losey "saw the advertisement mentioned on April 4, 1930, and went to the office of Howe & Haun Investment Co. and inquired about said loan; that they were informed by an agent of said Howe & Haun Investment Co. that it had the note and deed of trust hereinbefore mentioned; that it had received it and was making a building loan to plaintiff therefor, and that the moneys accruing to plaintiff from said loan were to be paid out to her only as the improvements had been carried forward; that the improvements had been carried forward to the point at which a payment was due to plaintiff from said Howe & Haun Investment Co., but that said payment had not been made but would be made within a day or two; that defendants John B. Losey and Alla Frances Losey visited the property described in the deed of trust hereinabove referred to on said 4th day of April, 1930, and observed that there was a building thereon in the course of construction; that neither of said defendants saw or communicated with the plaintiff herein. * * *" The court also found that the sum of $864 was paid on the first installment. The parties, however, have stipulated that the correct amount paid was $864.32; further, that certain deductions were made from the first installment of the loan, these items being as follows: Fire insurance premium $42; escrow charge $15; drawing deed $3.50; recording deed $3.50; tax $1.68; title insurance policy $30. They agree that the premium for the fire insurance policy, the recording fee, and the tax—a total of $47.18—were proper charges against plaintiff, but disagree as to the other items, the plaintiff claiming that under her contract with the company these charges, totaling $48.50, were improperly withheld and should have been added to the first payment made to the contractor.

The application for the loan recited that the company had "advanced ——— dollars to cover the costs of a title search with the understanding that should the said title search disclose any liens or incumbrances" then the applicant would discharge the same or the company might refuse the loan, in which event it agreed to release any mortgage or deed of trust which had been executed to it upon being reimbursed for all its expenses and any moneys advanced by it for agent's commissions. As shown by the agreement, the only deductions expressly provided to be made from the total amount of the loan was the sum of $200 to be paid the agent as a commission. In a letter from the company to the plaintiff dated April 9, 1930, inclosing the title insurance policy, she was told that the premium on fire insurance had been deducted from the first installment paid the contractor, but the letter made no mention of any other charge or deduction. Plaintiff appears to have acquiesced in the company's action, and her counsel stipulates that this and the other items aggregating $47.50 were proper charges against her. With the exception of the stipulation of counsel and the provision in the agreement quoted, the record discloses nothing which justified any deductions.

[1-3] As stated, the second installment on the building contract became payable when the side walls and the roof were "up and on and the building completely inspected." According to the testimony of the contractor, this work was complete on the 5th or 6th of April, and the company had been asked to inspect it. There was no direct evidence of an inspection. Nevertheless a check for the second installment was received by the contractor on April 10, but, as stated, was not paid by the drawee or otherwise. The company's obligation to plaintiff was to pay these sums as they became due the contractor, and such payment would have constituted performance on their part of their contract with her (Civ. Code, § 1487). However, in the absence of an agreement, the delivery of a check is not payment and does not have this effect until it is itself paid. Utah Construction Co. v. Western Pacific R. Co., 174 Cal. 156, 166, 162 P. 631; Williams v. Braun, 14 Cal. App. 396, 112 P. 465. When paid, it relates to the date of its delivery. Hooker v. Burr, 137 Cal. 663, 668, 70 P. 778, 99 Am. St. Rep. 17. But here, so far as shown, there was no

agreement to accept the check as payment by either the contractor or the plaintiff; and the same never having been paid a claim of performance could not be based thereon. It appears beyond reasonable question that the company was in default on the first installment to the extent stated, and also on the second installment, at the time defendants Losey completed their purchase, namely, on April 7, 1930.

[4, 5] It is the rule that knowledge by an indorsee that the note was given in consideration of an executory contract by the payee does not deprive the indorsee of his character as a holder in due course if he had no notice of a previous breach of the contract. Splivallo v. Patten, 38 Cal. 138, 99 Am. Dec. 358; Flood v. Petry, 165 Cal. 309, 132 P. 256, 46 L. R. A. (N. S.) 861; Pratt v. Dittmer, 51 Cal. App. 512, 197 P. 365; 8 Cor. Jur., Bills & Notes, § 718, p. 510. To constitute notice of an infirmity in the instrument or a defect in the title of the person negotiating it, the one to whom it is negotiated must have had actual notice of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. Civ. Code, § 3137. Every holder is deemed to be prima facie a holder in due course, but when it is shown that the title of any person who negotiated the instrument is defective, the burden is upon the holder to prove that he or some person under whom he claims acquired the title as a holder in due course (Civ. Code, § 3140); and such title is defective when the instrument has been negotiated in breach of faith or under such circumstances as to amount to fraud (Civ. Code, § 3136). But where the indorsee shows that the instrument was acquired for value before maturity in the usual course of business, and there are no circumstances creating the presumption that he knew of facts impeaching its validity, the burden is then cast upon his adversary to show that the instrument was taken with notice of the latter's equities. Goodale v. Thorn, 199 Cal. 307, 249 P. 11.

[6] It is evident from the testimony of defendants Losey, as well as from the finding quoted, that defendants were familiar with the terms of the contracts in question although they made no express admission of the fact. They also knew on April 4th, as the court found, that the first installment was past due. Further, they visited the property on that date and observed that the foundation and subfloor of the dwelling had been laid, this being the first stage of the construction as provided by the contracts; and also that the walls were up and that the roof was on. This was all that was necessary with the exception of an inspection to entitle the contractor to the second installment. It appears that the company failed to inspect and, as shown, defaulted in payment. It is also clear, both from defendants' testimony and the finding, that they relied upon the promises of the company's agent that these installments would be paid. The facts known to them were sufficient to impeach the company's right to negotiate the instrument; and it was their duty before making payment to ascertain whether the company's contract with the plaintiff had in these respects been performed.

[7] While, as stated, the court made no express finding on this question, nevertheless where the findings made and the evidence reasonably support but one conclusion, and that against the appellant, the failure to find on an issue is not ground for reversal. Hulen v. Stuart, 191 Cal. 562, 217 P. 750; Meadows v. Snyder, 209 Cal. 270, 286 P. 1012.

[8] As respects the claim that the interest payment by plaintiff constituted an estoppel, defendants suffered no detriment and the plaintiff received no benefit on that account; nor was such payment, in the light of what she then knew of the transaction between defendants and the company, necessarily inconsistent with her subsequent contention that the obligation was enforcible against her only in part.

[9] Defendants complain that the question of plaintiff's right to a credit for the interest payment in the manner decreed was not put in issue by plaintiff. While this is true of plaintiff's complaint, defendants alleged the fact of payment as ground for their plea of estoppel. It was a proper credit on any theory of the case, and the trial court correctly so held.

As stated, it was stipulated that the amounts properly charged against plaintiff totaled $911.50; consequently, this was the amount chargeable as a lien against the property and secured by the deed of trust. The judgment is accordingly modified by striking therefrom that portion which reads "but said note is valid and enforcible only for the sum of $864.00, with interest thereon at the rate of eight per cent per annum from the 7th day of April, 1930, and plaintiff is entitled to a credit thereon for the sum of $100.00 as of June 17, 1930," and inserting in lieu thereof the following: "But said note is valid and enforcible only for the sum of $911.50, with interest thereon at the rate of eight per cent per annum from the 7th day of April, 1930, and plaintiff is entitled to a credit thereon for the sum of $100.00 as of June 17, 1930." As so modified, the judgment will stand affirmed, each party to bear his own costs of appeal.

136 Cal.App. 416

PETROFF v. NUNES.

CONDOS v. SAME.

CAMPBELL v. SAME.

Civ. 4986.

District Court of Appeal, Third District, California.

Jan. 26, 1934.

1. New trial 🔑78(1).

Trial judge retains discretion to grant new trial second time for lack of evidence to support judgment, though he has previously granted similar motion to vacate another judgment entered pursuant to former verdict on same evidence.

2. New trial 🔑78(1).

Judge should scrutinize evidence more carefully before granting second new trial after two juries have reached same conclusion on same testimony.

3. Appeal and error 🔑977(1).

On appeal from second order granting new trial, reviewing court may reverse second order for less aggravated abuse of discretion.

4. New trial 🔑65.

Trial judge must exercise sound discretion in requiring every verdict to harmonize with facts and law of case.

5. Appeal and error 🔑979(1).

Trial court is vested with sound discretion to determine on motion for new trial whether verdict and judgment are supported by evidence, and its conclusion will not be disturbed on appeal except for abuse of discretion.

6. New trial 🔑78(1).

Granting of second new trial for insufficiency of evidence to support judgment for defendant motorist in actions for injuries to guests, *held* not abuse of discretion (Code Civ. Proc. § 657; St. 1929, p. 540, § 122).

7. Appeal and error 🔑750(9).

New trial granted for insufficiency of evidence to support judgment and on other grounds was affirmed where complaining party on appeal claimed no error in granting new trial for other grounds, but claimed error only in respect to insufficiency of evidence (Code Civ. Proc. § 657; Rules for Supreme Court and District Courts of Appeal, rule 8, §§ 2, 3).

8. Appeal and error 🔑854(6).
New trial 🔑163(2).

New trial granted in general terms includes all grounds on which motion was made, except that court must specifically mention insufficiency of evidence, and order will be affirmed if it finds adequate support on any of grounds included within general order (Code Civ. Proc. § 657; Rules for Supreme Court and District Courts of Appeal, rule 8, §§ 2, 3).

9. Appeal and error 🔑933(4).

Reviewing court must assume that new trial for insufficiency of evidence to support judgment and for other grounds was properly granted where no lack of evidence was pointed out and no reason assigned why order was not justified on other grounds in motion (Code Civ. Proc. § 657; Rules for Supreme Court and District Courts of Appeal, rule 8, §§ 2, 3).

Appeals from Superior Court, Solano County; W. T. O'Donnell, Judge.

Actions by Nick Petroff, by Nick Condos, and by C. H. Campbell against Fred Nunes. Judgment for defendant, and from an order granting a new trial, defendant appeals. On motion to dismiss appeals or affirm order granting new trial.

Order granting new trial affirmed.

J. Hampton Hoge, of San Francisco, and Joseph M. Raines, of Fairfield, for appellant.

Franklin P. Bull, William M. Maxfield, W. A. Lahanier, and Elmer E. Robinson, all of San Francisco, and W. U. Goodman, of Fairfield, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiffs have presented this alternative motion, under the provisions of rule V, section 3, of the Rules for the Supreme Court and District Courts of Appeal, to dismiss the appeal or affirm the order granting a new trial after judgment had been rendered pursuant to the verdict of a jury which was returned in favor of the defendant. The motion is made on the ground that the appeal was taken for the purpose of delay only, and that it presents no substantial issue of merit.

The above-entitled actions were consolidated for trial. They are suits for personal injuries sustained in an automobile casualty. The plaintiffs were riding with the defendant in his automobile along the public highway when a collision with another machine occurred. It was broad daylight. The pavement was straight and level. The defendant was running at a rapid rate of speed in close proximity behind another machine, which suddenly flashed on its tail-light, indicating that the foremost car was about to stop, or at least was slackening its speed. Both cars were traveling on the right-hand side of the pavement. The defendant swerved his machine to the left to pass the preceding car, when a head-on collision occurred with another automobile which was approaching from the opposite direction within less than 100 yards distant. The defendant failed to observe the approaching machine until after his car emerged from behind the one which he had been following.

These cases were previously presented to this court on appeal from a former order of the same judge also granting a new trial for insufficiency of the evidence to support the first judgment which was entered in favor of the defendant, pursuant to another verdict. The former order was affirmed on appeal. Petroff v. Nunes, 123 Cal. App. 614, 11 P.(2d) 648. The trials were presented to different juries upon substantially the same evidence. A more complete statement of the facts will be found in the former opinion of this court above cited. The record presents a conflict of evidence.

The motion for a new trial was presented to the court upon nearly all the grounds authorized by section 657 of the Code of Civil Procedure, including that of the insufficiency of the evidence. The motion was granted on the ground of insufficiency of the evidence, "and upon the other grounds set forth in said motion." In the appellant's brief he urges only the alleged sufficiency of the evidence as ground for a reversal. None of the other grounds upon which the new trial was granted are discussed.

The sole point upon which the appellant relies is his contention that the weight of the evidence supports the judgment which was rendered pursuant to the verdict, and that the trial judge has no discretion or authority to grant a new trial for a second time for a lack of evidence after two juries have returned similar verdicts based upon the same evidence. It is asserted that on appeal from a second order granting a new trial under such circumstances, the well-established rule which requires an appellate court to affirm the order except for an abuse of discretion on the part of the trial judge, does not apply, and, upon the contrary, that the court of appeal should then weigh the evidence and decide in favor of the preponderance thereof.

[1-4] We are of the opinion a trial judge retains a discretion to grant a new trial a second time for lack of evidence to support the judgment, even when he has previously granted a similar motion to vacate another judgment entered pursuant to a former verdict based upon the same evidence. It is true that a judge should exercise greater caution and scrutinize the evidence more carefully before he grants a second new trial after two juries have reached the same conclusion based upon the same testimony. It follows that upon appeal from a second order granting a new trial under such circumstances, while the trial court is still entitled to the benefit of the well-established rule that the order will be affirmed unless it appears that it was made as the result of an abuse of discretion, the reviewing court will be warranted in reversing the second order for a less aggravated abuse of discretion. Under our statute a trial judge is not only authorized, but it is his solemn duty to exercise a sound discretion in requiring every verdict, no matter how many times a case is tried before him, to harmonize with the facts and the law of the case, to the end that justice may be subserved. Both the judge and the jury have their independent functions to perform, subject only to the sound and sensible restrictions of the law. With due respect for the great benefits derived from our jury system, the conscientious and skilled judge, after all, must assume the final responsibility of seeing that all verdicts substantially conform to justice and law. There is nothing so infallible about the verdict of a jury as to render it unassailable under all circumstances. It is, however, true that a second verdict which reaches the same solution as that adopted by a former jury upon the same facts, furnishes more persuasive reason to assume that it is correct.

The law regarding the number of times a court may grant new trials, for lack of evidence, from judgments rendered pursuant to successive verdicts returned by different juries, based upon the same evidence, is very clearly and completely announced in 46 C. J., page 69, § 21. It is there said:

"In the absence of statute to the contrary, there is no absolute rule limiting the number of new trials that may be allowed in a case for any cause or causes."

This declaration is supported by a host of authorities, both federal and state. From that excellent review of this subject, it will be observed there is some conflict of authority. The statutes of many states specifically limit the number of times a court may grant a new trial for an insufficiency of the evidence. Our state has no such statute. The inference follows that our courts are therefore unlimited in the number of times a new trial may be granted for a lack of evidence provided the orders are made in the exercise of sound discretion and with increasing precaution with each succeeding order. In the absence of statutes limiting the number of times a court may grant new trials, it will be observed the weight of authority sustains the rule authorizing at least a second order granting a new trial under the circumstances of this case. In the case of Davis v. Central States Fire Ins. Co., 121 Kan. 69, 245 P. 1062, 1063, the facts regarding the power of a court to grant a second new trial under circumstances exactly like those which are involved in this case, except that the verdicts were rendered in favor of the plaintiff instead of the defendant, in response to the contention that the court exhausted its power to grant the second new trial, the court said:

"We cannot approve this contention. The fourth of the statutory grounds upon which a new trial may be granted is 'that the verdict * * * is in whole or in part contrary to the evidence.' * * * This does not mean merely that a verdict may be set aside, if there is no evidence tending to support it * * * but that a new trial may and indeed must be granted unless the judge is able to give his approval to the finding of the jury as a matter of fact. Nothing in the statute either expressly or by fair implication justifies confining the application of this provision to a single trial or verdict. * * *

" 'It has been the unvarying decision of this court to permit no verdict to stand unless both the jury and the court trying the cause could, within the rules prescribed, approve the same. When the judgment of the trial judge tells him the verdict is wrong, whether from mistake, or prejudice, or other cause, no duty is more imperative than that of setting it aside.' * * *

"The trial judge is not only authorized but required to exercise an independent judgment upon the issue of fact presented. This does not mean that he is to give no weight to the decision reached by the jury. * * * And where the same verdict is reached by two successive juries its persuasive force is obviously increased. But its weight in this connection is to be determined in the district court and not by this court on appeal. * * * The reasons back of the policy of having the judge, in the familiar phrase, act as the thirteenth juror, apply in subsequent trials as well as in the first."

Among the other states which, like California, have no statutes limiting the number of successive new trials which may be granted under the circumstances of this case, and which have rendered decisions in accordance with the preceding quotation from the Kansas case, are Pennsylvania, Georgia, New Jersey, Missouri, and Minnesota. The cases upon which the appellant chiefly relies in support of his theory that the court exhausted its discretion to grant a new trial for a second time for a lack of evidence are Thomas & Co., Inc., v. Hillis, 70 Wash. 53, 126 P. 62, and Faben v. Muir, 77 Wash. 460, 137 P. 1042. We are not in accord with the principle upon which these cases were determined.

[5] Since the court is vested with a sound discretion to determine upon a motion for new trial whether the verdict and judgment are supported by the evidence, and that its conclusion in that regard will not be disturbed on appeal except for an abuse of discretion (20 Cal. Jur. 27, § 13; 20 Cal. Jur. 111, § 71; 2 Cal. Jur. 905, § 533; Estate of Bell, 198 Cal. 32, 243 P. 423; Newman v. Overland Pac. Ry. Co., 132 Cal. 73, 64 P. 110), and that the same rule prevails even to the granting of a new trial for the lack of evidence, from a second judgment based upon the same evidence, and there being nothing in the record on appeal in this case to indicate an abuse of discretion, it follows that the order granting a new trial on that ground should be affirmed.

[6] We are unable to say there was an abuse of discretion in granting a new trial. It is not unreasonable to assume the judge was convinced from the evidence that the defendant was guilty of negligence in driving at a rapid rate of speed in such close proximity behind another machine, or that he was negligent in attempting to pass the machine in violation of section 122 of the California Vehicle Act, as it then existed (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50), without first ascertaining that the highway on his left side was "clearly visible and * * * free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety." If

the judge did believe that the evidence clearly shows the defendant to have been guilty of negligence, and, upon the contrary, that the plaintiffs were free from contributory negligence, it was his duty to grant a new trial. The order should therefore be affirmed on that ground.

[7] The order should be affirmed for another reason. The new trial was granted on the ground of the insufficiency of the evidence to support the judgment, and "upon the other grounds set forth in the motion." The motion was made upon all the grounds authorized by section 657 of the Code of Civil Procedure, except the fifth, which has reference to excessive damages. Upon their motion for new trial the plaintiffs relied specifically upon alleged irregularities in the proceedings, the alleged misconduct of adverse counsel and upon newly discovered evidence. Affidavits were filed in support of these contentions. Counter affidavits were also filed. The averments of these affidavits were conflicting. The appellant has made no claim on appeal and he presents no showing to indicate that the court was in error in granting the new trial on these last-mentioned grounds. The state of the record in that regard appears to amount to a concession that the new trial was properly granted on those grounds. In his brief, the appellant has made no effort to comply with the requirements of rule VIII, sections 2 and 3, of the Rules for the Supreme Court and District Courts of Appeal, by even suggesting in his statement of points involved, which appears on the first page of his brief, that there was error in granting the new trial for any reason other than that which is involved in the alleged sufficiency of the evidence. There was no effort to point out any evidence in the affidavits or elsewhere in support of a claim that the new trial was erroneously granted on any of the other grounds.

[8, 9] It is a well-established rule that when a new trial is granted in general terms, it includes all the grounds upon which the motion was made, except that the court must specifically mention the one of insufficiency of the evidence according to the requirements of section 657 of the Code of Civil Procedure, and under such circumstances the order will be affirmed on appeal if it finds adequate support on any of the grounds included within the general order. Mercantile Trust Co. v. Sunset Road Oil Co., 176 Cal. 461, 168 P. 1037. Since we are pointed to no lack of evidence, and since no reason is assigned by the appellant why the order is not adequately justified upon the grounds of newly discovered evidence and prejudicial irregularity of the proceedings, we must assume the new trial was properly granted on those grounds. It is said in Power v. Fairbanks, 146 Cal. 611, 80 P. 1075, 1076, that "every presumption is in favor of that order, and it devolves upon the party appealing from an order granting a new trial to affirmatively show error."

The order granting a new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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136 Cal.App. 493

MILLER & LUX, Inc. (CHOWCHILLA FARMS, Inc., Intervener) v. SAN JOAQUIN LIGHT & POWER CORPORATION (THE PINES, Inc., Intervener).

Civ. 1304.

District Court of Appeal, Fourth District, California.

Jan. 29, 1934.

Rehearing Denied Feb. 21, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Contracts ⟹169.

Contract should be interpreted in light of circumstances under which it was entered into and in view of objects sought to be accomplished.

2. Waters and water courses ⟹156(5).

Under contract by which riparian owners authorized storage of water on tributaries to main stream by power company only when flow in main stream at designated point exceeded prescribed measurement, permitted storage of upper waters of main river and its tributaries by other appropriators under contract with riparian owners *held* proper for consideration in ascertaining stages of main river in which power company was entitled to store water under contract.

Appeals from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Miller & Lux, Incorporated, against the San Joaquin Light & Power Corporation, wherein the Chowchilla Farms, Incorporated, intervened on behalf of the plaintiff, and The Pines, Incorporated, intervened on behalf of the defendant. From the judgment rendered, the defendant and the intervener on its behalf appeal.

Judgment reversed.

Hearing denied by Supreme Court. PRESTON and LANGDON, JJ., disqualified; SPENCE, J., dissenting.

Thomas J. Straub, of San Francisco, W. R. Dunn, of Sacramento, and Conley, Conley & Conley, of Fresno, for appellant San Joaquin Light & Power Corporation.

Everts, Ewing, Wild & Everts and Dan F. Conway, and M. K. Wild, all of Fresno, for appellant The Pines, Inc.

J. E. Woolley, of San Francisco (Vincent J. McGovern, of San Francisco, of counsel), for respondent Miller & Lux, Inc.

Athearn, Chandler & Farmer and Frank R. Devlin, all of San Francisco, for respondent Chowchilla Farms, Inc.

BARNARD, Presiding Justice.

In this action the plaintiff seeks to enjoin the defendant from storing waters of the North fork of the San Joaquin river other than in accordance with the terms of a certain contract entered into on June 14, 1909, between the predecessors of the plaintiff and of Chowchilla Farms, Inc., as first parties, and the predecessor of the defendant as second party. Chowchilla Farms, Inc., intervened on behalf of the plaintiff. The plaintiff and Chowchilla Farms, Inc., will be hereinafter referred to as the respondents, and the defendant will be referred to as the appellant. Under the contract referred to the appellant was given the right to store certain waters of the North fork of this river, the stored waters to be used for the development of electric power and then released under certain conditions. The North fork is a tributary or branch of the San Joaquin river, is quite short as compared with that portion of the main river lying above the junction of the two, and lies in general at a much lower elevation than the upper reaches of the main river. The general watershed draining into the North fork is considerably smaller in area than that feeding the main river above the junction, and the latter is fed by more numerous and larger tributaries than is the former. As against the appellant the respondents claim a right to the uninterrupted flow of the San Joaquin river in connection with the irrigation of large tracts of land owned by them, except as this right is limited by the contract referred to.

In a general way and briefly, it may be stated that this contract of June 14, 1909, recognized the riparian and appropriative rights of the respondents in the waters of the San Joaquin river and that the appellant had theretofore maintained a small reservoir on the North fork and had diverted and used certain water for the generation of electric power, later discharging the waters into the main channel of the river a short distance below the mouth of the North fork. It then provided that the appellant might construct other reservoirs on the North fork and use the stored waters for the development of electric power only, returning the same to the channel of the North fork or of the main river. It contained elaborate provisions for measuring the flow of the main river at a point just below the point where the waters stored by the appellant were to be returned to the river and also at a point some miles downstream and just above the place where waters were diverted to the lands of the respondents. It also provided that without the consent of the other parties the appellant would not store waters of the North fork during the period from April 1st to August 31st of any year, unless at least 3,000 cubic feet of water per second was flowing in the river at the second point of measurement above referred to, and would not store such waters during the remaining months of the year unless at least 1,500 cubic feet of water per second was flowing in the river at the point of measurement first mentioned.

Among other things, the complaint set forth the general provisions of the contract of June 14, 1909, and alleged that during the months of February and March, 1929, the appellant breached the agreement by storing water when at all times during those months less than 1,500 cubic feet of water per second was flowing in the river at the appropriate point of measurement; that the appellant had threatened to continue to store water at times and stages of the river when it had no contractual or other right to store the same; and that great and irreparable damage will result from the acts of the appellant. The prayer was for an injunction preventing the appellant from storing waters of the North fork except as provided for in the agreement of June 14, 1909.

The answers, in addition to the denials contained therein, set up and alleged some sixteen separate defenses. On a former appeal (120 Cal. App. 589, 8 P.(2d) 560), it was held that certain of these defenses raised issues and required the taking of evidence. After the decision on the former appeal, The Pines, Inc., intervened on behalf of the appellant, setting forth various claims which it is unnecessary to here consider under the view we take of the other issues involved.

After a trial on the merits the court found that in pursuance of the contract of June 14, 1909, the appellant had constructed certain works including a large storage reservoir on the North fork; that the respondents are entitled to have certain waters of the San Joaquin flow through their lands except as limited by the agreement of June 14, 1909; that during February and March, 1929, the appellant stored a large quantity of water to which the respondents were entitled and at a time when less than 1,500 cubic feet of water per second was flowing in the San Joaquin river at the point of measurement provided for in the contract; that at various times the appellant had stored water when it had no right to store under the terms of the agreement; and that the appellant had threatened to continue to store the waters of said river irrespective of the limitations imposed upon it by the terms of the contract of June 14, 1909, at times when it had no contractual or other right to store the same and at times and stages when such storage would violate the right of the respondents. The court drew the conclusion of law that the respondents were entitled to a decree enjoining and restraining the appellant from storing any waters from the North fork of the San Joaquin river "except as provided for in said agreement of June 14, 1909." A judgment was thereupon entered restraining the appellant from withholding any water flowing in the North fork or any of its tributaries, without first obtaining the written consent of the respondents, unless there shall be flowing in the San Joaquin river at least 3,000 cubic feet of water per second or 1,500 cubic feet of water per second, respectively, in accordance with the months of the year during which those respective limits were to govern under the terms of the contract. From this judgment this appeal was taken.

It will be noted that this action is based on the contention that the appellant has only such right of storage on the North fork as it acquired under the contract of June 14, 1909; that it has violated the terms of that contract by storing water at stages of the river when storage is prohibited thereby; and that it should be enjoined from storing water in the future other than in strict compliance with the same. Correspondingly, the court found that this contract prohibited the appellant from storing water unless certain fixed quantities of water were flowing in the main river at certain definite points during particular seasons of the year, that the appellant had violated the contract by storing water at times when the required amount of water was not flowing in the main river, and enjoined the defendant from storing at any time when the flow in the river was less than the fixed amount found requisite at certain times and places. This brings us to what we regard as the decisive issue involved on this appeal, namely, the matter of the interpretation of certain portions of the contract of June 14, 1909, and the effect of these provisions on the appellant's right to store water on the North fork at times when the flow in the main river at the points designated in the contract is less than 3,000 c. f. s. or 1,500 c. f. s. during respective seasons of the year.

As one of its defenses the appellant alleged as follows: "In this connection, however, defendant alleges that there would have been flowing in said river at the point referred to in said agreement, at certain times during said months, more than fifteen hundred (1500) cubic feet of water per second, except that by the contracts of plaintiff with other persons, including Southern California Edison Company, a corporation, and by permission granted by plaintiff to Southern California Edison Company, a corporation, said Southern California Edison Company did reservoir and store waters of the San Joaquin River on branches and channels of said river above the point where the North Fork of the San Joaquin River enters the main channel of said San Joaquin River, without the consent or acquiescence of defendant, and thereby caused the said river to flow, at the point referred to in said agreement, at a lesser flow than fifteen hundred (1500) cubic feet per second, and defendant further avers that by virtue of various and sundry contracts made and entered into between plaintiff and other persons, including Southern California Edison Company, a corporation, the said plaintiff has, for many years last past, without the consent or acquiescence of this defendant, permitted and allowed said other persons, including said Southern California Edison Company, to impound, reservoir, detain and store substantial quantities of waters of the said San Joaquin River above the point where the waters of the North Fork of the San Joaquin River enter the main channel thereof, and that thereby and on account thereof the flow of said river, at the points designated in said agreement (Exhibit 'A'), for the measurement of the flow of said river, has been and is substantially reduced, and defendant avers that the flow of said river thus prevented with the acquiescence and consent of plaintiff as aforesaid, should be taken into account by the court in ascertaining what the flow of the river would otherwise be at the point mentioned in said agreement; and defendant further avers that by reason of said facts, said plaintiff is estopped to maintain that the flow of said river at the point mentioned in said agreement, notwithstanding such detention, reservoiring and storage by said other parties, should amount to three thousand (3000) cubic feet per second during the months of April, May, June, July and August, and fifteen hundred (1500) cubic feet of water per second during the months of September, October, November, December, January, February and March."

With respect to this issue the court found as follows:

"That it is true that plaintiff has entered into contracts with the Southern California Edison Company and its predecessors in interest, wherein and whereby the said Companies are permitted to store water in mountain reservoirs on the San Joaquin River, and tributaries of said river other than said North Fork; and that pursuant to said contracts said Companies have installed storage at Huntington Lake, Florence Lake and Shaver Lake, but no storage has been installed by said Companies on the North Fork of the San Joaquin River; and plaintiff has entered into no contracts with any power company, or other person other than the defendant, permitting storage of water on said North Fork. That the contract between plaintiff and the predecessors in interest of the Southern California Edison Company permitting storage at Huntington Lake is referred to in said contract of June 14, 1909, between plaintiff, intervener Chowchilla Farms, Inc., and the predecessor in interest of defendant; and it is expressly provided that the limitations of storage provided for in said contract of June 14, 1909, shall be binding upon the parties to said contract, irrespective of any storage made in Huntington Lake. That it was further provided in said contract of June 14, 1909, that plaintiff and intervener Chowchilla Farms, Inc., reserved the right to enter into contracts for storage on the San Joaquin River other than Huntington Lake storage, and that the rights of the defendant's predecessor in interest to store on the North Fork should be governed by the flow of the San Joaquin River, irrespective of the amount of such other storage carried on on the main San Joaquin River, or the tributaries thereof other than the North Fork.

"That the contracts entered into with said Power Companies other than defendant's predecessor in interest, provide for the same limitations of storage as is provided for in said agreement of June 14, 1909, that is to say, fifteen hundred (1500) cubic second feet limitation during September, October, November, December, January, February and March of each year, and three thousand (3000) cubic second feet limitation during April, May, June, July and August of each year; and said limitations are incorporated in and are a part of each of said contracts permitting storage at said Huntington Lake, Florence Lake and Shaver Lake, and said Southern California Edison Company, the present owner of said reservoirs, is not permitted to store any water in said reservoirs when there is flowing in the San Joaquin River at Whitehouse Gauging Station less than fifteen hundred (1500) cubic second feet of water during the months of September, October, November, December, January, February and March of each year, and is not permitted to store any water in said reservoirs when there is flowing in said river at Whitehouse Gauging Station less than three thousand (3000) cubic second feet of water during April, May, June, July and August of each year."

The court thus found that the respondents had permitted storage of waters by others on the main river and its tributaries above the North fork, but made no finding on this issue as to whether such upper storage had so lessened the flow of the river at the points of measurement provided for in the contract of June 14, 1909, as to interfere with the appellant's right to store water, and as to whether such other storage should be taken into account in ascertaining the stages of the river at which the appellant was entitled to store water under the terms of the contract. In effect, the court held that any storage by others on the upper river, with the consent of the respondents, was immaterial; it being held that the contract permitted the respondents to consent to any amount of storage by others on any part of the upper river without affecting the fixed limits named in the contract below which the appellant should have no right to store waters in any reservoirs it might construct on the North fork.

[1, 2] If the interpretation thus placed by the court on the provisions of the contract of June 14, 1909, is correct, a finding on this issue was unnecessary since any storage that the respondents might permit on the upper river would be immaterial if the contract provided that they might consent to such storage, and that the same should not be considered in determining the stage of the river at or above which the appellant would be permitted to store water on the North Fork.

The provisions of the contract of June 14, 1909, which affect this issue, are as follows:

"In the event water is taken out of said river or diverted therefrom or withheld therein or therefrom below the point where water is returned to said river by the party of the second part, and above such point of measurement on the San Joaquin River aforesaid, then the party of the second part shall in similar manner, measure such water so taken out or withheld, and the same shall be considered a part of the flow of said stream.

"But this shall not be construed as referring to the reservoiring of water, or withholding the same from any of the tributaries of said San Joaquin River by the parties of the first part, or by any person acting through or under them, or with their consent, *as provided for in this agreement.*

"It is the understanding and agreement between the parties hereto that the said parties of the first part, Miller & Lux, Incorporated, and the Las Animas and San Joaquin Land Company, have heretofore entered into an agreement with John S. Eastwood and others with respect to the reservoiring of certain waters of said San Joaquin River on Big Creek, a tributary of said river, and it is the understanding and intention between the parties that the reservoiring and withholding of the waters of said San Joaquin River or of said tributary *under said agreement* shall not affect the rights of the parties hereto nor the stages of said river at which, nor the conditions or provisions hereof under which, the party of the second part may withhold and reservoir the waters of said North Fork of said San Joaquin River and its tributaries. And it is also mutually understood and agreed that nothing herein contained is intended to or shall prohibit or prevent the first parties, or others acting under them, or with their consent, from reservoiring or withholding the waters of the San Joaquin River, or any of its tributaries, at any place above the point of return of the waters of said river thereto by the second parties to this agreement, or upon any tributaries of said river, whether such tributaries flow into said river above or below such point of return of the waters of said river by the second parties, *as provided in said contracts;* and the measurement and flow of said river as in said contracts provided with respect to the stages thereof at which the second parties may reservoir its waters, shall control and govern whether or not the first parties, or others acting under them shall *so* withhold or reservoir *such* waters; but the first parties shall not withhold, authorize or consent to the withholding or reservoiring of any waters of said river, or its tributaries, that flow into and supply the reservoirs to be constructed by the second parties, or by them constructed under this agreement." (Italics ours.)

In support of the court's findings with respect to this matter, the respondents argue that the first part of the third paragraph quoted provides that any waters stored under the previous agreement with Eastwood and others shall not affect the stage of the river at which the appellant may begin to store, and that the remaining portion of that paragraph provides that the respondents have an unlimited right to permit any other and additional storage on the upper river, and that any such storage subsequently permitted shall not affect the stage of the river at which the appellant is permitted to begin to store. While the language of the contract is not as clear as might be desired, this interpretation has the practical effect of eliminating the words "as provided in said contracts" from that portion of the paragraph relied upon as giving them the right to consent to unlimited storage on the upper reaches of the river. This seems to us an essential part of the contract which may not be thus eliminated. It is argued that the word "also" early in the second sentence of the paragraph connotes something additional to that which has just been referred to and indicates an intention to provide for something entirely different from a complete coverage and protection with respect to all rights of storage which had already been given under the Eastwood contracts. But the first sentence of this paragraph refers only to rights of storage given to Eastwood and others on Big creek, one of the tributaries of the river, while the Eastwood contract, which is in evidence, discloses that it also gave rights to future storage on other tributaries which are in the region of Big creek. It seems more reasonable that the provisions contained in the second sentence of the paragraph were intended to fully cover all storage, whether on the San Joaquin river or any of its tributaries, which might occur as a result of the contract previously entered into between the respondents and Eastwood and others. This is especially true since the reference to such future storage is expressly limited by the phrase "as provided in said contracts," and a further reference to future storage is again limited by the phrase "shall so withhold or reservoir such waters."

Taking up this part of the contract more in detail, the first paragraph provides that any water that may be diverted or stored between the appellant's works and the lower measuring station, or that may be withheld from that part of the river, shall be considered a part of the flow of the stream in determining the stages of the river at or above which the appellant shall be allowed to store on the North fork. If this provision stood alone, it would prevent any storage on the upper main river or its tributaries, without considering the same as a part of the flow at the point of measurement, since any such storage must necessarily withhold the water so stored from that lower portion of the river. The second paragraph then provides that the modification of the method of measurement, just referred to, shall not be construed as preventing the reservoiring of water on any tributaries of the San Joaquin river, which reservoiring is provided for in this agreement. Had the intention been to reserve to the respondents an unlimited right to consent to storage affecting the main river above the North fork, regardless of the effect of such storage on the river at the point of measurement, the rather complicated provisions of the second and third paragraphs quoted would have been entirely unnecessary. In that event a simple reservation covering the right to consent, past and future, to storage on the upper river and its tributaries, would have been sufficient. The last clause of the second paragraph indicates a clear intent that the right to consent to other storage, to be reserved to the respondents, is not an unlimited right, but is one restricted and limited by the terms of this agreement. The only provisions of the contract purporting to set forth these limitations or to define the right so reserved is contained in the third paragraph. That paragraph refers to a right of storage on Big creek, a tributary of the San Joaquin river, under an agreement previously entered into between the respondents and John S. Eastwood and others, and provides that any water stored under that agreement shall not affect the stages of the river at which the appellant is permitted to store waters of the North fork. In the same paragraph it is then stated that nothing therein contained is intended to prevent the storage of waters of the San Joaquin river or any of its tributaries above a certain point "as provided in said contracts." That this clause was designed and intended to cover every possible situation that might later arise in connection with rights of storage already given, is again indicated by the phrase "as provided in said contracts." It may be here observed that the evidence shows that there were in fact two agreements with John S. Eastwood and others, both entered into on the same day in 1906 and both later transferred to the Southern California Edison Company. The words "as provided in said contracts" must refer to something outside of this agreement in which they appear, and the most reasonable explanation of their use is that they refer to the Eastwood contracts. This is especially true since they appear in the paragraph in which the rights already given to Eastwood and others have just been referred to, and since the next following clause refers to *such* waters reservoired and *so* withheld. The remainder of the paragraph we are considering provides that the measurement and flow of the river, with respect to the stages at which the "second parties" may reservoir "its" waters, shall control and govern whether or not the respondents or others acting under them "shall so withhold or reservoir such waters," with the final provision that in any event there shall be no storage on any part of the river or its tributaries that flows into the reservoirs "to be constructed by the second parties" under the terms of this agreement. While this portion refers to "second parties," it seems clear from the reference to "its" waters and the reservoirs to be constructed under this agreement that such reference is to the appellant. While the words "as in said contracts provided" used in referring to the measurement and flow of the river are ambiguous, and perhaps were merely an error, whether the same were intended to refer to the contract in which they appear or to the prior contract with Eastwood, or to both, the provision that a fixed stage of the river shall be taken as the basis for the right to store on the North fork, whether or not other storage is permitted, is again qualified and limited by the words "so" and "such," which can only refer to waters stored in accordance with limitations previously referred to. We take the third paragraph as intended to fully and completely cover all rights of storage that may have been previously consented to by the respondents under the contracts with Eastwood and others, which storage, under the terms of the second paragraph, is not to be considered as a part of the flow of the river in determining the stage at which the appellant may begin to store on the North fork.

Any contract should be interpreted in the light of the circumstances under which it was entered into and in view of the objects sought to be accomplished. It appears from the entire contract that the respondents had vast areas of land under irrigation from the San Joaquin river and that they were interested in having water stored during periods of high flow in the river, to be later released during periods of low flow. Under the circumstances, the fixing of the exact stages of the river at or above which the appellant should be permitted to store water was one of the most vital parts of this contract. It was not a matter that would be lightly passed over by either side to the agreement. In the first paragraph quoted in this connection, it was fully agreed that any water diverted or stored or withheld from that part of the river between the appellant's works and the point of measurement near respondents' diversion should be taken as a part of the river for the purpose of determining whether the minimum flow permitted storage on the part of the appellant. No good reason appears why water taken out of that portion of the river should be considered in determining the stage at which the appellant might exercise its right of storage, and water withheld from that portion of the river through upper storage should not be considered. If unlimited amounts of water could be taken out of the upper reaches of the river, the flow at the point where appellant's rights were to be determined would not only be seriously affected but, as a practical matter, this might easily result in an almost total destruction of the rights of storage purportedly given to the appellant under this contract. The second and third paragraphs quoted should be considered in the light of that situation, and this furnishes an additional reason for believing that the intent of the contract is to provide for an exception made necessary by the fact that other rights of storage had already been consented to.

If the construction contended for by the respondents is correct, the contract may be virtually annulled by them at any time and an investment of some $4,000,000 by the appellant in reliance on the contract may be rendered practically worthless. The interpretation contended for not only involves rewriting the contract by omitting the important clause referred to but results in a contract so unreasonable that a court of equity should not be asked to enforce it. Whether or not the holding of this court on the former appeal, to the effect that the matter under consideration constituted a defense to the action, has become the law of the case, we are of the opinion that the findings with respect to this matter are neither supported by the evidence nor sufficient to support the judgment. As indicated in the finding quoted, the respondents have entered into subsequent agreements permitting storage on the upper reaches of the San Joaquin river over and above that provided for in the Eastwood contract referred to. It appears from the evidence that other contracts have been entered into permitting additional storage in Huntington Lake, with other storage at Florence Lake and Shaver Lake, and that such storage has at times reduced the flow of the river at the point of measurement below the stages named in the contract at or above which the appellant was entitled to store. If such subsequently permitted storage should be taken into consideration in determining the flow of the river at the point of measurement provided, the evidence does not sustain the findings to the effect that the appellant has stored water on the North fork in violation of the terms of its contract.

While the court found that the appellant had threatened to continue to violate the contract under which it was given the right to store water on the North fork, this finding must be taken in connection with other findings to the effect that the contract fixed a certain limit as to the flow of the river at the measuring point, below which the appellant would not be permitted to store, without taking into consideration any storage on the upper portions of the river which had been subsequently permitted. The findings, taken together, do not justify the conclusion that the court found that the appellant had threatened to violate the provisions of the contract, regardless of its true meaning. The finding as to irreparable loss is predicated upon the taking of any water from the river when the flow therein at the measuring points is under 1,500 feet and 3,000 feet, respectively, regardless of any subsequent storage on the upper river, and the judgment is for an injunction preventing the appellant from taking water from the North fork when the flow in the river at the measuring point is less than a fixed amount during the respective seasons of the year. As we view the contract, the evidence and findings are insufficient to sustain the judgment.

Under our view of the meaning of the contract of June 14, 1909, it is unnecessary to consider the other points raised, which relate to the situation that exists if, in fact, the appellant has violated the terms of the agreement.

For the reasons given, the judgment is reversed.

We concur: MARKS, J.; JENNINGS, J.

136 Cal.App. 569

MONGERSON v. WILLIAMS.

Civ. 798.

District Court of Appeal, Fourth District, California.

Feb. 2, 1934.

Appeal and error ⊂⇒1151(3).

Judgment for plaintiff solely for money due him for manufacturing dies for defendant was amended to include money due plaintiff for manufacturing parts of bread-cutting machine, where trial court found both issues for plaintiff and clerical error caused mistake in judgment.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by W. R. Mongerson against Thomas C. Williams, wherein defendant filed a cross-complaint. From the judgment, plaintiff appeals.

Judgment amended, and, as amended, affirmed.

Samuel Taylor, of Bakersfield, for appellant.

Jos. Barcroft, of Madera, for respondent.

MARKS, Justice.

This is an appeal on the judgment roll from a judgment in favor of the plaintiff in the sum of $2,333.57. Plaintiff asks us to modify the judgment and affirm it as modified. Defendant has filed no brief, but his counsel appeared at the oral argument and stated that his client desired the reversal of the judgment which had been rendered against him.

The complaint states a cause of action in the form of a common count for $4,075.06. The answer denies any indebtedness of defendant to plaintiff. Defendant filed a cross-complaint asking damages for breach of a contract to manufacture dies and parts of a bread-cutting machine. The answer to the cross-complaint denied the breach of contract, and alleged a contract whereby defendant agreed to pay plaintiff the market price for the materials used and $2 an hour for the time consumed in making dies for the machine, and 27 cents each for five thousand sets of certain parts of the machine. He alleged his performance of the contract and delivery to defendant.

The trial court found all issues in favor of plaintiff and cross-defendant, that five thousand parts were manufactured at the agreed price of 27 cents, or a total price of $1,350, and that the value of the time and materials used in cutting dies was $2,333.57. Judgment was entered for the latter amount.

The findings are responsive to the issues made by the pleadings. They show that the plaintiff is entitled to judgment in the sum of $3,683.57. The mistake in the judgment was very evidently the result of the clerical error of failing to add the $1,350 found unpaid for the parts, to the $2,333.57, found to be due for the dies.

The judgment is amended by striking therefrom the words and figures, "Two Thousand Three Hundred Thirty-three 57/100 ($2,333.57) Dollars," and inserting in lieu thereof the following: "Three Thousand Six Hundred Eighty-three and 57/100 ($3,683.57) Dollars," and, as so amended, is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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136 Cal.App. 571

NEVIN v. MALLON.

Civ. 1452.

District Court of Appeal, Fourth District, California.

Feb. 2, 1934.

1. Appeal and error ⊂⇒509.

Notice of appeal is necessary part of record to enable appellate court to assume jurisdiction of appeal.

2. Appeal and error ⊂⇒659(3).

Motion for diminution of record, seeking to incorporate in record duly certified copy of notice of appeal, was granted, since appeal notice may be certified by clerk alone.

3. Appeal and error ⊂⇒1035.

Trial of case by jury notwithstanding plaintiff's waiver of jury trial by failure to deposit jury fee in time *held* not reversible error as against defendant objecting to jury trial, since trial court, in its discretion, could disregard waiver.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Charles A. Nevin against James J. Mallon. From a verdict and judgment for plaintiff and an order overruling objections to a trial by jury, defendant appeals and moves for a diminution of the record.

Motion granted in part and denied in part, attempted appeals from the verdict and the order overruling objections to a jury trial dismissed, and judgment affirmed.

Elbert E. Hensley, of Los Angeles, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondent.

MARKS, Justice.

Appellant has moved for a diminution of the record on appeal, whereby he seeks to have incorporated in it a duly certified copy of his notice of appeal and certified copies of various documents and account books by which he maintains it is shown that a jury trial was waived by the parties.

[1, 2] The notice of appeal is a necessary part of the record in order that this court may be enabled to assume jurisdiction of the appeal. As it is a document which may be certified by the clerk alone, the motion to make it a part of the record is granted, and the certified copy presented with the motion for diminution of the record is ordered filed. Lapique v. Kelly, 67 Cal. App. 531, 228 P. 355.

As will appear in our consideration of the appeal from the judgment, the other documents which appellant desires incorporated in the record could have no bearing on the final determination of this appeal. The motion for diminution of the record as affecting all copies other than the notice of appeal is denied.

[3] Appellant objected to a trial by jury at the time the case was called in the department of the presiding judge for assignment to a trial court. He renewed his objection in the trial department. Both judges overruled his objections, and the case was tried before a jury which returned a verdict against him. His counsel now states that the case was first set down for trial on December 7, 1931; that the trial was continued from time to time until July 25, 1932, when it was had; that one day's jury fee was deposited May 6, 1932. Assuming these facts to be true, the trial of the case before a jury does not constitute reversible error. In Dickey v. Kuhn, 125 Cal. App. 68, 13 P.(2d) 834, 835, it was said: "It is the rule that notwithstanding a jury has been waived in the statutory manner, it is within the discretion of the trial court to disregard the waiver and try the case by a jury. 2 Bancroft's Code Practice and Remedies, § 1120, p. 1580, and cases there cited; 35 Cor. Jur., Juries, § 139, p. 222; Doll v. Anderson, 27 Cal. 248; Bullock v. Consumers' Lumber Co., 3 Cal. Unrep. 609, 31 P. 367, 369; Harmon v. Hopkins, 116 Cal. App. 184, 2 P.(2d) 540. The court did not abuse its discretion in so doing; and after an examination of the entire record we are convinced that the verdict was fully sustained, and that no error has been shown which can reasonably be said to have resulted in a miscarriage of justice."

This action grew out of a collision, in an intersection of public streets, between a light sedan driven by plaintiff and a loaded oil truck and trailer driven by defendant.

Defendant urges as grounds for reversal that the evidence fails to show negligence on his part and does show the contributory negligence of the plaintiff; that the damages awarded are excessive; that the trial court committed errors in the admission and exclusion of evidence and in refusing his proposed instructions to the jury and in instructions given.

The case presents no new or unusual features, and it is unnecessary to detail the evidence here. The evidence on the questions of the negligence of the defendant and contributory negligence of the plaintiff is sharply conflicting. There is evidence supporting the implied findings of the jury on both questions. That being the case, the verdict and judgment finds evidentiary support and cannot be disturbed by us.

The jury returned a verdict for $7,587. The plaintiff was seriously injured and had not fully recovered at the time of the trial, more than a year after the accident. We find nothing in the record to indicate that the jury was influenced by passion or prejudice in arriving at its verdict.

We have examined the record, and are satisfied that the rulings of the trial judge on objections made by counsel were fair to both parties. We find no prejudicial error in any of them.

The instructions given the jury correctly stated the law applicable to the case. The instructions proposed by defendant and not given were properly refused.

The attempted appeals from the verdict and the order overruling objections to a trial by jury are dismissed.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 405

PEOPLE v. LEWIS et al.

Cr. 2319.

District Court of Appeal, Second District, Division 1, California.

Jan. 26, 1934.

Hearing Denied by Supreme Court April 20, 1934.

1. Criminal law 🔑511(5).

That accused accompanied accomplice in automobile to warehouse where burglary was committed and previously solicited orders for tools which he filled by delivery to purchaser after burglary *held* to corroborate testimony of accomplice implicating accused in conspiracy to commit burglary (Pen. Code, § 1111).

2. Criminal law 🔑511(4).

Evidence that accused sold goods for delivery in five days and attempted to explain late delivery as due to holiday, and that accused delivered goods after burglary in accomplice's automobile accompanied by accomplice, *held* to corroborate testimony of accomplice implicating accused in burglary (Pen. Code, § 1111).

3. Criminal law 🔑511(4).

Evidence that accused sold stolen articles on day after burglary and used accomplice's automobile in delivering articles, and that accused was present at time of burglary and drove accomplice from warehouse where burglary was committed, corroborated testimony of accomplice implicating accused in burglary (Pen. Code, § 1111).

4. Criminal law 🔑511(5).

Evidence that accused waited outside of warehouse in automobile while accomplice was within, and that accused drove away when accomplice was arrested for burglary in warehouse, corroborated testimony of accomplice implicating accused in burglary (Pen. Code, § 1111).

5. Criminal law 🔑1038(3).

In prosecution for burglary, failure to give instruction that testimony of accomplice required corroboration for conviction of accused *held* not reversible error, where such instruction was not requested (Pen. Code, § 1111).

6. Burglary 🔑42(1).

Possession of stolen goods soon after burglary was evidence of guilt of accused, where evidence showed that property came into possession of accused at time of burglary in which he participated.

7. Criminal law 🔑1172(1).

Where evidence in prosecution for burglary showed offense was committed about 8:30 p. m., instructions as to first degree burglary *held* not reversible error, since court judicially knew burglary was in nighttime, and court later reduced verdict to second degree burglary (Pen. Code, §§ 459, 460, 463; Code Civ. Proc. § 1875, subd. 8).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

A. B. Crist, C. K. Lewis, and others were indicted and A. B. Crist was convicted of conspiracy to commit burglary and burglary in the second degree, and he appeals.

Affirmed.

See, also (Cal. Sup.) 27 P.(2d) 73.

Robert H. Patton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment of conviction of the crime of conspiracy to commit burglary; also from each of three judgments of conviction of the crime of burglary in the second degree, as well as from an order by which his motion for a new trial, which related to each of such respective convictions, was denied.

It is first contended that "the corroborative testimony fails to connect the appellant A. B. Crist with the conspiracy charged"; the point being that, although the testimony given by an accomplice in the alleged crime implicated the appellant, the corroborating evidence failed to measure up to the requirements of section 1111 of the Penal Code, which, as far as is pertinent herein, provides that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *"

[1] As hereinbefore has been indicated, the crime of conspiracy arose out of an alleged agreement or understanding that existed between defendant and his accomplice to commit the crime or crimes of burglary by feloniously entering a warehouse and stealing therefrom certain tools and equipment ordinarily used in the drilling or operation of an oil well, and thereafter, upon the sale of such stolen articles, to divide between them the proceeds thereof. The corroborating evidence includes testimony from which it readily may be inferred that on each of the sev-

eral occasions when a burglary ws committed, defendant accompanied his accomplice in an automobile to or near the warehouse that was burglarized; and that shortly preceding the date when at least one of such burglaries was committed, he solicited and received from a third person an order for specified tools and equipment which defendant and his accomplice delivered to the purchaser thereof on the day following the date when the articles were stolen. Without adverting to other facts which also were introduced in evidence and which tended to corroborate the testimony given by the accomplice, we entertain no doubt but that the facts to which attention has been directed were sufficient to meet and to overcome the objection herein interposed by appellant.

Insufficiency of evidence to corroborate the accomplice also is specified with regard to each of the three counts of burglary of which defendant was convicted.

[2] The first of such crimes was the one to which reference hereinbefore has been had in the conspiracy count, wherein, more specifically, the evidence disclosed that on a specified Wednesday a sale by defendant of certain merchandise was made, to be delivered on the following Monday. In the course of the negotiations for such sale, defendant said he could "buy this stuff at one-half price," and that the reason for its proposed belated delivery was that "the supply store could not get the stuff on account of its being a holiday; * * * a Bohemian holiday. * * *" He also said that he was buying it at a "bankrupt sale." The delivery of the stolen merchandise was made in an automobile which was driven by defendant, at which time he was accompanied by the accomplice. We are of the opinion that such independent evidence supplied the necessary corroboration of the testimony given by the accomplice.

[3] With regard to the second of the burglaries of which defendant was convicted, the evidence that corroborated the testimony given by the accomplice consisted of a sale by defendant of the stolen articles on the day following the date on which the burglary was committed; that in making delivery of such merchandise defendant drove a Ford coupé, although he usually drove a Chrysler automobile; and it was shown that the accomplice was the owner of a Ford coupé. In substance, a private detective testified that on the night when the burglary was committed he was "trailing" the defendant and his accomplice; that about 8:30 o'clock on said evening he had parked his automobile near the warehouse which was burglarized, and at that time he saw the accomplice "coming through the weeds," away from the warehouse; that the accomplice "climbed" into a Ford coupé which was parked near by, which coupé at that time was occupied by defendant; that thereupon defendant and his accomplice drove into the yard of the warehouse and the lights on the coupé were turned out; that defendant and the accomplice occupied that position for not over two or three minutes, at the expiration of which time they drove away; that they then drove into a truck yard, turned out the lights on the coupé, remained there for a few minutes, and then rapidly drove away again. From such testimony it would seem clear that the evidence adduced on the trial *tended* "to connect the defendant with the commission of the offense." Section 1111, Pen. Code.

[4] As to the third of such burglaries which here is the subject of inquiry, from the evidence it appears that the accomplice was arrested while in the commission of the offense. On the trial of the action his testimony implicated defendant. Of course, no sale of the stolen merchandise was made. However, a detective testified that on the evening on which the burglary occurred, at first he saw defendant in a Chrysler automobile accompanied by someone, in close proximity to the warehouse that was burglarized. Shortly thereafter a Chrysler automobile was parked within one-half block of the warehouse; that a man got out of the Chrysler automobile; that a moment later lights appeared in the windows of the warehouse; that as soon as such lights appeared the Chrysler automobile in which the accomplice and the other man had been riding was driven away; that the person in the Chrysler automobile was, or appeared to be, defendant; and that immediately after the lights appeared in the warehouse the accomplice, accompanied by two other men who had arrested him, appeared in the doorway of such warehouse. Considering such circumstances, this court is of the opinion that, under the provisions of section 1111 of the Penal Code, the corroboration of the testimony given by the accomplice was sufficient.

[5] It is next urged by appellant that "the court prejudicially erred in instructing the jury that a verdict of guilty should be returned if the jury found from the evidence beyond a reasonable doubt that the defendants committed the crimes charged, without qualifying that instruction to the effect that the tes-

timony of the accomplice required corroboration under the law."

But from the record it appears that neither of the defendants requested of the trial court either that a separate instruction be given in accord with the suggestion here presented, or that the instruction that was given to the jury be modified in such particular.

In this state the law appears to be fairly well settled that where on appeal an appellant raises a question such as is here presented to the court for its consideration, and from the transcript on appeal it appears that on the trial of the action the defendant made no request for an appropriate instruction in that regard, he is in no position to assign the failure to give such an instruction as reversible error. People v. Tobin, 39 Cal. App. 76, 179 P. 443; People v. Yates, 71 Cal. App. 788, 236 P. 185; People v. Casey, 79 Cal. App. 295, 249 P. 525; People v. Olds, 86 Cal. App. 130, 260 P. 321.

It would therefore seem to follow that the point here presented by appellant is untenable.

[6] Prejudicial error is predicated upon the fact that, at the request of the people, the trial court in effect instructed the jury that the possession by defendant, soon after the date of the burglary, of the property alleged to have been stolen was a circumstance of which the jury was entitled to take notice; his point in that connection being that, since such stolen property "was admittedly received by defendant from a third party, the original larcenous taker thereof," such a possession, at such a time, did not constitute any evidence of the guilt of defendant, citing People v. Boxer, 137 Cal. 562, 70 P. 671. But in distinguishing the facts of the cited case from those presented herein, it may be noted that the evidence in the instant case is not that the stolen property came into the possession of defendant *after* the burglary was committed; to the contrary, in effect it is that defendant was an active participant with the accomplice in perpetrating the offense, and that defendant assisted in transporting the stolen property from the place where it was stolen. Besides, specific language in the cited authority indicates the correctness of the instant instruction. In part, it is there said: "In cases of larceny, the recent unexplained possession of the stolen property is a circumstance tending to show guilt. Probably the same may be said as to the recent unexplained possession of stolen property the fruits of a burglary, but this instruction assumes that the defendants may have received the stolen property into their possession after the burglary was committed by other parties. * * *" See discussion of People v. Boxer, supra, in People v. Reynolds, 130 Cal. App. 754, 757, 20 P.(2d) 952. We conclude that the point presented by appellant cannot be sustained.

[7] Appellant complains because the trial court gave to the jury an instruction substantially in the language of sections 459, 460, and 463 of the Penal Code, which included a definition of burglary in the first degree. His point is that no evidence was introduced which would justify a verdict of burglary in the first degree. However, since the record shows that at least one of the burglaries was committed at about 8:30 o'clock in the evening, and since by the terms of section 463 of the Penal Code any burglary committed between sunset and sunrise is committed in the nighttime; and by the provisions of section 460 of the Penal Code a burglary committed in the nighttime is of the first degree; it would seem that under the rule of knowledge of the court, or "judicial notice" (subdivision 8, § 1875, Code Civ. Proc.), the trial court was authorized to take notice of the fact that at 8:30 o'clock p. m. the sun had set, and consequently that the burglary was committed in the nighttime; of which fact no direct evidence was necessary. 10 Cal. Jur. 720, and authorities there cited; People v. Girotti, 67 Cal. App. 399, 227 P. 936; Fouch v. Werner, 99 Cal. App. 557, 279 P. 183. Moreover, on the hearing of the motion for a new trial, as to each of the counts on which defendant was convicted, the trial court in effect reduced the verdict of the jury from first degree burglary and rendered judgment against defendant as for second degree burglary only. So that, in any event, appellant has no just cause for complaint.

It is ordered that the several judgments, and the order by which defendant was denied a new trial, be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

136 Cal.App. 369

MOLLES v. DOLLAR S. S. LINES, Inc., Limited.

Civ. 9177.

District Court of Appeal, First District, Division 2, California.

Jan. 24, 1934.

Hearing Denied by Supreme Court March 22, 1934.

1. Wharves ⟹21.

Absent evidence to contrary, mere fact that chute against which operator of wharf jitney backed was left partly down on wharf actively engaged in shipping and in use for storing *held* insufficient to show negligence of shipping company using wharf.

2. Wharves ⟹21.

Shipping company using wharf *held* not liable for injuries to operator of wharf jitney, where chute against which operator backed was then in control of operator's employer, an independent contractor of shipping company, though there was insufficient light, where conditions were known to operator (Pol. Code, § 2524).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Frank Molles against the Dollar Steamship Lines, Inc., Limited. From a judgment for plaintiff, defendant appeals.

Reversed.

Redman, Alexander & Bacon and Herbert Chamberlin, all of San Francisco, for appellant.

Joseph A. Brown, of San Francisco, for respondent.

STURTEVANT, Justice.

From a judgment based on the verdict of a jury awarding damages for personal injuries the defendant has appealed and has brought up typewritten transcripts. It makes several points, among others, that the record does not show the defendant was negligent, but that it does show the plaintiff was negligent and that he assumed the risk out of which the injury occurred. In its opening brief the defendant has made an extended statement of the facts. In his brief the plaintiff does not controvert any of the facts which to us seem material to a determination of the case. In this manner we gather the following:

Pier 44 in San Francisco was constructed and is owned by the state of California. It extends east from the Embarcadero, and consists of two stories. The inside of the wharf is approximately 700 feet long and 103 feet wide. The center aisle of the lower floor extends the length of the wharf and is 33 feet wide and is fringed with posts a foot square. These posts have spreading supports at the upper portion and are surmounted with steel crossbeams upon which rest the joists of the upper floor, which is 18½ feet above the lower. For the purpose of conveying freight from the upper to the lower floor the wharf is provided with chutes, jointed near the middle, and equipped with ropes and tackle whereby, as occasion demands, they can be lowered to the floor in the center aisle or raised to a position where the lower section of the chute is virtually parallel with the level of the upper floor. Truckmen, employed by the consignees of freight, raise or lower these chutes to such levels as will accommodate their necessities and conveniences. The chute involved in the present case is approximately 250 feet east of the Embarcadero and is called chute No. 2. It occupies a position 20½ feet north of the southerly extreme of the center aisle, and in this center aisle and to the south of the chutes the state maintains and controls electric lights of 200-watt power at intervals of each 44 feet. These lights hang from the ceiling and below the floor joists and the top of the beams, but are a little above the bottom of the crossbeams.

In July 1925, and pursuant to section 2524 of the Political Code, the preferential use of Pier 44 was assigned to the Dollar Line by the state harbor commissioners; the commission retaining the right to assign the temporary use thereof to other lines when the Dollar Line was not exercising its preference. The equipment above referred to was then on the wharf, and the maintenance and repair thereof rested upon the state. When its ships are engaged in loading or unloading freight, the Dollar Line augments the center line of lights with two additional lights, one on the north side and one on the south side of the wharf, with the lights 28½ feet apart. And when the chutes are in operation and Dollar Line freight is involved, employees of the Dollar Line on the second floor of the wharf "slide the cargo down the chute" to waiting truckmen who adjust and manipulate the chutes and who are employed by the consignees of freight.

The Bay Cities Transportation Company is engaged in the business of transporting freight across the bay by means of barges. It acts as an independent contractor. On the

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes night of the accident the company had transported two barges of freight for the Dollar Line from east bay points and was engaged in unloading the barges on the south side of the pier for shipment of the freight on the President Coolidge, a ship of the Dollar Line, which was docked on the north side of the pier. As the freight came off the barges, employees of the Bay Cities Transportation Company deposited it on the wharf on movable frames of wood, called "platforms" or "flats," and then small gasoline and electric trucks, called "jitneys," and owned by the company, would pick up the platforms and sort the freight by distributing it to places designated on the wharf according to its destination and the freight manifest. The jitneys were equipped with appropriate appliances for picking up the platforms, and were so constructed that in operating them the driver was required to stand upright on two pedallike appliances in front of the motor, and to face the load he was transporting. Some eighteen employees of the company were engaged in this work of unloading, sorting, and distributing the freight under the supervision of Charles Jones, its barge clerk, and he in turn co-operated with Joseph Brolan, the receiving clerk of the Dollar Line. In the course of this work no freight was deposited in the center aisle or within 20 feet south of chute No. 2, but freight was deposited by the Bay Cities Transportation Company within 20 feet north of the chute. The work had been in progress approximately four hours when plaintiff was injured, and during that period the lighting on the wharf was adequate to enable the barge clerk of the company and the receiving clerk of the Dollar Line to read a typewritten manifest at all places on the wharf and to check the names and addresses on the various boxes of freight. The lighting was also sufficiently adequate to enable the employees of the company to perform their work of unloading, sorting, and distributing the freight.

Plaintiff was an employee of the Bay Cities Transportation Company and had worked around Pier 44 for seven years, and had operated a jitney for about six years. He came on duty about midnight of December 30, 1931, and in the four hours following operated a jitney in picking up platforms and distributing freight at different places on the wharf. He experienced no difficulty in seeing what he was doing during that period. About 4:15 in the morning, plaintiff, while operating a jitney, endeavored to pick up a platform to the west of chute No. 2 for the purpose of taking it to his fellow employees to be unloaded. His endeavor was unsuccessful for the reason that he had approached the platform with his jitney at an angle thereto, thereby creating the necessity of adjusting his position so that the jitney would be straight with the platform. To accomplish that adjustment, the plaintiff backed his jitney, and with his back to the direction in which he was going and without having previously taken the precaution to look in that direction, he collided with chute No. 2 after he had backed about 6 feet. The chute was then in a lowered position approximately 7 feet from the floor, but the record is silent of evidence as to who lowered it or how long it had been lowered before the accident. In the area 184 feet long and 103 feet wide surrounding the chute there were sixteen electric lights all illuminated. The nearest of these lights was 7 feet west of the east end of the chute and 4 feet south of the chute, the light next nearest was 18½ feet west of the west end of the chute, and the distance of the other fourteen lights from the west end of the chute varied from 38½ feet to 95 feet. According to the witnesses for the defendant, the chute was visible on the wharf from any point on the wharf. Witness Terrell, who was working with the plaintiff at the time and who appeared in his behalf, testified that when he looked he could see the chute from a distance of 15 feet. Witness Porter, who was also working with the plaintiff and who also appeared in his behalf, testified that he knew the chute was down five or ten minutes before the accident, and that he could see it was down for a distance of over 15 feet. Defendant's witness Jones, barge clerk of the Bay Cities Transportation Company, testified that on the night of the accident and prior to its occurrence he had warned the plaintiff to be careful and not go under the chute. Witness Jones and defendant's witness Surratt, operating manager of the Bay Cities Transportation Company, both testified that after the accident plaintiff admitted he knew the chute was down, but had forgotten about it and had run into it. Plaintiff denied such warnings or admissions, but to excuse his conduct claimed that he did not know the chute was down, and that when it was not being operated it was usually raised. It is conceded that the chute was not in operation at the time of the accident. There was no evidence that the chutes were defective, that they were improperly installed, nor that when one was not being used any duty rested on the defendant to immediately enter the premises, raise the chute, and secure it.

[1, 2] From the foregoing facts it is clear that at the time of the accident the wharf where it happened was a place actively engaged in shipping, and at the same moment it

was being used for storing. That such a place under such conditions, when conducted with ordinary care, may, nevertheless, present conditions of danger, will be conceded. However, there is no legal standard defining ordinary care in the operation of such a place. We think it follows that, in the absence of evidence to the contrary, it may not be said the mere fact a chute is left partly down is negligence. Long v. John Breuner Co., 36 Cal. App. 630, 638, 172 P. 1132; Roach v. Wells Fargo Bank & Union Trust Co., 102 Cal. App. 380, 282 P. 967. Nor under the facts was the act of omission or commission the act of the defendant, as the use, operation, and adjustment of the chutes were, for the time, in the hands and management of the plaintiff's employer and its agents. But whatever the liability of the plaintiff's employer may be, this defendant was not liable. Boswell v. Laird, 8 Cal. 469, 493, 68 Am. Dec. 345. If plaintiff's employer desired to use the chutes it was at liberty to do so. If it did not desire to use any particular chute, but desired to operate beneath, it was at liberty to raise the chute, if down, and fasten it in place. If it was not down, the same party had the right to examine the fastenings to the end that the laborers might safely work thereunder. But, under the facts, no one of these duties rested on the defendant. This defendant is not liable for the acts of strangers who left the chute hanging halfway down. In Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A. L. R. 129, the court was considering a set of facts involving an injury caused by a swinging door. The principle would seem to be the same as to a hanging door or a chute. Commencing on page 208 of 203 Cal., 263 P. 518, 519, the court said: "Swinging doors in buildings and stores are installed and maintained for the accommodation of those who have occasion to enter such buildings. The operation of such doors is not within the exclusive control of the owner of the building or proprietor of the store. Customers and patrons take a very distinct part in their operation and are chargeable with the exercise of ordinary care in their use. Injury may occur in their operation from a lack of such care on the part of the persons who use them, and for whose negligence the owner or proprietor would be in no wise responsible. In the present case the injury to the plaintiff may have been caused by the negligent operation of the left-hand door shown by the evidence to have been hurriedly used by the third lady when it rebounded and struck the plaintiff (Smith v. Johnson, 219 Mass. 142, Ann. Cas. 1916D, 1234, L. R. A. 1915F, 572, 106 N. E. 604; Pardington v. Abraham, 93 App. Div. 359, 87 N. Y. S. 670, affirmed in 183 N. Y. 553, 76 N. E. 1102), or it may have been caused by the plaintiff's own negligent use of the right-hand door."

The fact that it was nighttime and that the lighting conditions were insufficient did not change the rule. The conditions that then existed were as well known to the plaintiff as to the defendant. Under those circumstances there was no duty resting on the latter to warn by sign, light, or other method of possible dangers. Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 561, 296 P. 76.

In view of what has been said, it is unnecessary to discuss other points made by the defendant.

The judgment is reversed.

We concur: NOURSE, P. J.; SPENCE, J.

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136 Cal.App. 390

HURT v. PICO INV. CO.

Civ. 5030.

District Court of Appeal, Third District, California.

Jan. 25, 1934.

Hearing Denied by Supreme Court March 26, 1934.

1. Mortgages ⟹497(2).

Decree of foreclosure was void as to owner of mortgaged property who was not served with process in foreclosure action.

2. Judgment ⟹585(3).

Defense to second action in foreclosure that mortgage was already foreclosed could not be sustained, where intervening action by holder of mortgage to quiet title to mortgaged land resulted in decree of title in defendant subject to plaintiff's mortgage.

3. Mortgages ⟹502.

Decree of foreclosure void because of failure to serve owner of mortgaged property with process was ineffectual to effect valid sale of property, and hence commissioner's deed did not pass title to property.

4. Mortgages ⟹585.

Second action in foreclosure can be maintained where foreclosure in first action is ineffective because of omission through mistake of owner of mortgaged property as party to action.

5. Mortgages ⟹585.

Second action in foreclosure *held* maintainable where first foreclosure action was ineffective because of failure to serve owner of mortgaged property with process.

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Arthur C. Hurt against the Pico Investment Company, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Perry F. Backus, of Los Angeles, for appellant.

James H. Howard and William A. Farner, both of Los Angeles, for respondent.

LEMMON, Justice pro tem., delivered the opinion of the court.

This action was instituted by the assignee of a mortgage to foreclose the mortgage. The defendant, Pico Investment Company, a corporation, appeals from a decree of foreclosure. The mortgagees, James Hocking and Ella Hocking, had previously, and in a separate action, sought foreclosure of this mortgage. That action will be referred to as No. 194481. Prior to the assignment to the plaintiff herein, a decree of foreclosure had been entered in action No. 194481. A sale of the mortgaged premises had been held by a commissioner appointed therein, and the commissioner had received from the plaintiff in that action, the assignor of the plaintiff herein, a receipt for the full amount of the judgment. Just prior to the expiration of the period of redemption, the plaintiff herein, Arthur C. Hurt, took an assignment from the Hockings of the certificate of sale, and later received from the commissioner a deed to the premises as holder of the certificate of sale. About sixteen months after the entry of the decree of foreclosure in action No. 194481, the court, upon motion of Hurt, by an order entered in its minutes, set aside the judgment. An amended and supplemental complaint was filed, and an alias summons was issued and served upon the Security Realty Company and D. H. Penny, two of the defendants. Upon motion thereafter, the court entered an order quashing the service of the alias summons, and striking the amended and supplemental complaint. Thereafter Hurt was substituted as plaintiff, and moved the court to vacate the commissioner's certificate of sale and the deed issued in pursuance thereof, and the satisfaction of the judgment, or, as an alternative, to issue a writ of assistance for the purpose of placing him in possession of the property. This motion was denied.

Following an abortive attempt on the part of Hurt to maintain a second suit in foreclosure, he instituted an action, No. 286987, to quiet title to the property in question. The court, in action No. 286987, decreed that the defendant, Pico Investment Company, is the owner of the property in fee, subject to the mortgage then held by Hurt. The Pico Investment Company appealed from that part of the judgment, determining that the real property was subject to the mortgage, and the District Court of Appeal for the Fourth Appellate District, on October 20, 1932, affirmed the judgment. Hurt v. Pico Investment Company, 127 Cal. App. 106, 15 P.(2d) 203.

The appeal now to be considered is from a judgment entered in an action to foreclose the mortgage, the fourth action in what has been referred to appropriately as this "ill-starred litigation."

[1] At the time action No. 194481 was commenced D. H. Penny, appellant's grantor, was the owner of the land subject to the lien of the mortgage. D. H. Penny was not properly served with process in that action, and, as to her, the decree of foreclosure therein was void on the face of the record.

[2] Appellants contend that the mortgage sought to be foreclosed in this action has already been foreclosed in the prior action, No. 194481. The decision in the quiet title action is adverse to this contention. There remains to be decided whether it is proper to seek foreclosure in a second action where the decree of foreclosure and sale in the first action is void as to the owner of the property at the time of the commencement of the first action.

[3] We are considering now a mortgage which has not been foreclosed. The decree in No. 194481 was ineffectual to effect a valid sale of the mortgaged property, and the commissioner's deed did not pass title to the property, due to the fact that the judgment was void as to the owner of the property.

[4] The cases of Brackett v. Banegas, 116 Cal. 278, 48 P. 90, 58 Am. St. Rep. 164, and Ludwig v. Murphy, 143 Cal. 473, 77 P. 150, are authority for the principle that a second action in foreclosure may be maintained if, in the first action, an owner of an interest in the mortgaged premises is omitted as a party, through mistake, and the proceeding is rendered thereby ineffective as a foreclosure. Obviously, a sale under a decree void as to such an owner does not accomplish the purpose of a foreclosure which is to effect a valid sale of the mortgaged premises, and

thereby enforce payment of the debt secured by the mortgage. "A party holding a valid mortgage lien has an absolute right to an effectual foreclosure by an action begun at any time within four years from the time his cause of action accrues, irrespective of, and in the face of, any degree of laches or delay. The previous attempt to foreclose was, so far as the security was concerned, wholly ineffectual, and in Brackett v. Banegas [116 Cal. 278, 48 P. 90, 58 Am. St. Rep. 164], supra, a similar judgment of foreclosure was held absolutely void as to the security. If it was void as to the security, it could not affect the mortgage, nor the lien created thereby, and it could not constitute a bar, nor in any wise affect an action to foreclose the same." Ludwig v. Murphy, 143 Cal. 473, 77 P. 150, 151.

[5] The distinction in the facts between the cited cases and the instant case are not of moment in determining that the rule is applicable here. The foreclosure is just as ineffective where the judgment is void through invalid service of process upon a named necessary party defendant as where the necessary party is not mentioned in the action.

In such a situation as herein presented the proper remedy is by a new action in foreclosure, although the courts have allowed the original suit to be reinstated upon amended pleadings. Norton v. Newerf, 45 Cal. App. 14, 187 P. 57. It follows that there is no merit in appellant's contention that in this action a collateral attack is made upon the decree in action No. 194481.

The judgment appealed from is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

SPECK et ux. v. WYLIE et al.*

Civ. 5027.

District Court of Appeal, Third District, California.

Jan. 26, 1934.

Rehearing Denied Feb. 24, 1934.

Hearing Granted by Supreme Court March 26, 1934.

1. Principal and agent ⟹148(4).

Where contract for sale of property contained express notice to purchasers of limitation on selling agent's authority and that vendors were not responsible for statements made by agent, vendors *held* not liable for agent's alleged misrepresentations made in selling property.

2. Evidence ⟹434(8).

Principal is bound only by representations embodied in written contract where provision therein so limits agent's authority.

3. Principal and agent ⟹148(4).

Persons dealing with agent knowing of instructions limiting agent's power are bound by them.

4. Principal and agent ⟹159(1).

Principal's liability for agent's torts is restricted to acts of agent within scope of his authority, absent ratification, or estoppel.

5. Principal and agent ⟹148(4).

Specific instructions limiting agent's power bind third party dealing with agent, whether general or special, if known to such third party.

6. Principal and agent ⟹171(4).

One accepting fruits of fraud with knowledge of misrepresentations by which they were obtained is liable therefor, even though he did not participate in the fraud.

7. Principal and agent ⟹166(6).

Payment of $9,000 for realty worth only $1,500 on misrepresentations of agent regarding building by third parties, *held* not evidence that vendors knew of fraud, particularly where purchasers knew that agent was without authority to make such representations.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by Harry A. Speck and Yetta A. Speck, husband and wife, against Oliver Wylie and others. From a judgment for plaintiffs, defendants Sarah E. Wylie, as executrix of the estate of Oliver Wylie, deceased, and Sarah E. Wylie appeal.

Reversed.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Robert F. Schwarz, of Los Angeles, of counsel), for appellants.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for respondents.

Mr. Justice pro tem. LEMMON delivered the opinion of the court.

In this action plaintiffs sought to recover from defendants a sum of money paid to defendants under a contract for the purchase and sale of certain real property, which contract was allegedly induced through fraudulent representations of the defendants and upon which misrepresentations plaintiffs predi-

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*For subsequent opinion see 36 P.2d 618.

cated a rescission. From a judgment in favor of plaintiffs, defendants Wylie prosecute this appeal.

Defendants Oliver Wylie and Sarah E. Wylie, his wife, were the owners of the real property and placed it in the hands of the Frank Meline Company, as exclusive selling agent for the purpose of sale. C. E. Long, a salesman in the employ of the Frank Meline Company and an acquaintance of plaintiffs, showed the property to plaintiffs. Admittedly appellants personally made no representations to plaintiffs and all of the claimed misrepresentations were made by Long. During the negotiations leading up to a formal contract of purchase and sale, Long made statements as to the value of the real property and informed the plaintiffs that the property was certain to increase in value as the California Produce Terminal Company had purchased several blocks of nearby property in the same tract and that that company would erect a terminal thereon costing a large sum of money. The contract finally signed between the defendants as sellers and the plaintiffs as purchasers contained this provision:

"It is understood and agreed that this contract contains all the covenants, stipulations and provisions agreed upon by the parties hereto and no agent of either party to this contract has authority to alter or change the terms hereof and neither party is or shall be bound by any statement or representation not in conformity herewith. It is understood and agreed that said property above described has been inspected by said Purchaser, or the Purchaser's duly authorized agent; that the same is and has been purchased by the Purchaser as a result of said inspection and not upon representations made by the Sellers or any selling agent, and that the Purchaser hereby expressly waives any and all claims for damages or for cancellation of this contract because of any representation made by any selling agent or person whatsoever other than as contained in this agreement; and the sellers will not be responsible for or liable on account of any inducements, promises, representations, or agreements not set forth herein."

[1-3] Appellants contend that the trial court erred in admitting in evidence testimony as to the representations made by Long and assert that the clause above quoted is an express notice to respondents of limitation of the agent's authority and that appellants are not answerable for the statements made by the agent.

Appellants rely largely upon the case of Gridley v. Tilson, 202 Cal. 748, 262 P. 322, 323. In that case the purchaser claimed that false representations had been made to him by a selling agent. The contract contained a clause of similar import to the one above set out. The court, after stating that fraud in the inducement of a contract may be shown, said:

"A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract, where a provision in the contract notified the prospective purchaser that the agent's authority went no further."

It is elementary that instructions which limit the power of an agent and which are known by a party dealing with the agent are binding upon such party as well as upon the agent. The liability of a principal for the torts of his agent is restricted to acts of the agent within the scope of his authority unless the acts are subsequently ratified or, due to particular circumstances, the principal is estopped from denying the agent's authority.

Gridley v. Tilson, supra, and the rule therein laid down and above quoted are cited with approval in the case of W. J. Latchford Co. v. Southern Cal. Gas Co., 125 Cal. App. 112, 13 P.(2d) 871, wherein are listed several other California cases in support of the same principle. There is a diversity of authority elsewhere, but the rule is established by judicial sanction in this state.

[4] Respondents attempt to distinguish this case from the Gridley Case by pointing out that here we have an exclusive or general agency, while in the latter the representative was acting as a special agent. The Gridley Case in no way turned on the ground the agent was designated as a special agent. There is no basis in reason for the application of a different rule where there is a general agency.

"If specific instructions are brought home to the knowledge of a third person dealing with the agent it cannot matter whether he is a general or a special agent; in either case his power to bind his principal will be limited by these known instructions or limitations." 2 C. J. 570.

The cases in this state which hold that fraudulent representations may be established by parol despite notice of limitation of the agent's authority contained in the contract between the vendor and purchaser and which may appear to be in conflict with the rule herein expressed are to be distinguished in that in those cases either there is the absence of a clause in the contract such as is found in the instant case or the misrepresentations declared upon were made by the principal personally.

[5-7] The proof disclosed that the plaintiffs contracted to pay $9,000 for real property of the value of $1,500. The testimony is without conflict upon the point that the purchase price and any representation of value were based upon the prospective enhancement in value which would result from the construction of the terminal by third parties. Plaintiffs contracted to purchase with a full understanding of this. One who accepts the fruits of fraud with knowledge of the misrepresentations by which they are obtained is liable therefor, even though he did not participate in the fraud. The disparity between the contract price and market value of the property is not evidence that appellants knew that a fraud had been perpetrated, particularly in view of the circumstances above noted.

Other points raised by appellants to the effect that the representations made are not actionable and that the evidence discloses that respondents did not rely thereon need not be passed upon in view of the conclusion which we have reached upon the others discussed.

The judgment is reversed.

We concur: PLUMMER, J.; PULLEN, P. J.

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136 Cal.App. 488

WALLACE v. WALLACE.

Civ. 5036.

District Court of Appeal, Third District, California.

Jan. 29, 1934.

1. Husband and wife ⇨266.

Husband and wife may alter their legal relations as to property (Civ. Code, § 159).

2. Divorce ⇨249(2).

Monthly payments ordered to be made by husband to wife in divorce decree *held* part of property settlement rather than alimony, where prayer asked approval of property settlement rather than alimony, and court did not designate payments as alimony and followed agreement as to amounts and time of payment.

3. Divorce ⇨249(2).

When property settlement agreement was received at trial of divorce action, it became evidence, and like other evidence could be considered by court.

4. Appeal and error ⇨1010(1).

Definite finding on issue before trial court supported by evidence is binding on reviewing court.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Gertrude Muriel Wallace against Ernest Le Roy Wallace. From an order denying a motion to modify interlocutory and final decrees as to property settlement, defendant appeals.

Affirmed.

John A. Gilligan, of Los Angeles, for appellant.

Sherman & Sherman, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

On October 31, 1930, respondent herein filed her complaint for divorce against appellant upon the ground of cruelty. In this complaint, among other things, she alleged:

"That plaintiff and defendant have entered into a property settlement agreement wherein and whereby they have made a division of all the community property belonging to them and said defendant has made provision for the payment of certain alimony to plaintiff.

"Wherefore plaintiff prays judgment; that the bonds of matrimony heretofore and now existing between plaintiff and defendant be dissolved and the said property settlement and agreement be approved in all its terms."

Defendant having failed to answer this complaint, his default was duly entered; thereafter an interlocutory judgment of divorce was granted, said decree containing the following provisions: "It is further ordered, adjudged and decreed that defendant pay to plaintiff the sum of $170.00 forthwith, and the further sum of $155.00 on the first day of January, 1931, and a like sum of $155.00 on the first day of each and every month thereafter to and including the first day of April, 1932."

Introduced as an exhibit upon the hearing of the divorce was the property agreement entered into between the parties, which contains the following paragraph pertinent to the issues herein involved:

"Whereas, the parties hereto are husband and wife, and are now living separate and apart and are desirous of entering into a contract dividing their community property interests and settling and determining their obligations toward each other from now on and henceforth:

"Now, therefore, it is mutually agreed between the parties as follows: * * *

"Second: That said first party does hereby grant, assign, sell, convey and transfer to said second party all of his right, title and interest in and to the following described real and personal property. * * *

"Third: That said second party does hereby grant, assign, sell, convey and transfer to the first party all of her right, title and interest in and to the following described personal property. * * *

"Fifth: The first party further agrees to pay to the second party the following sums:

"1. The sum of $250.00 cash, the receipt whereof is hereby acknowledged.

"2. The sum of $165.00 as second party's attorney's fees, the receipt whereof is hereby acknowledged.

"3. The sum of $170.00 on the first day of December, 1930.

"4. The sum of $155.00 on the first day of January, 1931, and a like sum of $155.00 on the first day of each and every month thereafter to and including the first day of April, 1932.

"Sixth: That each of the parties hereto receives the benefits of this contract under the covenants herein contained in full and complete satisfaction of any and all claims he or she has or may have as a husband or wife of the other party hereto * * *, and each of the parties hereto accepts the benefits of this contract in full and complete satisfaction of all rights that he or she now have or may hereafter have to support or maintenance, alimony or attorney's fees or court costs from the other party, and each party does hereby release the other from any obligations of law or otherwise to support or maintain the other, it being the intention of the parties hereto that this agreement shall be constructed as and is a full and final settlement of all the property rights and obligations of the parties hereto."

On December 23, 1931, a final decree of divorce was entered and docketed. On January 27, 1932, there was issued out of the Superior Court in which this action was pending, a petition whereby defendant sought an order of that court modifying the payments as set forth in the interlocutory and final decrees, for the reason that plaintiff had remarried, and that thereby such support as a matter of law should cease. Upon the hearing of this order the court found as a fact:

"That said defendant had paid all the sums up to and not including the first day of January, 1932, and had paid none since that time; that said plaintiff did on the 30th day of December, 1931, marry one Israel J. Woloson, and she is now his wife; that a contract of property settlement was entered into by and between plaintiff and defendant on or about the 30th day of October, 1930, which contract was offered in and accepted in evidence at the trial of said action, and marked 'Plaintiff's Exhibit 3'; that said order to pay alimony in the sum of $155.00 per month to and including the first day of April, 1932, contained in and made a part of the interlocutory and final decrees of divorce was not in the nature of alimony but was and is the balance of the sums due plaintiff under said contract of property settlement.

"Therefore as conclusions of law based upon the above findings of fact the court concludes that the remarriage of plaintiff Gertrude Muriel Wallace does not invalidate the payment of the sums of money payable to her by reason of the contract of property settlement and the interlocutory decree of divorce, and that this court has no discretion in this matter of the order to show cause in re modification of alimony."

From this order discharging the order to show cause defendant appeals. Two questions only are involved; the first being whether the order for the payment of certain sums of money as set forth in the interlocutory decree of divorce is an order for the payment of support or alimony or whether it is a portion of an agreement of property settlement; secondly, whether the remarriage of plaintiff after the entry of the final decree of divorce and while the order for the payment of support was still in effect, worked an estoppel of such order, which could be taken advantage of by the defendant.

Let us determine first the nature of the monthly payments, for if they are found to be a part of a property settlement entered into between the parties prior to the divorce it would be a complete answer to the present controversy.

[1, 2] That a husband and wife may alter their legal relations as to property is well established (Civ. Code, § 159), and apparently with that in view the parties hereto attempted to mutually adjust their respective claims to certain property. Regardless of any allegation in the complaint using the word alimony, a reference to the property settlement agreement discloses they were attempting to effect a complete adjustment of their property and the benefits thereof were to be accepted in full satisfaction of support, maintenance, or alimony. With that clause in the agreement it hardly seems probable that the allowance in the decree would have been by way of alimony, but rather as part of a property adjustment. This is further emphasized by the fact that the prayer of the complaint does not ask for alimony but merely that the property settlement agreement be approved, and by the further fact that the order of the court did not in form designate it as alimony and followed the agreement as to amounts and time of payment.

[3, 4] Appellant claims the property settlement cannot here be considered because it was not submitted to the trial court for approval now included in the decree, and if not so included has no standing in the divorce proceedings, and the court has no jurisdiction to consider the agreement other than as an exhibit. In this appellant is in error. When the agreement was presented and received at the trial, it became evidence in the case, and like any other evidence, could be considered by the court. The case of Ex parte Weiler, 106 Cal. App. 485, 289 P. 645, seems to be a complete answer to this contention of appellant. Furthermore, this agreement was before the court upon the order for modification, and upon that hearing the court made the findings given above, to the effect that the payments directed to be made were not in the nature of alimony but was the balance of the sums due plaintiff under said contract of property settlement. That being a definite finding upon the issue before the court, we are bound thereby. As the court said in Atlass v. Atlass, 112 Cal. App. 514, 297 P. 53, 54: "Had the court found the provisions for support to have been in fact by way of property settlement then the said provisions could not have been disturbed. * * *" There was ample evidence to support the finding in the instant case, and we must therefore accept the same as true.

It therefore appears that the installments to be paid were a part of a valid and binding property settlement, and it therefore becomes unnecessary to consider the second point urged for reversal.

The order is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

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136 Cal.App. 574

DUTTON DREDGE CO. v. UNITED STATES FIDELITY & GUARANTY CO.

Civ. 9071.

District Court of Appeal, First District, Division 2, California.

Feb. 3, 1934.

As Modified on Denial of Rehearing March 5, 1934.

Hearing Denied by Supreme Court April 3, 1934.

1. Insurance 🔑128(2).

Employer's action for damages for insurance company's breach of contract to keep plaintiff covered with compensation insurance *held* sustainable as action for breach of parol contract to insure.

2. Judgment 🔑707.

Decision of Industrial Accident Commission in compensation case that insurance company was not employer's insurance carrier at time of injury *held* not res judicata in employer's action against company for breach of parol contract to insure.

3. Customs and usages 🔑19(2).

Evidence of custom in insurance world not to enter into oral contracts of compensation insurance *held* inadmissible to disprove making of contract.

4. Customs and usages 🔑18.

Evidence of custom in insurance world not to enter into oral contracts of compensation insurance *held* properly excluded as not responsive in employer's action against insurance company for breach of contract to keep plaintiff covered with compensation insurance.

5. Frauds, statute of 🔑49.

Insurance company's contract to keep employer covered with compensation insurance *held* performable within one year, and therefore outside statute of frauds, where contract was terminable by either party on written notice (Civ. Code, § 1624, subd. 1).

6. Insurance 🔑131(3).

Oral contract to keep employer covered with compensation insurance *held* not merged in first written policy (Civ. Code, § 1625).

7. Insurance 🔑128(2).

Jury could find that any breach by insured, of insurer's oral agreement to insure, was waived, where, on notice of cancellation of policy, delinquent premium was paid and policy reinstated, and thereafter another policy was issued.

8. Insurance 🔑128(1).

Employer's failure to pay advance deposit premium required by rider on compensation policy *held* not breach of oral contract whereby insurer was to keep employer covered with compensation insurance, where no policy for succeeding year was delivered; payment of premium and delivery of new policy being concurrent conditions.

9. Insurance 🔑128(2).

Damages to employer for compensation insurer's breach of oral contract to insure *held* amount of disbursements employer was required to pay to its injured employees, less amount of premiums which employer would have been required to pay (Civ. Code, § 3300).

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Dutton Dredge Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant appeals.

Reversed, with directions.

Horace W. B. Smith and George A. Work, both of San Francisco, for appellant.

Edward J. Lynch, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff commenced an action to recover damages for breach of an alleged contract under the terms of which the defendant undertook to keep the plaintiff covered with compensation insurance. The defendant answered, and the action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

After the plaintiff had filed its complaint the defendant commenced an action to obtain a writ of prohibition to restrain the trial court from further proceeding with the trial. The writ was denied. United States F. & G. Co. v. Superior Court, 214 Cal. 468, 6 P.(2d) 243. The nature of the complaint of the plaintiff in the instant case is quite fully set forth in that decision.

[1] 1. The defendant asserts that the evidence does not support the verdict. It claims that parol contracts of insurance must be clearly and convincingly established in every particular or the courts will refuse any relief. It cites American Can Co. v. Agricultural Ins. Co., 12 Cal. App. 133, 106 P. 720. That was an action on an alleged parol contract of insurance. The instant case is one for damages as for a breach of contract. "There is a well-defined distinction maintained in the cases between a parol contract to insure or to issue an insurance policy, and a parol contract of insurance." Hartford Fire Ins. Co. v. Whitman, 75 Ohio St. 312, 79 N. E. 459, 460, 9 Ann. Cas. 218. The instant case falls within the first class and not the second class. Assuming without deciding that the authorities cited by the plaintiff on this point are applicable, we will apply the rule to the evidence. In applying the rule contended for, the Supreme Court of Pennsylvania quoted with approval as follows: "To constitute a verbal contract of insurance the minds of the parties must have met upon all the essentials of the contract. The testimony must make clear the subject-matter of insurance, the amount and elements of the risk, including its duration in point of time and extent in point of hazard assumed, the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premium on the other." Benner v. Fire Ass'n of Philadelphia, 229 Pa. 75, 78 A. 44, 46, 140 Am. St. Rep. 706. In its brief the defendant does not specify any point on which the minds of the parties did not meet. We have found none in our examination of the record. That the minds of the parties met is evidenced by the fact that almost immediately after the oral agreement was made the first policy was issued. Without further consultations, annually thereafter, others were issued which it is stipulated were similar in form. The insurance in question was workmen's compensation insurance. It is conceded by both counsel that such policies were issued for a term of one year. The amount and elements of the risk were fixed by the Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 279, as amended). By the nature of the risk the entire premium could not be known until a reckoning had after the termination of the policy. Considering all of these circumstances it is quite im-

possible to say that the minds of the parties did not meet.

As just stated, the defendant presents the point on the theory that the plaintiff's claim rests on a parol contract of insurance. That claim is repeated in other places in the briefs. We think the claim cannot be sustained. The plaintiff did not plead a parol contract of insurance. Neither did it introduce evidence in support of such a claim. Nevertheless, the defendant says that the plaintiff could have obtained insurance for one year from any broker; hence it follows that, when the plaintiff's agent called on the manager of the defendant company, he could not have called for any other purpose than to obtain insurance for a period exceeding one year. That conclusion does not necessarily follow. No business man of large affairs can be presumed to carry his office files with him wherever he goes. Neither will it be presumed that he carries his insurance policies in his pocket. It is therefore important that some one should watch the dates of expiration and advise him when certain policies are about to expire, the amount of the renewal premium, and to see to it that no lapses occur. Both the plaintiff's complaint and the testimony of its witnesses were addressed directly to that theory and not otherwise. If the jury believed those witnesses, and from its verdict we must assume it did, this court may not disturb the implied finding of the jury in plaintiff's favor. The contract which the plaintiff claims it made with the defendant could have been made with a broker. But, if it had been, it would hardly be claimed that the broker would have become the insurance carrier. We therefore repeat that the plaintiff's cause of action rests on an alleged breach of a parol contract to insure and not on a parol contract of insurance.

[2] 2. It is next claimed that the decision by the Industrial Accident Commission that the defendant was not the insurance carrier for the plaintiff at the time of the injury is res judicata of the issues involved in this action. The point may not be sustained. The plaintiff does not again tender that issue. On the contrary, it relies on the finding made by the Industrial Accident Commission as being a part of its case.

[3, 4] 3. The third point is that the trial court erred in refusing to allow the defendant to introduce evidence to show that the custom and usage in the insurance world was not to enter into oral contracts of compensation insurance. It is not claimed that such evidence would have assisted the court in interpreting any specific clause of the alleged contract. It is claimed that such evidence would have created a circumstance tending to show that the officers of the defendant corporation never made the alleged contract. For that purpose the evidence was not admissible. In Barnard v. Kellogg, 10 Wall. (77 U. S.) 383, at page 390, 19 L. Ed. 987, Mr. Justice Davis, speaking for the court, said: "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this intrinsic evidence." In 17 C. J. 508, § 77, the author says: "Where the terms of an express contract are clear and unambiguous they cannot be varied or contradicted by evidence of custom or usage, and this is true whether the contract is written or parol." He cites a large number of cases. Some of those applying the rule to oral contracts are: Hollingham v. Head, 140 Eng. Rep. Reprint, 1135, 1136; Stewart & Co. v. Exum, 132 Ga. 422, 64 S. E. 471, 472; Lucia v. Meech, 68 Vt. 175, 179, 34 A. 695; Hodges v. Richmond Manufacturing Co., 10 R. I. 91, 94; Goodfellow's Executors v. Meegan, 32 Mo. 280, 284; Lane v. Bailey, 47 Barb. (N. Y.) 395, 402; 3 Ency. of Ev. 519. In Lane v. Bailey, supra, the court said: "The offer of the defendants to prove that it was the practice of their firm, on extending time, to demand collaterals, was not admissible. The question as to the extent of the pledge depended entirely on the agreement; and this was ascertainable from what was said or done by the parties, at the time, in relation to this particular transaction. No practice of the firm, in relation to their general transactions, could have affected the testimony relative to this particular transaction, one way or the other." Furthermore, it was not responsive to the issue. The plaintiff claimed the defendant orally agreed to insure. It did not claim the defendant orally insured.

[5] 4. It is next claimed that the alleged contract is within the statute of frauds because it was not to be performed within one year. Among other replies the plaintiff calls to our attention that the basic covenant of the alleged contract was that the defendant agreed to insure the plaintiff and to keep it insured. Continuing, it calls attention to the fact that by another covenant it was agreed the contract could be terminated at any time by either party giving written notice thereof to the other party. Both parties concede that policies for compensation insurance are written for one year. We think the answer

is complete, because under such covenants the contract by its terms could have been performed within a few days, not to mention a year. Such contracts do not come within the statute of frauds. Civ. Code, § 1624, subd. 1; 12 Cal. Jur. 857; Blake v. Voigt, 134 N. Y. 69, 72, 31 N. E. 256, 30 Am. St. Rep. 622.

[6] 5. It is then said that, even if there was an oral contract made in the beginning, it was merged into the written contract, that is, the first policy that was written. If the oral contract sued upon was an oral contract of insurance, the contention would have merit. Civ. Code, § 1625; Moore v. State Ins. Co., 72 Iowa, 414, 34 N. W. 183. But it was a continuing collateral contract to insure, and the issuance of a policy for one year was but one step in its performance. Ferrar v. Western Assurance Co., 30 Cal. App. 489, 159 P. 609, 611, contains nothing to the contrary. In that case the oral contract to keep the owner insured was made by Coleman, a broker. The insurance was written by the Western Assurance Company. There were two separate contracts to each of which the owner was a party, but, otherwise the parties were different. No merger was claimed by any one. As we understand Harrower v. Insurance Co. of North America, 144 Ark. 279, 222 S. W. 39, another case relied on by the defendant, it is to the effect that the preliminary oral arrangement for insurance is merged in the written policy that follows. In this state that rule is statutory. Civ. Code, § 1625. True it is, in that case there was involved an oral agreement which the plaintiff claimed obligated the insurance company to keep the owner insured. That agreement by its terms ran for a period of three years. As it was not in writing and did not contain a cancellation clause, it was held to fall within the statute of frauds.

[7] 6. In its next point the defendant claims that the oral agreement, if any, was canceled during the year 1927 and ceased to exist at that time. On April 22, 1927, the plaintiff was delinquent in the payment of its premiums. On that date the company sent to the insured a written notice that its policy was canceled as of date May 1, 1927. There was evidence that on receipt of the notice the insured paid the delinquent premium and the policy was reinstated. There was also evidence that thereafter another policy was issued, and that the premiums thereon were paid as they fell due. Conceding that such facts show the plaintiff breached its contract, it also appears there was evidence that the breach was waived.

[8] 7. The next point made by the defendant is that the alleged agreement was breached prior to the date of the accident. It repeats the facts asserted under the point last discussed and also asserts that for the period December 17, 1928, down to the date of the accident, April 20, 1929, no premium was paid. In this connection reference is made to a clause contained in a rider, " * * * the assured will pay a deposit premium of one hundred (100) dollars in advance." The defendant says it was not paid, and it claims the plaintiff further breached the oral contract to insure. For several reasons we are not inclined to sustain the claim. There is no evidence whatever that $100 was to be paid before a policy was written, or that a policy for the year 1929 was written, or delivery thereof tendered. We think it is but a fair interpretation that the clause quoted was a statement that such payment and the delivery of the policy were to be concurrent conditions. As no policy was delivered, there was no breach in failing to make the payment.

The plaintiff went to trial on an amended and supplemental complaint. Therein it inserted allegations purporting to plead that it had paid the premium for the year December 17, 1928 to December 17, 1929. If we understand the record correctly at the end of the trial it was stipulated that said premium had not been paid. The evidence shows that the total premiums earned during the year 1928 amounted to $775.36. It does not show what the premiums would have amounted to for the year 1929. If as claimed the defendant breached the contract the plaintiff was entitled to damages but its recovery should have been limited to the amount which would compensate it for all the detriment proximately caused by the breach. Civ. Code § 3300. In the instant case that amount would be the amount of the disbursements the plaintiff was required to pay to its injured employee less the amount of the premium on the policy. Hardwick v. State Ins. Co., 20 Or. 547, 26 P. 840, 843; Interstate Fire Ins. Co. v. McFall, 114 Va. 207, 76 S. E. 293; 1 Cooley's Briefs on Ins. (2d Ed.) 531. But the plaintiff was allowed $3767.81, the total sum of its expenditures together with interest, and the premium was not deducted.

The judgment is reversed and the trial court is directed to again try the issue as to damages. The defendant will recover its costs on this appeal.

We concur: NOURSE, P. J.; SPENCE, J.

136 Cal.App. 582

PEOPLE v. K. NAKAMARU.

Cr. 1316.

District Court of Appeal, Third District, California.

Feb. 3, 1934.

Rehearing Denied Feb. 17, 1934.

1. Homicide 🔑**167(8).**

In prosecution for murder by administering strychnine, where defendant denied having bought strychnine, druggist's evidence in rebuttal that, 14 months before deceased's death, defendant had purchased strychnine from druggist *held* not inadmissible as too remote.

2. Homicide 🔑**166(1).**

In prosecution for murder by administering strychnine, defendant's failure to account for possession or disposition of strychnine, after satisfactory evidence of its purchase had been adduced, *held* evidence of guilty knowledge and criminal motive.

3. Homicide 🔑**253(5).**

Evidence sustained conviction of first degree murder by administering strychnine.

4. Criminal law 🔑**366(1).**

Deceased's declaration, during convulsions shortly before death, that he had eaten hotcakes and thought they were poisoned *held* admissible as res gestæ.

5. Homicide 🔑**203(3).**

Deceased's declaration, immediately before death and during convulsions from effect of poison, that defendant had come to deceased's cabin on preceding night and deceased thought hotcakes consumed by deceased had been poisoned *held* admissible as dying declaration.

6. Criminal law 🔑**1036(1).**

Defendant not objecting to admission of dying declarations could not, on appeal, complain of lack of preliminary proof.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

K. Nakamaru was convicted of murder of the first degree, and he appeals.

Affirmed.

K. D. Robinson, of Auburn, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted of murder of the first degree and sentenced to life imprisonment. He was charged with administering strychnine to his associate, Hanjiro Onishi. The case is based largely on circumstantial evidence. It is contended the verdict is not supported by the evidence and that the court erred in admitting certain declarations which were made by Onishi just before his death occurred.

The defendant and Onishi were Japanese. They had been acquainted for several years. For about six months they had been employed to work in the orchard on the farm of Louis Threlkel near Newcastle. They lived together in a one-room cabin situated a short distance from the dwelling house of their employer. For two or three months they had been quarreling about a debt of $170 which was due from Onishi to the defendant. Half a dozen witnesses testified to frequent quarrels on the ranch and elsewhere. In conversations with other persons the defendant frequently criticized and cursed Onishi, complaining of his failure to pay the debt, of his eating more than a fair share of the provisions, of his manner of spraying the orchard, and of various other faults. They had agreed upon the terms of a settlement of the debt, but Onishi lacked the funds with which to promptly pay it. He had attempted to borrow the money. The defendant was impatient and angry because of the delay. For several days he remained away from the ranch waiting about a Japanese boarding house at Penryn for Onishi to bring him the money. He was in a rage and demanded an immediate settlement of the debt. On June 8, 1933, Onishi succeeded in borrowing $30 which he brought to the defendant at the boarding house in Penryn and offered it to him in the form of a check. In anger, the defendant threw the check upon the floor, saying, "I don't want it." Onishi picked up the check and placed it in his pocket. The defendant violently seized Onishi, pulling him toward the kitchen and saying "I want to chastise you." He cursed and repeatedly struck his victim. Mr. Goto, the proprietor of the rooming house, and several other Japanese who were present, separated them. The defendant then rushed into the adjoining room and seizing an ice pick, hastened back toward Onishi cursing and threatening him. He said, "I will get you." Advancing toward him with the pick held aloft the defendant in anger said, "To get a fellow like Onishi is easier than getting a dog or cat." The defendant was, however, disarmed and prevented from making a further assault. Goto testified that he then said, "I am going to get him." Another Japanese by the name of Wega also testified that the defendant in a passion said: "I will kill him with iron bar. * * * I am going to crash Onishi's head with an iron bar."

At 8 o'clock on the following evening the defendant, in company with another companion, went in an automobile to the Threlkel ranch for the assumed purpose of procuring his personal belongings from the cabin. It appears to have been the custom of Onishi to prepare batter each night in the cabin for hotcakes which he fried for breakfast the following morning. The defendant knew of this practice on his part. The automobile was parked near the dwelling house some distance from the cabin. The defendant and his companion went immediately to the cabin where they found Onishi. Mr. and Mrs. Threlkel and their two sons testified to a renewal of the quarrel between the defendant and Onishi at the ranch on that occasion. They overheard and recognized the angry voice of the defendant. After a few moments they observed Onishi and the defendant's companion coming down the pathway together from the cabin to the automobile. They were carrying the defendant's bedding and personal belongings. The defendant remained in or about the cabin for a few moments after the others left. The defendant was then seen following them down the pathway at a distance of 75 feet or more. Evidently the defendant did not remain in the cabin after the others had left for the purpose of securing other belongings, for he carried nothing away with him as he followed them to the machine. The defendant and his companion then drove away. The owners of the ranch overheard very little of the controversy which occurred on that occasion, as they left soon after the defendant's arrival to attend commencement exercises in town.

The following morning, June 10th, Mr. and Mrs. Threlkel were awakened at 5 o'clock by Onishi's hammering on their door. Upon inquiry he said: "I am very sick. * * * I can't go, my legs hurt." They opened the door and found him to be in great pain. He fell upon the grass a few yards from their doorway and writhed in agony. He suffered violent convulsions. His teeth were firmly set. His body became rigid and arched. Over the objection of the defendant, Mrs. Threlkel was permitted to testify that Onishi, in the course of his convulsions, said "he had eaten the hotcakes; that they didn't taste good. I think so poisoned. Go get them, not let the cat and the dog eat them." Subsequently, Mr. Threlkel testified without objection that "he hollered 'Nakamaru Nakamaru' twice the first spasm, and the next spasm he hollered 'Nakamaru' fierce like he was angry, three different times." Norwin, the son of Louis Threlkel, also testified, without objection, that he "heard him call Nakamaru's name several times, told me about the hotcakes being poisoned he thought, * * * called for a doctor." Another Japanese, by the name of Enkoji, who was also present at the time of the death of Onishi, testified without objection that he was writhing on the ground in great pain, and after "quite a bit of struggle" Onishi said "Nakamaru, s——— of a b———, came over here last night, and also the night before; (he said) I was going to die, and I want you (to) remember."

A doctor was promptly called, and arrived within about half an hour. In spite of every effort to save Onishi he died within a few moments in fearful convulsions. The doctor testified that he had all the symptoms of internal poisoning by strychnine. The cabin was immediately searched without finding any strychnine present. Six well-browned hotcakes were found in the frying pan in the cabin. Evidently Onishi had used all the batter in cooking these six cakes. No additional batter was found. About one-third of one of the hot-cakes had been consumed. The cakes were afterwards examined by the sheriff who found no evidence of the presence of poison crystals on the surface thereof. A can of baking powder, a large can of flour, and the pancakes were immediately taken from the cabin by the sheriff. An autopsy on the body of the deceased was performed. The contents of his stomach were subsequently analyzed and found to contain 1.6 grains of strychnine. A cross-section of the six pancakes was also examined and found to contain a similar amount of strychnine. Neither the flour nor the baking powder contained strychnine. Expert medical evidence established without contradiction the fact that the deceased died from strychnine poison. Since it was found in such abundance in the pancakes, of which the deceased had eaten about a third of one cake, there can be no reasonable doubt but that he was poisoned by means of strychnine which had been placed in the batter from which he made the cakes.

[1, 2] The defendant remained in or about the cabin the night of June 9th, after his companion and Onishi had left with his belongings, long enough to have placed the strychnine in the batter. The defendant admitted he was familiar with the custom of the deceased to mix the batter for the hotcakes the night before they were fried. This was done to permit the batter to raise by standing over night. The defendant denied that he had

ever purchased strychnine or that he knew what it looked like. Upon subsequent investigation the sheriff discovered he had previously bought strychnine at a drug store in Newcastle three miles distant from the Threlkel ranch. A Sacramento druggist was called as a witness and testified that the defendant bought one-eighth of an ounce of strychnine from him February 16, 1932. It was delivered in an amber-colored bottle. The evidence of the druggist is competent. It was not too remote. It was in rebuttal of the defendant's denial that he had ever bought strychnine. The poison record of the drug store was signed by the defendant, and he was identified by the druggist. The record indicates that he bought the poison for the avowed purpose of killing rats. In spite of this record and convincing evidence of the purchase of strychnine from the Sacramento druggist, the defendant persisted in denying that he ever bought it. He said: "I no buy nothing, that poison, I never buy. (I) signed 'medicine'. I never (bought) that kind medicine. I never buy in all my life." It is true this particular strychnine was bought fourteen months before Onishi was poisoned. It is reasonable to assume the defendant did not originally purchase the strychnine to poison him. It is, however, not unreasonable to assume that a portion of the strychnine was retained in the bottle, and used by the defendant to poison the batter on the night of June 9th, after his enmity for Onishi arose. That was a matter for the determination of the jury. The defendant failed to account for his possession or subsequent disposition of the strychnine after satisfactory evidence of its purchase had been adduced. That is evidence of guilty knowledge and a criminal motive.

[3] The defendant's enmity toward Onishi; his threat to kill him; his knowledge of the custom of mixing the batter the night before it was used to fry the cakes; his visit to the cabin the night before the fatal poisoning occurred, and his remaining there long enough to have deposited the strychnine in the batter after the others had left; his denial of ever having purchased strychnine; the presence of strychnine in both the pancakes and the contents of the stomach of the deceased; the violent death of Onishi from the undisputed cause of strychnine poison and the accusation of Onishi in the very convulsions preceding his death that Nakamaru had poisoned him, furnish satisfactory evidence of the guilt of the defendant. We are, therefore, convinced the verdict and judgment are adequately supported by the evidence.

[4] The declarations of Onishi were properly admitted in evidence as a part of the res gestæ. People v. Wong Ah Foo, 69 Cal. 180, 10 P. 375; 13 R. C. L. 925, § 228. The only statement to which an objection was made is that "he had eaten the hotcakes; that they didn't taste good. I think so poisoned. Go get them, not let the cat and the dog eat them." This statement does not purport to charge the defendant with poisoning the hotcakes. It merely asserts that he had eaten hotcakes and that he thought they were poisoned. It merely attempts to account for the excruciating pain with which he was then suffering and from which he died within a few moments. It does not purport to be a dying declaration. The fact that the hotcakes did contain poison was established by other evidence beyond controversy and without conflict.

[5, 6] The other statements which were made by the deceased immediately before his death occurred, and while he was suffering convulsions from the effect of the poison just before he expired, were competent as dying declarations. People v. Jones, 130 Cal. App. 717, 720, 20 P.(2d) 713. The foundation for the admission of these declarations was sufficiently proved. Moreover, they were admitted without objection. The deceased was writhing in pain and lived but a few moments. While he was in that condition Onishi declared to his countryman Enkoji that he was going to die, and admonished him to remember what he said. He called the name of the defendant several times and said he had come over to the cabin the preceding night, and he thought the hotcakes had been poisoned.

We are of the opinion these statements were admissible as dying declarations. They were admitted without objection on the part of the defendant and he may, therefore, not complain of a lack of preliminary proof.

The judgment and the order are affirmed.

We concur: **PLUMMER, J.; PULLEN, P. J.**

136 Cal.App. 588

COVINA UNION HIGH SCHOOL et al. v. CALIFORNIA INTERSCHOLASTIC FEDERATION, SOUTHERN SECTION, et al.

Civ. 9091.

District Court of Appeal, Second District, Division 2, California.

Feb. 5, 1934.

1. Appeal and error ⚿781(4).

Appeal from decree enjoining interscholastic federation from interfering with school's participation in athletics "during present football season" should be dismissed where period of injunction had expired; reinstatement of injunction being a vain act.

2. Appeal and error ⚿781(1).

Appeal must be dismissed when controversy between parties thereto terminates.

Appeal from Superior Court, Los Angeles County; Irvin Taplin, Judge.

Suit by the Covina Union High School and others against the California Interscholastic Federation, Southern Section, and others. From an adverse decree, defendants appeal.

Appeal dismissed.

Tipton & Sawyer, Newby & Newby, and Charles R. Newby, all of Los Angeles, for appellants.

L. G. Shelton, of Los Angeles, for respondents.

CRAIG, Justice.

Motion to dismiss appeal from decree restraining the defendant association from disqualifying or barring the plaintiff school from participating in interscholastic athletics.

Upon a complaint wherein the trustees and principal of Covina Union High School alleged that their students had been excluded from certain athletics illegally and contrary to provisions of the constitution and rules of the defendant association of which the plaintiff school was a member, and praying an injunction against said association and reinstatement therein, a decree was entered in favor of the plaintiffs. After trial of the issues, it was ordered and decreed that the defendants permit and consent to the participation by said school in athletics "during the present football season on the same footing as other high school members," and that they be restrained from preventing the plaintiff school from participating in football games "for the 1932 season on said ground" that it was ineligible so to do. Said decree was dated the 4th day of November, 1932, and the defendants appealed therefrom on the 29th day of the same month.

[1, 2] The respondents move to dismiss the appeal upon the ground that the time during which said decree became or could be effective has elapsed. The appellants resist such motion, claiming that the decree was based upon erroneous findings of fact, that the rulings of the association were not based upon a consideration of any cause for disqualification of said school other than that which would bar it from participation during the 1932 athletic season, and that a decision of the appeal upon its merits might serve as a guide should a similar controversy arise in the future. With findings of fact as to the cause of suspension of the plaintiff school during the season of 1932, this motion is not concerned, and the second ground for opposing it would seem to defeat the appellant's argument, in effect, that the said decree remains in any respect operative. As to the third, to anticipate a future controversy would require an assumption of facts which do not exist. Since it has been and is the settled law that to reinstate an injunction after the lapse of its usefulness would be a vain act, and that, when a controversy between parties to an appeal ceases to exist, the appeal must be dismissed, there is no alternative but to dismiss the appeal in question here. Foster v. Smith, 115 Cal. 611, 47 P. 591; Munger's Laundry Co. v. Rankin, 8 Cal. App. 448, 97 P. 95.

The appeal is dismissed.

I concur: STEPHENS, P. J.

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

136 Cal.App. 445

LAMIA v. TOZZI et al.

Civ. 8186.

District Court of Appeal, Second District, Division 2, California.

Jan. 27, 1934.

Hearing Denied by Supreme Court March 26, 1934.

1. Appeal and error ⚿1071(6).

Failure of court to make findings that alleged causes of action were untrue *held* not prejudicial, where such findings could avail defendant nothing, and plaintiff had waived right to recover on such causes of action.

2. Appeal and error ⚿1071(6).

Failure of court to make findings as to liability of defendants not served *held* not prejudicial, since action was against party served only (Code Civ. Proc. §§ 379, 414).

3. Brokers ⚿8(3).

That buyer refused to sign or perform contract for sale of oranges drawn by seller at buyer's directions did not prevent existence of agency between buyer and broker who arranged dealings and transmitted directions to seller.

4. Brokers ⚿8(3).

In action by broker for commissions, evidence established that buyer contracted to buy fifty cars of oranges and to pay broker's commissions thereon.

Appeal from Superior Court, Los Angeles County; H. Parker Wood, Judge.

Action by Vincent R. Lamia against James Tozzi, individually, and doing business as James Tozzi & Co., and others. Judgment for plaintiff, and named defendant appeals.

Affirmed.

Conley, Conley & Conley, of Fresno, for appellant.

Stanley Howell and Edwin W. Taylor, both of Los Angeles, for respondent.

CRAIG, Justice.

In an action for commissions alleged to have accrued for services rendered under a contract to obtain an agreement to furnish to the defendant and appellant fifty carloads of oranges, the latter appealed from a judgment founded upon affirmative findings of fact.

In the interest of economy of time and discussion, a common ground of the parties may be stated as established. The plaintiff, a fruit broker, was requested by the defendant to buy for the latter fifty carloads of Valencia oranges, pre-season, the seller to pay broker's commission, but first to advise as to name of shipper and brand obtainable before closing the purchase; in an interchange of correspondence the broker stated after negotiations that he had located and obtained from the Highlands Orchard Company, of Highland, Cal., for Tozzi, fifty carloads of Cherokee brand oranges at 6 cents per pound for shipment one car daily, terms $200 on each car to be deposited at once on confirmation, balance cash when shipped, plus brokerage; the buyer, after examination of said brand, wrote and telegraphed that he would give the quoted price and make said deposit upon signing contract, "accept fifty cars Valencias, price, terms, shipping date satisfactory"; upon receipt of a telegram advising that the purchase had been made and that the papers would be prepared and mailed immediately, a telegraphic reply and confirmation by mail to the broker stated, "Satisfactory; draw contract today, mail same immediately for approval." Further recital of terms and prepared and signed contract specifying the agreed grade, quality, price, terms of payment and shipment were promptly forwarded to the buyer; the plaintiff testified that, after making a careful study of the situation, inspecting groves in all good districts, and investigating the market and crop conditions, he "brought the deal about" preparatory to filling so large an order. The appellant did not disapprove any term or condition of the stipulated contract, but at this point the transaction was at an end; he notified his broker that he was interested in another fruit district, and had "therefore decided to pass it up." Receiving no response to demands for consideration of his claim, the broker filed suit against the buyer, James Tozzi, doing business as above indicated, and others, and each thereof individually, but process was served upon the first-named defendant alone.

[1, 2] Criticism of findings of fact as prejudicial error if such be intended upon the ground that alleged causes of action consisting of common counts and for damages is untenable, for the reason that, if not supported by any evidence, a finding that they were untrue could avail the defendant nothing, and the plaintiff waived all right to recover thereon. Browne v. T. J. Lawrence Co., 204 Cal. 424, 268 P. 631. Equally without merit is the claim of prejudicial error in the omission of findings as to liability of defendants other than the appellant and who were not served. The action was maintained against the party

served as if he were the only defendant served. Code Civ. Proc. §§ 379, 414; Callahan v. Danziger, 32 Cal. App. 405, 163 P. 65.

[3, 4] Under a heading, "No contract for brokerage was ever made between Lamia and Tozzi," it is argued upon authorities appropriate to hypothetical cases stated that, in order for parties to be bound by a contract, they must deal with each other directly with the intention of creating contractual rights and duties; and that, since the formal contract "which was not executed by the parties" was silent as to brokerage, no privity of contract existed between the appellant and respondent. However, we think the authorities cited do not apply to the facts of this case. The conclusion that default of a principal by refusing to sign or to perform a contract procured from and prepared and signed by a third party in dealings between them through the agent under direction of the former precludes the possibility of the existence of the agency itself is unwarranted in law or in fact. It is not apparent that from the statement of a general hypothesis the asserted conclusions must result in a particular case from an incomplete array of the facts, since from the whole record it appears that the appellant sought and requested the respondent to effect the purchase made, that he obtained and forwarded the contract which was presented, and that they were expressly confirmed by the buyer, through the services of the broker. In response to the first request that the commodity be purchased with the condition, "seller to pay you brokerage," he was immediately advised that the original terms and conditions under the agreement "plus brokerage" were the best obtainable, and replied by wire, "price, terms, shipping date satisfactory," wrote in confirmation, "satisfactory to accept the fifty cars, price and terms you mention"; and two days later wired, "satisfactory, draw contract today, mail same immediately"; writing, "immediately wired you to draw up contract right away." So, through dealings between buyer and seller through the buyer's broker, it was expressly understood that the item of commission should not be of concern to the seller, but that the "price, terms and shipping date satisfactory" to the buyer included commission. The privity of contract between buyer and agent thus resulted in the consummation of another between buyer and seller, which the buyer declined to perform.

Other questions presented are covered by the foregoing. The evidence as to rate of commission was ample.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

136 Cal.App. 517

In re HAMON'S ESTATE.

BROWN v. RUDOLPH et al.

Civ. 9138.

District Court of Appeal, First District,
Division 1, California.
Jan. 29, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Executors and administrators ⊂⇒45.

Provision of will bequeathing legacy to trustee in trust for testatrix' daughter, to be turned over to daughter at expiration of twenty years or upon death of her husband before that time, *held* not to vest title in daughter, so as to entitle her executor to trust estate, upon her death, before termination of trust (Civ. Code, § 863).

2. Wills ⊂⇒686(2).

Where daughter who was beneficiary of trust under will died before termination of trust, trust failed, and trustee of express trust became trustee of resulting trust for benefit of all heirs at law of testatrix, including daughter (Civ. Code, § 863).

3. Executors and administrators ⊂⇒45.

Executor of daughter, who was beneficiary of trust and who died before its termination, *held* entitled to proportionate share of trust with other heirs at law, where testatrix made no disposition of trust estate if trust should fail (Civ. Code, § 863).

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Mary C. Hamon, deceased, wherein F. W. Brown, executor of Edith I. Brown, deceased, filed a petition against Paul Rudolph, trustee, and others. From an order directing distribution of the trust estate, petitioner appeals.

Reversed, with directions.

George W. Patterson, of San Jose, for appellant.

Robert D. Duke and Laurence A. Cowen, both of San Francisco, for respondents Lizzie J. Sutfin, J. A. Hamon, and Annie E. Ostrom.

Bohnett, Hill & Cottrell, of San Jose, for respondents Paul Rudolph, trustee, Mary E. Ostrom, Ella M. Richardson, and Cora M. Hamon.

KNIGHT, Justice.

This appeal involves the interpretation of a trust clause of a will.

Mary C. Hamon, the testatrix, died in September, 1927, survived by seven adult children, a son and six daughters, one of whom was Edith I. Brown, the wife of appellant. The will provided first that all real property belonging to the estate be sold. The testatrix then bequeathed to six of her children, not including Mrs. Brown, a one-seventh interest each in her estate; and the remaining one-seventh, over which this controversy arises she disposed of as follows: "Third: I give, devise and bequeath to Paul Rudolph, of San Jose, California, one-seventh (1-7) of all property, of whatsoever kind and wheresoever situated, of which I may die possessed, in trust, however, for purposes as follows: To invest and reinvest from time to time said trust fund and pay the income therefrom quarter-yearly, or oftener, as he may choose, to my daughter, Edith I. Brown. At the end of twenty (20) years from date of this will, or upon the death of the husband of my said daughter if death should occur prior to the end of said twenty (20) years, said Trustee shall deliver said trust fund to my said daughter, Edith I. Brown, to be her sole and separate property." The will was admitted to probate, and as nominated therein the seven children were appointed, respectively, the executor and the executrices thereof. In due course and in August, 1928, final distribution of the estate was granted in strict conformity with the provisions of the will; that is, six of the seven shares of the estate were distributed without restriction or limitation to six of the children, and the remaining one-seventh was distributed "To Paul Rudolph * * * in trust, however, for the following purposes, to-wit: To invest and re-invest from time to time said trust fund and pay the income therefrom quarter-yearly or oftener, as he may choose, to Edith I. Brown," etc., and then followed the exact wording of the remaining portion of the trust clause of the will. Approximately four years after the decree of final distribution was entered, Edith I. Brown died; whereupon her husband, F. W. Brown, as executor of her will, petitioned the court to terminate the trust and to distribute to him as such executor all the property belonging to the trust estate. The petition was denied, the court in its order declaring that said trust estate should be distributed to the six surviving heirs of Mary C. Hamon; from which order F. W. Brown, as such executor, has appealed.

As ground for reversal, he contends that title to the one-seventh interest bequeathed under the trust clause of the will vested in Edith I. Brown at the death of her mother, Mrs. Hamon, subject only "to said trust estate for years and to future possession and enjoyment," and that, therefore, said one-seventh interest was subject at all times to the testamentary disposition of or grant by Edith I. Brown.

[1] We are of the opinion that, as held by the trial court, the terms of the will cannot be so construed, because nowhere in the trust clause nor elsewhere in the will is any language used indicating an intention on the part of the testatrix to vest present title to the trust property in Edith I. Brown. On the contrary, as will be noted, by express terms the testatrix bequeathed said one-seventh interest to Paul Rudolph, as trustee, and not to Edith I. Brown, showing a clear intention to vest title in the trustee during the period of the trust, and to make Edith I. Brown merely the beneficiary thereof during such period. At the end of twenty years, if living, or sooner in the event of the death of her husband, she was to become the absolute owner of said trust fund; but during the period of the trust her status as beneficiary carried with it no investiture of title. As declared in the Estate of Troy, 214 Cal. 53, 56, 3 P.(2d) 930, 932: "It may be taken as settled by the decisions in this state that the beneficiary of a trust takes no estate in the property itself, and that title vests in the trustee with the right in the beneficiary to enforce performance of the trust," which is, in substance, a restatement of the legal principle embodied in section 863 of the Civil Code. Another case holding to the same effect is In re Estate of Steele, 124 Cal. 533, 57 P. 564.

Appellant has devoted much of his argument to a discussion of the theory of a vested remainder, and in furtherance thereof has cited numerous authorities. We have given full consideration to this theory and examined the authorities cited in support of it, but find nothing therein which would warrant the conclusion that the trust clause here involved created a remainder of any kind. In the Estate of Ritzman, 186 Cal. 567, 199 P. 783, one of the cases strongly relied on by appellant, there was no devise nor bequest made to the trustee, as there was in the present case. In another, Miller v. Oliver, 54 Cal. App. 495, 202 P. 168, 169, there was no trust clause involved; it being admitted that the interest in controversy was "what is known as a 'remainder,'" and the dispute arising over the question of whether it was a vested or a contingent remainder. And the facts stated in Re De Vries' Estate, 17 Cal. App. 184, 119 P. 109, show that it is essentially different from the present case.

[2, 3] Therefore, Edith I. Brown, the beneficiary of the trust estate, having died before the lapse of the twenty-year period fixed for the duration of the trust, and not having survived her husband, the trust failed; and no disposition of said trust estate having been made by the testatrix in the event of such failure, the trustee of the express trust became, by operation of law, the trustee of a resulting trust for the benefit of all the heirs at law of the testatrix, one of whom was Edith I. Brown. In re Estate of Steele, supra. Respondents concede, therefore, that appellant, as the legal representative of the estate of Edith I. Brown, deceased, was entitled to have the trust terminated and to receive one-seventh of said trust fund; and they have stipulated in their briefs that the trial court be directed to modify its order accordingly. It appears from the record, however, that the trial court denied appellant's petition in toto, and held that the trust fund "should be distributed, in settling the estate of Mary C. Hamon, deceased, to the six surviving heirs of said Mary C. Hamon, deceased." Consequently, the order thus made cannot be modified. It must be reversed, and it is so ordered, with directions to the trial court to enter a new order granting that portion of appellant's petition praying for the termination of the trust, and thereupon to distribute the trust fund in the proportions stipulated by respondents and in conformity with the views herein expressed.

We concur: TYLER, P. J.; CASHIN, J.

136 Cal.App. 621

DOUGLAS MacLEAN PRODUCTIONS v. WARNER BROS. PICTURES, Inc.

Civ. 9314.

District Court of Appeal, First District, Division 2, California.

Feb. 7, 1934.

Hearing Denied by Supreme Court April 5. 1934.

Literary property ⚷9.

Evidence, in assignor's action on contract for assignment to motion picture producer of right to purchase play, sustained finding of assignor's compliance with contract provision for obtaining release of distributor's rights.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Douglas MacLean Productions against Warner Brothers Pictures, Incorporated. Judgment for plaintiff, and defendant appeals.

Affirmed.

Freston & Files, of Los Angeles (Ralph E. Lewis, of Los Angeles, of counsel), for appellant.

Walter E. Burke, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on a written contract. The cause was tried before the court sitting without a jury, and the plaintiff had judgment for $5,000, from which the defendant appeals on typewritten transcripts.

Both parties to the agreement were motion picture producers. In the summer of 1929 negotiations were had concerning the purchase by the defendant of certain literary rights of the plaintiff. On October 31 of that year plaintiff made a written offer to defendant, which was duly accepted by the latter and which reads:

"For and in consideration of the sum of Five Thousand ($5,000) Dollars to be paid to Douglas MacLean Productions on or before February 15, 1930, by Warner Bros. Pictures, Inc., the said Douglas MacLean Productions, a corporation organized and existing under and pursuant to the laws of the State of California, hereby assigns all of its right, title and interest in and to that certain contract dated December 21, 1923, by and between Shubert Theatrical Company and Douglas MacLean Productions for the purchase of that certain original play entitled 'Never-Say-Die,' a copy of which agreement is hereto attached.

"Subject to the rights of Pathe, Inc., as distributor of said motion picture, which rights the said Douglas MacLean Productions is exerting its greatest efforts to secure;

"In the event said rights are not secured on or before the 15th day of February, 1930, this assignment shall be of no further force and effect unless the time in which to secure them is mutually extended by the parties hereto.

"[Seal] Douglas MacLean Productions
"By Walter E. Burke, Vice President"

Conformably to the terms of its agreement, the plaintiff procured a release of all the distributor's rights of Pathe, Inc., subject, however, to outstanding foreign rights. On February 10, 1930, plaintiff notified defendant that "everything has been cleared," but that if anything further was required by the defendant to be done the plaintiff stood ready to supply any document or perform any act necessary to carry out the full and complete terms of the agreement. Nothing further was requested by the defendant and no indication was given that it deemed plaintiff's performance incomplete but, after the payment became due, the defendant sought relief from its obligation on the asserted ground that plaintiff had failed in complete performance in that the release of the distributor's rights for Pathe, Inc., was not in writing, that it did not include the rights of foreign distributors, and that plaintiff had failed to deliver negatives of the picture.

The trial court found with the plaintiff on all disputed points. The defendant offered no evidence of any character in support of its defense. Hence the single question presented on this appeal is whether the evidence and the inferences deducible therefrom support the findings.

Evidence of the release from Pathe, Inc., was in the form of a telegram signed by one Flynn. Testimony was received that Flynn was an officer of the Pathe Company. This was confirmed by a letter signed by the same individual on a printed letterhead of the company bearing the inscription, "Pathe Exchange, Inc. Executive offices." From this evidence the court could infer that the officer was acting with proper authority.

The contract did not specifically call for the release of the rights of foreign distributors, but it called for the release of "the rights of Pathe, Inc., as distributor." The reservation in the assignment as to foreign rights might have been nothing more than a notice to the assignee that such rights

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

were extant. There is nothing in the evidence to show that Pathe, Inc., had any interest in such foreign rights. It is a fair inference from all the evidence that plaintiff cleared all the rights of Pathe as distributor within the agreement of the parties to the contract.

The only reference to the inclusion of negatives in the contract is in a separate letter addressed to defendant on the same day the contract was made. If plaintiff was thus obligated to deliver negatives or to tender delivery, it is manifest that a tender would have been idle after defendant had repudiated the contract before such tender was due.

There are no questions of law presented on the appeal. It is simply a trial de novo upon the same evidence heard in the trial court. On that evidence the trial court found that the excuses offered by the defendant for its noncompliance with the terms of the contract were not valid. We find no error in the record.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

SOUR et al. v. SUPERIOR COURT IN AND FOR SAN DIEGO COUNTY et al.*

Civ. 1112.

District Court of Appeal, Fourth District, California.

Feb. 5, 1934.

Rehearing Denied Feb. 21, 1934.

Hearing Granted by Supreme Court April 5, 1934.

1. **Justices of the peace 🔑140.**

New statute dealing with procedure only, such as extent of order Superior Court may make on appeal from justice court, applies to both pending and future actions (Code Civ. Proc. § 980).

2. **Justices of the peace 🔑187.**

Superior Court's power to make order on appeal from justice court *held* defined by statute authorizing it to review all orders affecting judgment appealed from, set aside, confirm, or modify subsequent proceedings, and order new trial (Code Civ. Proc. §§ 974, 980, 982a, 988h).

Proceeding by George Sour and another for certiorari to review a judgment of the Superior Court of the State of California, in and for the County of San Diego, Charles C. Haines, and Clarence Harden, Judges, reversing a judgment recovered by petitioners against the Western States Grocery Company in a justice's court and entering judgment for the grocery company.

Judgment of the Superior Court annulled with instructions.

J. L. Hofflund, of San Diego, for petitioners.

Liggett & Liggett, of San Diego, for respondents.

MARKS, Justice.

Petitioners, George and Peter Sour, recovered judgment in the justices' court of San Diego township, county of San Diego, against Western States Grocery Company, Inc., which appealed to the Superior Court of San Diego county on questions of law alone. Judgment in the justices' court was rendered April 3, 1933, and on October 31, 1933, the following judgment was rendered by the Superior Court: "It is ordered that the judgment of the trial court be reversed, and that judgment be entered herein in favor of the defendant Western States Grocery Company, Inc., a corporation. It is further ordered that said defendant recover costs in the trial court and upon the appeal."

San Diego township has a population in excess of 30,000. At the time the appeal from the justices' court was taken, section 982a of the Code of Civil Procedure provided that appeals from such justices' courts "shall be taken, heard and determined as provided in chapter four of this title relating to appeals from municipal courts." Section 988h of the Code of Civil Procedure provides that on appeal from a municipal court, the Superior Court "may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered."

Section 982a of the Code of Civil Procedure was repealed in August, 1933 (St. 1933, p. 1904, § 198). Effective the same day, the title of chapter 3, title 13, part 2 of the Code of Civil Procedure was amended to read "Appeals from Justices' Courts" (St. 1933, p. 1893, § 153), with the machinery of appeal and power of the appellate court set forth in that chapter.

Section 974 of the Code of Civil Procedure provides for appeals to the Superior Court on questions of law, or fact, or both. Section 980 of the same Code provides that "upon an ap-

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*For subsequent opinion see 36 P.2d 373.

peal heard upon a statement of the case, (an appeal on questions of law alone) the superior court may review all orders affecting the judgment appealed from and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial."

The principal question to be decided here is whether the powers of the Superior Court on appeal from the judgment were defined by section 980 or section 988h of the Code of Civil Procedure. There is no question but that the provisions of section 988h were applicable to appeals from the justices' court of San Diego township at the time the case was tried, judgment given, and the appeal perfected in that court. During the pendency of the appeal, section 982a of the Code of Civil Procedure was repealed. This had the effect of removing section 988h from the Code provisions governing appeals from justices' courts. During the same time chapter 3, title 13, part 2 of the Code of Civil Procedure was made the law governing appeals from all justices' courts.

[1] The extent of the order which the Superior Court could make on appeal is a matter of remedy and procedure. "When a new statute deals with procedure only, it applies to all actions—those which are pending, and future actions." Heron v. Bray, 122 Cal. App. 79, 9 P.(2d) 513, 514. See, also, City of Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298.

[2] We conclude that the power of the Superior Court to make an order on appeal from a justices' court on October 31, 1933, was defined and limited by the provisions of section 980 of the Code of Civil Procedure. The powers given by this section to the Superior Courts on an appeal from a justices' court on questions of law alone was considered in the case of G. & H. Commercial Service v. Superior Court, 121 Cal. App. 191, 8 P.(2d) 549, 550, where it was said: "The appeal to the superior court was heard upon a settled statement of the case, which assigned the admission of hearsay evidence by the justice's court as error. The case was not tried de novo by the superior court. No evidence was adduced upon the hearing in that court. After argument by respective counsel, the superior court rendered and entered a judgment which reads in part: 'It appearing to the court that the said Justice's Court erred in law in the matters specified as such errors in said statement of the case, above referred to: It is therefore ordered and adjudged that the judgment of said Justice's Court of Marysville Township * * * be and it is hereby reversed and set aside, and that judgment be entered in favor of said defendant.'

"In an appeal upon questions of law alone, which is taken from a judgment rendered in a justice's court, the superior court is without jurisdiction to try the cause de novo, or to render a judgment on the merits.

"In the case of Lugo v. Superior Court, 55 Cal. App. 561, 203 P. 812, 813, it is said: '"We think it clear * * * that upon an appeal on questions of law alone * * * the superior court can merely pass upon the questions brought before it on the appeal, and has no jurisdiction to try and determine the whole cause as if it had been transferred to that court upon an appeal upon questions of both law and fact."'" Sherer v. Superior Court, 94 Cal. 354, 29 P. 716.

The judgment of the Superior Court of San Diego county is annulled with instructions to that court to proceed in the case in accordance with this decision.

We concur: BARNARD, P. J.; JENNINGS, J.

220 Cal. 93

BOONE v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Sac. 4771.

Supreme Court of California.
Feb. 15, 1934.

1. Automobiles ⚷245(81).

Whether motorcyclist, colliding with rear of wagon carrying no light, was contributorily negligent, *held* for jury under evidence that motorcyclist could have seen wagon and avoided collision if reasonably careful.

2. Appeal and error ⚷930(4).

In action for death of motorcyclist in collision with rear of wagon carrying no light, where verdict was for defendant, it was presumed on appeal that jury found motorcyclist contributorily negligent.

3. Death ⚷68.

Evidence of habit of doing specific act in careful or careless manner is admissible when there are no eyewitnesses to accident and when evidence is not too remote in time and is limited to approximate place of accident and circumstances substantially similar.

4. Automobiles ⚷243(4).

There being no eyewitnesses to collision between motorcycle and wagon and no testimony as to motorcyclist's speed at time of accident, evidence of motorcyclist's habit, for extended period just prior to accident, of speeding on same highway in same vicinity, *held* admissible.

In Bank.

Appeal from Superior Court, Merced County; H. S. Shaffer, Judge.

Action by Minnie Boone against the Bank of America National Trust & Savings Association and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

Hugo McKinley and L. B. Schlingheyde, both of Modesto, for appellant.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondent Bank of America Nat. Trust & Savings Ass'n.

George Angels, in pro per.

WASTE, Chief Justice.

This is an action for damages for the wrongful death of plaintiff's adult son, resulting from a collision between decedent's motorcycle and the rear end of a wagon loaded with farm implements, being driven by the defendant Angels along a public highway in Merced county. The defendant bank held a chattel mortgage on the wagon and its contents. It was plaintiff's theory, in joining the bank as a defendant, that Angels was the agent of the bank. This theory is founded on the fact that Angels, pursuant to directions from the bank and because of his financial inability to further carry on his farming operations, was, at the time of the accident, proceeding to a warehouse for the purpose of there storing the wagon and its contents in order to preserve them as security under the bank's chattel mortgage. The conclusion we have reached, and the fact that the jury brought in a verdict against the plaintiff and in favor of both defendants, makes it unnecessary for us to determine whether plaintiff upon the trial had satisfactorily established the relation of principal and agent between the defendants. For present purposes we shall assume, without deciding, that this relationship existed between the parties.

Upon this appeal from the judgment the plaintiff contends that the court below committed reversible error when, over objection, it permitted two of the defense witnesses to testify as to the decedent's habit or custom for an extended period just prior to the accident of repeatedly and continuously driving his motorcycle at excessive rates of speed over and along the highway upon which and in the vicinity at which the accident occurred. With this evidence excluded, the appellant urges there is no evidence of contributory negligence on the part of the decedent.

[1, 2] It appears that both vehicles were proceeding along a straight highway in a northerly direction when decedent ran his motorcycle into the rear of the wagon being driven by the defendant Angels. The accident occurred shortly after 6 o'clock on the evening of December 17, 1931. An almanac introduced in evidence indicates that the sun had set at 4:41 p. m. on that day. There is evidence to the effect that it was "dusk" or "almost dark" at the time of the accident. The defendant Angels admitted on the stand that his wagon was not equipped with a light. It is undisputed that the headlight on the decedent's motorcycle was lighted prior to and at the time of the accident and was capable of throwing a beam of light a considerable distance ahead of the vehicle. It was also shown that a motorcycle traveling at a speed of forty-five miles an hour, the maximum legal rate of speed, can be stopped within a distance of 60 feet. We are satisfied that the jury on this evi-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

dence, and without considering the "habit" evidence here complained of, might reasonably conclude, and in view of the verdict it will be presumed they did so conclude, that, had decedent been operating his motorcycle in a careful and prudent manner, and had he been attentive to surrounding conditions, he would have been aware of the presence of the wagon on the highway and by the exercise of reasonable diligence could have averted bringing his motorcycle into collision therewith. This would appear to be so in view of the testimony that the highway was straight for a considerable distance either side of the scene of the accident, and that it was not yet dark, but merely "dusk," and particularly in view of the defendant Angels' testimony, which under the verdict we are bound to accept, that it was "daylight" and visibility good.

[3, 4] We are therefore of the opinion that there is sufficient in the record, exclusive of the "habit" evidence, to support the verdict and judgment. This latter evidence, if properly admitted, and we think it was under the circumstances of this case, tends further to support the reasonableness and propriety of the jury's verdict herein. The rule now appears to be crystallized in this state that evidence of habit, i. e., evidence tending to show that an individual had the habit of doing a specific act in a careful or careless manner, is admissible when there are no eyewitnesses to an accident and when the evidence is not too remote as to time and is limited to habit at the approximate place of the accident and under circumstances substantially similar to those in controversy. Some of the cases dealing with and announcing this rule of evidence are Wallis v. Southern Pac. Co., 184 Cal. 662–672, 195 P. 408, 15 A. L. R. 117; Starr v. Los Angeles Ry. Corp., 187 Cal. 270–281, 201 P. 599; People v. Crossan, 87 Cal. App. 5–15, 261 P. 531; Blackford v. Beckworth, 90 Cal. App. 37–40, 265 P. 514; Gorman v. County of Sacramento, 92 Cal. App. 656–663, 268 P. 1083; Lindsey v. Pacific Elec. R. Co., 111 Cal. App. 482–499, 296 P. 131. Examination of the cited cases discloses that in those instances where evidence of habit was held to have been improperly admitted there were eyewitnesses to the accident who testified upon the very issue sought to be established by the habit evidence or the evidence of habit was too remote to give it any probative value. Such is not this case. Here there were no eyewitnesses to the accident, and no one testified as to the rate of speed at which the decedent was traveling at the time of the accident. True, the defendant Angels testified that as he was driving along the highway he heard a noise, and upon looking back saw a motorcycle approaching about 500 feet to the rear of his wagon. He then states that he proceeded to drive and turn his wagon so that its two right wheels would be off in the dirt to the right side of the paved portion of the highway. The collision followed almost immediately. Nowhere has the defendant Angels testified as to the speed at which the decedent's motorcycle was traveling at the time of the accident. The record is also singularly free of such testimony from plaintiff's witnesses. This is necessarily so in the absence of eyewitnesses. Plaintiff's witnesses merely gave the approximate speed of the motorcycle as it passed them several miles from the scene of the accident. This being so, and in the absence of testimony of eyewitnesses as to the speed of the decedent's motorcycle at the time of the accident, we are satisfied that "habit" evidence was admissible, for whatever probative value the jury desired to attach to it, as tending to establish the decedent's usual and customary mode of operating the vehicle. This evidence concerned itself with decedent's method of operating his motorcycle at excessive speeds on the same highway upon which the accident occurred, and in the vicinity thereof, and covered a period of time immediately preceding the accident. It was not therefore so remote, under the authorities, as to make it inadmissible.

The judgment is affirmed.

We concur: CURTIS, J.; IRA F. THOMPSON, J.; SHENK, J.; TYLER, Justice pro tem.; SPENCE, Justice pro tem.

SEAWELL, Justice (concurring).

I am in accord with the judgment of affirmance. I do not, however, subscribe to the proposition that "habit" has the force of evidence only in cases where there are no eyewitnesses and is inadmissible in cases where there are such witnesses to an accident.

The court or jury should be permitted to weigh it against the testimony of one or any number of witnesses. Surely, if it is to be regarded as having any evidentiary force at all, it should prevail against the testimony of a single discredited witness. I see no reason, if it is to be received in courts of law as evidence, why its application should be limited to cases in which there are no eyewitnesses.

220 Cal. 107

EMPLOYERS' LIABILITY ASSUR. CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14572.

Supreme Court of California.
Feb. 16, 1934.

Insurance ⚷512½.

Where final judgment was rendered against one compensation insurer, employer had not intended to carry double insurance, and second insurer had agreed to take care of insurance only if first insurer was not bound, award against second insurer should be annulled.

In Bank.

Proceeding under the Workmen's Compensation Act by William H. Palms, employee, opposed by the Atascadero Mill & Lumber Company, employer, and the Indemnity Insurance Company of North America, insurance carrier, and Employers' Liability Assurance Corporation, alleged insurance carrier. On petition of Employer's Liability Assurance Corporation for certiorari to review an order of the Industrial Accident Commission awarding compensation for injuries.

Annulled in part and affirmed in part.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Bronson, Bronson & Slaven, of San Francisco, for respondent Indemnity Insurance Company of North America.

CURTIS, Justice.

An award was made by the Industrial Accident Commission in favor of William H. Palms and against his employer, the Atascadero Mill & Lumber Company, and against the petitioner herein, the Employers' Liability Assurance Corporation, and the Indemnity Insurance Company of North America, as insurance carriers of said employer. The Indemnity Insurance Company had issued to the employer a policy of compensation insurance for the year beginning December 18, 1931, and ending December 18, 1932. This policy was written through Paul Bone, the agent of the company. The policy contained a provision which permitted either party to cancel the policy without cause by giving notice to the other party. About three months after the date of the policy, the Indemnity Insurance Company gave notice of cancellation of the policy on the ground that the employer had failed to pay the premium. The employer had, however, paid the premium in full to Bone, the agent, who evidently had failed to pay it over to his company. The employer immediately notified Bone of the notice of cancellation, and asked the reason why such a notice had been sent. Bone assured the employer that it was all a mistake and that he would communicate with the company and straighten up the matter, and assured the employer that its policy was intact and was not subject to cancellation. Nothing further was heard from the company regarding the policy. It did not send a member of its auditing staff, as it said it would in the notice of cancellation, to ascertain the amount of the premium earned under the policy, nor did it return any part of the premium paid by the employer, nor take any action whatever indicating that it had canceled said policy of insurance. Five months afterwards Bone absconded, and the employer fearing that its policy with the Indemnity Insurance Company might be affected by Bone's disappearance, took the matter up with the agent of the petitioner. The agent of petitioner stated that Bone's affairs were in such shape he could not determine whether the policy of the employer was in force or not. He promised verbally "to take care" of the employer in case the policy with the Indemnity Insurance Company was not in force, and later wrote to the employer a letter to that effect. No policy was ever issued by the petitioner, nor was any premium ever paid petitioner by said employer. A few days later, after the date of this letter, and on October 31, 1932, the employee Palms was injured. Under this state of facts, the Industrial Accident Commission held both insurance companies. If the policy issued by the Indemnity Insurance Company was canceled by the notice sent to the employer, then that company is not liable. If it were not canceled, that company is liable, and the petitioner here is not liable, as the uncontradicted evidence of the employer was that it did not intend to take out duplicate insurance. The Indemnity Insurance Company filed a petition for a hearing herein after the District Court of Appeal had denied its petition to annul said award against said company. This petition we denied, with the result that the award in favor of the employee against the Indemnity Insurance Company has become final. It follows as a necessary corollary from our decision sustaining the award against the Indemnity Insurance Company that the award against the petitioner should be annulled, as we think the evidence conclusively shows that the employer had no intention of insuring with the petitioner, if its insurance with the Indemnity Insurance Company was in effect at the time the agent of the insurance company absconded.

In justice to the Industrial Accident Commission we think it should be said that in the first instance its award was against the Indemnity Insurance Company only, but on a petition for a rehearing before said commission, when it became apparent that the Indemnity Insurance Company might seek an annulment of said award in the court, it granted said petition for a rehearing and rendered a final award against both insurance companies, evidently intending that should it be finally determined that said award should be annulled as against either of said companies then the other company should be held to the award in so far as said award was against it. It is apparent that the commission in granting the award against both insurance companies was endeavoring to protect the employee under either of these two contingencies. The award against the Indemnity Insurance Company having been affirmed, that against the petitioner should be annulled.

It is, therefore, ordered that the award of the respondent commission in so far as said award renders this petitioner liable for the payment thereof, is annulled, but in all other respects it is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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220 Cal. 104

CALIFORNIA CORRUGATED CULVERT CO. v. STEWART et al.

Sac. 4772.

Supreme Court of California.

Feb. 16, 1934.

Mechanics' liens ⚿281(1).

Evidence supported finding that entire ranch was improved by construction of rice elevator and additions to barn, rendering entire ranch subject to mechanic's lien.

In Bank.

Appeal from Superior Court, Glenn County; H. S. Gans, Judge.

Action by the California Corrugated Culvert Company against W. H. Stewart and another. From a judgment in favor of the plaintiff, the defendant the Oakland Bank appeals.

Affirmed.

George R. Freeman, of Willows, and McKee, Tashiera & Wahrhaftig, of Oakland, for appellant.

Gaylord & Lovell and Robert B. Gaylord, all of San Francisco, for respondent.

IRA F. THOMPSON, Justice.

This action was brought to foreclose a mechanic's lien upon the ranch of defendant Stewart, arising out of the construction by plaintiff of a rice elevator and, in connection therewith, of making additions to his barn. The contest is actually between plaintiff and the appellant bank, a subsequent incumbrancee of the ranch.

The case was here on a former appeal from that part of the judgment only which limited the area to be foreclosed under the mechanic's lien and from "the orders amending and directing the amendment of the findings of fact and conclusions of law and judgment in said action, in connection with the denial * * * of the motion for a new trial of said action." California Corrugated Culvert Co. v. Stewart, 215 Cal. 120, 8 P.(2d) 1013, 1014. It was determined by that decision that although the plaintiff by appropriate language had proffered the issue that the whole of the 729-acre ranch was "necessary for the convenient use and occupation of said barn and grain elevator," yet the appellant had failed to raise the issue by a proper denial, wherefore the allegation of the complaint stood admitted and the case was tried as though "the extent of the land necessary for the convenient use and occupation of the buildings was" not "an issue." Hence, when, after trial, the court attempted to amend the findings and judgment to limit the area, it was in error. The cause was reversed "with directions to the trial court (1) to enter judgment for the plaintiff on the findings of fact and conclusions of law originally made and filed, or (2) upon a proper and sufficient application for leave to amend the answer so as to put in issue the question of the extent of the area required for the convenient use and occupation of the barn and elevator, then, upon

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

such issue joined, to determine that sole question and enter judgment accordingly." Reference may be had to the former opinion for a more complete statement of facts showing the controversy between respondent and appellant.

After the going down of the remittitur, the appellant asked and was granted leave, over the strenuous objection of respondent, to amend its answer. Upon the trial of the sole issue respondent refused to introduce any evidence in addition to that originally taken at the trial, but submitted its case upon the former testimony and its objection that the trial court was without jurisdiction to permit the amendment or try the issue. Judgment was rendered to the effect that the whole area of the ranch was subject to respondent's lien.

The appeal is from the judgment so entered, and it is appellant's claim, in effect, that the evidence is not sufficient to sustain the conclusion that the whole of the ranch was necessary for the convenient use and occupation of the buildings. We cannot agree with appellant. The testimony in support of the determination that the whole of the ranch was necessary to the use of the buildings discloses that the defendant Stewart was engaged in the raising of rice upon his ranch and was desirous of handling his crop in bulk. He approached the respondent with a query concerning how it might be done and was informed that it could "design and build him an elevator for doing that work." It was agreed that respondent should prepare the plans, and supply the labor and materials for its construction. The defendant Stewart testified: "[T]he entire ranch was then used for raising rice and it was my purpose in getting this elevator to handle the rice crop through the elevator." With respect to the additions to the barn, Stewart also testified that he told respondent's agents that he had no shelter for his teams and that he would have to get the iron from them to build additions to the barn, which barn was used for hay, for storage, and for the horses. There was testimony produced by appellant to the effect that Stewart solicited from a couple of farms the business of putting their rice through the elevator and that several changes were made in the elevator. The most that may be said of the testimony of appellant is that it raised a conflict in the evidence, which was resolved in respondent's favor by the trial court. It seems clear from the testimony relied upon to support the judgment that the entire ranch was to be improved and to be benefited by the erection of the elevator and the additions to the barn. In Western Well Works v. California F. Co., 60 Cal. App. 749, 214 P. 491, 494, the District Court of Appeal, speaking through Mr. Justice Richards, said: "The question is not so much as to the amount of land required for the area to be occupied by the well and its appliances, but rather as to the amount of land to be improved or benefited by the creation and use of the well." This language, as well as other of like tenor in the opinion, is particularly pertinent because the defendant Stewart's own testimony shows that it was his purpose and intent to improve the entire ranch. We find nothing contrary in the cases of Tunis v. Lakeport A. P. Ass'n, 98 Cal. 285, 33 P. 63, 447; Gregg v. H. & M. Drilling Co., 92 Cal. App. 189, 267 P. 903; or Cowan v. Griffith, 108 Cal. 224, 41 P. 42, 49 Am. St. Rep. 82.

The conclusion to which we have come renders it unnecessary to discuss the questions raised by the respondent.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

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220 Cal. 80

LEWIS v. SHELL OIL CO.

Sac. 4779.

Supreme Court of California.

Feb. 8, 1934.

1. Sales ⚿174.

Under five-year contract requiring filling station operator to buy 75 per cent. of oil and 100 per cent. of gasoline from seller, buyer buying only 40 per cent. of oil from seller for over four years, and then placing order to make up for shortage, could not recover for seller's refusal to sell gasoline.

2. Contracts ⚿171(1).

Whether contract is severable is question of interpretation, depending on parties' intent.

3. Sales ⚿62.

Contract, requiring buyer to buy certain percentages of his oil and gasoline from seller, was not severable so as to permit buyer not buying required percentage of oil, to recover for seller's refusal to sell gasoline.

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Contract provided for lease by oil company, seller, of exclusive advertising privileges on signs on top of buyer's building at certain monthly rental, and that buyer, filling station operator, agreed to purchase petroleum products from oil company for sale and dispensing through certain equipment, and that oil company should secure not less than 100 per cent. of total volume of gasoline business and not less than 75 per cent. of total volume of lubricating oil sold by buyer during life of agreement, and that differential on gasoline should be not less than 3 cents per gallon.

4. Contracts ⟹171(1).

Buyer not buying percentage of oil from seller required by contract could not recover from seller agreed rental for advertising privileges on buyer's building; contract not being severable.

5. Appeal and error ⟹109.

Denial of motion for judgment non obstante veredicto is appealable (Code Civ. Proc. § 963, subd. 2).

6. Appeal and error ⟹1176(2).

Where judgment non obstante veredicto should clearly have been granted, reviewing court may reverse with instructions to enter judgment for appellant (Code Civ. Proc. § 629).

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by R. Lewis, doing business under the firm name and style of the Yosemite Garage, against the Shell Oil Company, formerly called the Shell Company of California. From a judgment for plaintiff, defendant appeals.

Reversed, with instructions.

Prior opinion, 16 P.(2d) 744, 26 P.(2d) 651.

McCutchen, Olney, Mannon & Greene, F. F. Thomas, Jr., and William E. Wright, all of San Francisco, for appellant.

Barcroft & Barcroft and John J. Coghlan, all of Madera, for respondent.

IRA F. THOMPSON, Justice.

This litigation revolves around a contract, between the parties, in the following words:

"This agreement, made and entered into this 22nd day of March, 1927, by and between R. Lewis of the City of Madera, County of Madera, State of California, and Shell Company of California, a California Corporation.

"That for the term, at the rental and upon the conditions, covenants and agreements hereinafter expressed and subject thereto and in consideration of One ($1.00) Dollar to said R. Lewis in hand paid, receipt of which is hereby acknowledged, said R. Lewis hereby agrees that the Shell Company of California shall lease the exclusive advertising privileges on the signs on top of building, and certain panels on south side of said building of said R. Lewis for a period of five (5) years from completion of said work or during the life of this agreement.

"In consideration of the Shell Company of California leasing the exclusive advertising privileges for which they agree to pay a sum of Fifty ($50) Dollars per month for a period of five years from March 22nd, 1927, to March 22, 1932 said R. Lewis hereby agrees to purchase petroleum products from the Shell Company of California for sale and dispensing through the following units of equipment: One Wayne visible Curb pump, Cut 711, Serial 72349; One Bowser buggy, serial C. 17554; 2 Lub-oil containers. In event of said R. Lewis' removal from his present location, or sale of lease under which he holds premises, he shall have the right to carry on under this agreement at his new place of business, under the same terms and conditions herein provided, over a period of even and consecutive dates during which time the advertising privileges are hereby leased.

"It is further agreed that the Shell Company of California are to secure not less than the sum of 100 per cent of the total volume of gasoline business sold and not less than 75 per cent of the total volume of lubricating oil by said R. Lewis during the life of this agreement. Differential, on gasoline, not less than three (3) cents per gallon, during the life of this agreement."

On July 31, 1930, the defendant company refused to sell Lewis any further supply of gasoline. This action was commenced to recover damages for the company's refusal in this regard. The defense, by way of demurrer, and subsequently by answer, amounts to the same contentions as are now advanced on this appeal by it from the judgment entered on a verdict of the jury in plaintiff's favor, together with an appeal from an order denying defendant's motion for a judgment non obstante veredicto.

It is asserted by appellant that the agreement is void for uncertainty because there is no basic price established by the agreement from which to determine, by means of the differential, the selling price of gasoline to the respondent, and because no price whatever was agreed upon for lubricating oils. It is also urged that for the entire period of the contract, up to and including the day on which the defendant refused to sell gasoline to the respondent, the latter had violated and breached the agreement by failure to purchase 75 per cent. of his total volume of lubricating oil, but had secured more than 60 per cent. of his requirements from the Pennzoil Oil Company. In truth, the record discloses that he purchased the following percentages per annum from appellant: In 1927, 39 per cent.; in 1928, 39 per cent.; in 1929, 36 per cent.; and in 1930, 40 per cent.

[1] We are not inclined, in this case, to follow counsel through the long arguments and authorities concerning the certainty or uncertainty of the contract, because this uncontradicted fact remains that respondent had consistently purchased more than 60 per cent. of his lubricating oil from another company. His contention is that, after the appellant refused to deliver gasoline, he ordered enough oil to make up the shortage, and that he had the whole term of the contract within which to purchase 75 per cent. of his requirements. With this contention we cannot agree. Assuming, solely for the purpose of argument, that the contract was valid and certain, it is evident that it was the plain intent of the parties that he should purchase from the defendant company 75 per cent. of the oil sold by him in the ordinary course of his business. To test his compliance with this provision, a reasonable length of time and a reasonable run of business would be the standard. But to say that for four years and four months he can make no pretense of complying with the covenant by him to be performed, and yet exact damages from the other party for failure to discharge its obligation, is reducing the situation to an absurdity. The rule of law is so elementary and fundamental, and so in keeping with good conscience and common justice, that we need do no more than refer to Los Angeles Gas & Electric Corp. v. Amalgamated Oil Co., 168 Cal. 140, 142 P. 46, and Sterling v. Gregory, 149 Cal. 117, 85 P. 305.

[2-4] This conclusion is founded upon the proposition that the contract under consideration is entire—which cannot successfully be denied. Whether a contract is severable or entire is a question of interpretation, depending upon the intent of the parties. Los Angeles Gas & Elec. Co. v. Amalgamated Oil Co., 156 Cal. 776, 106 P. 55. The contract in the present case can be properly likened to an agency contract for the sale of appellant's products, both gasoline and lubricating oils. The parties by their writing specified the maximum permissible departure from exclusive representation of appellant by respondent, thereby manifesting their intent that the contract should not be severable, but entire. In other words, the nature of the subject-matter was such and the language of the parties such as to indicate that the purchase by respondent from appellant of 100 per cent. of his gasoline and 75 per cent. of his lubricating oil requirements was essential to the contract. The entirety of the agreement also disposes of respondent's contention that he was entitled to recover by a supplemental complaint filed by him the rental of the advertising space. Not only is it apparent from a reading of the agreement that the roof and panels were leased in consideration of the agreement of respondent to purchase Shell gasoline exclusively and 75 per cent. of Shell lubricating oil, but also it is in evidence that the rental was based upon an estimate of respondent's annual sale of gasoline, calculated upon previous years at the rate of one cent per gallon. The contract being nonseverable, respondent was not entitled to recover after his own persistent failure to comply.

[5, 6] As heretofore indicated, the defendant, after the return of the jury's verdict, but before the entry of the judgment, made a motion for a judgment non obstante veredicto, which was denied and from which order it has also appealed. We are asked to reverse this order and, by so doing, in effect, direct the trial court to enter judgment against the plaintiff and for defendant. In view of the plain language of section 963 of the Code of Civil Procedure, the conclusion is inescapable that the order is appealable. Subdivision 2 of that section specifies an order "denying a motion for judgment notwithstanding the verdict in an action or proceeding tried by a jury where such trial by jury is a matter of right." Concededly the parties here were entitled to a trial by jury as a matter of right—hence the appeal lies. We are not called upon, in this instance, to say whether in all cases where the evidence is insufficient to support the verdict and such a motion has been denied, we are under the obligation to direct a verdict in favor of the moving party. That there is grave doubt upon that general question is sug-

gested by the language of section 629 of the Code of Civil Procedure, which indicates that the order may rest in the judicial discretion of the appellate tribunal. We do not decide this question because our previous discussion very clearly demonstrates that the order should have been granted and that a different result on retrial can hardly be imagined. For which reasons, the order should be reversed with instructions.

Other points are raised by the appellant which we deem it unnecessary to discuss.

The judgment and order are reversed, and the trial court instructed to enter a judgment for defendant.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.

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220 Cal. 89

FARM LAND INV. CO. v. EICH, County Treasurer, etc. (two cases).

FARM LAND INV. CO. et al. v. SAME.

Sac. 4734–4736.

Supreme Court of California.

Feb. 13, 1934.

Appeal and error ⟹1043(5).

Where certificates of sale of lands in reclamation district, against which assessments were delinquent, were adjudged irregular and void, landowners *held* not entitled to complain of refusal of injunction against sale of property to satisfy assessments unless landowners, within time limited, paid re-estimated assessments, where judgments could not be construed not to declare certificates void unless re-estimated assessments were paid.

In Bank.

Appeals from Superior Court, Yuba County; J. O. Moncur, Judge.

To separate actions by the Farm Land Investment Company, and by the Farm Land Investment Company and others, against H. D. Eich, as Treasurer of the County of Yuba, and as Trustee of the Bond Fund of Reclamation District No. 784. From the judgments rendered, the plaintiffs appeal.

Affirmed.

Rich, Weis & Carlin, of Marysville, for appellants.

Snook, Snook & Chase, of Oakland, and Erling S. Norby, of Marysville, for respondent.

IRA F. THOMPSON, Justice.

The actions entitled as above were commenced by the owners of different parcels of land in reclamation district No. 784 to enjoin the defendant as treasurer of the county of Yuba and as trustee of the bond fund of the reclamation district from selling the property and issuing deeds by himself, as trustee, to purchasers after default by the plaintiffs in the payment of installments of assessment on the land. Altogether there were four hundred and eighty causes of action set forth in the three complaints. The basis of each complaint was that the defendant had estimated the sum necessary to pay that portion of the principal falling due on January 1, 1930, and the interest due at the same time, at too high an amount. To understand the contentions it is necessary to note that, in the year 1920, an assessment was levied against the land in the district for a total of $897,427.39. Bonds aggregating $834,000 were sold. On January 1, 1930, $90,000 of the principal became due and interest in the sum of $25,020. Concededly the defendant calculated those sums correctly. However, he then added to the total of these two amounts 15 per cent. thereof to cover possible delinquencies, making altogether $132,273. He then took a rate of 15 cents per hundred, which totaled $601.66 greater than the sum of $132,273.

It was also claimed that on October 1, 1929 (the date on which the estimate was computed), there was in the bond fund of the district $4,490.24, no part of which was taken into consideration in arriving at the sum to be raised by the levy.

The trial court found that defendant's estimate was excessive in the amount of $601.66, or, in other words, that he should have taken the exact rate instead of conveniently fixing it at 15 cents per hundred. By the judgment the court declared the certificates of sale which the defendant, as treasurer and trustee, had made and executed in favor of himself as trustee, to be irregular and void, but the court estimated the correct amount due from each parcel of land, and provided that unless the respective plaintiffs should, within twenty days from the date of the judgment, pay the amount thus fixed, no injunction would issue. The plaintiffs prosecute this appeal and contend that they were entitled to an injunction without being required to pay the amounts fixed by the court.

The effect of the judgment in each action is to declare that the certificates of sale were "irregular and void and of no effect" and to adjudge that they "be set aside and canceled." It was further decreed that the defendant either as treasurer or as trustee of the bond fund had no "right, title or interest" in any of the parcels of land, except that, on December 30, 1929, there was due to the defendant as Treasurer of the county the proportionate shares of the entire outstanding assessment which was secured by a direct, valid and subsisting lien upon the respective parcels of real property. The fact that the court further ordered the plaintiffs to pay their respective portions of the amount found to be due as a condition precedent to the injunction deserves little or no consideration at this time in view of the outcome of a proceeding which is called to our attention by both appellants and respondent, the record of which is before us, and the substance of which we will now narrate.

Julia Adams Balding and E. M. Price, holders of bonds which represent a portion of the assessment here involved, filed their petition for a writ of mandate asking that H. D. Eich as treasurer of the county of Yuba be directed and compelled to estimate the sum of principal due on January 1, 1930, January 1, 1931, and January 1, 1932, together with all interest accrued and to proceed with a call of assessment and sale thereunder. The peremptory writ was granted February 6, 1932. See Balding v. Eich, 120 Cal. App. 491, 7 P. (2d) 1073, 1074. The record shows (an order confirming the respondent's proceedings under the writ having been made) that the directions of the court were performed.

In the course of the opinion in the case, after referring to the estimates made by the respondent on October 1, 1929, here involved, and in subsequent years, the District Court of Appeal said:

"It further appears from the petition that, in the making of various estimates of the moneys necessary to pay the maturing bonds and the interest upon the outstanding bonds, as hereinbefore referred to, the respondent erred in adding to his estimates the costs and expenses of publishing the notices referred to, and that proceedings have been taken and had in the superior court of Yuba county by certain landowners whose lands were subject to assessment, contesting the validity of the calls hereinbefore referred to, and that judgments have been entered to the effect that the calls referred to are and were invalid by reason of the errors in the estimates, and that the sale of lands thereafter had by reason of the failure of landowners to pay their assessments under the calls referred to herein are ineffective.

"It further appears that while a few of the landowners owning lands in said reclamation district have paid the assessment levied upon their lands, a large number have allowed the assessments to go delinquent and by reason of the fact that the estimates, calls and sales on account of delinquencies are each and all ineffective for the reasons stated, nothing is being paid, and nothing is being collected by the respondent as trustee of the bond fund of said district, nor is any action being taken by him to enforce payment, or to make a valid sale of the lands and premises situated within the exterior boundaries of said district and subject to such payments on account of delinquencies in making such payments."

It is apparent that the court construed the judgment in the instant case to mean that the certificates of sale were void and ineffective for any purpose. Under the circumstances we can see no reason for not adhering to the same opinion and many reasons why we should. First of all, as we have already indicated, the judgment plainly declares them to be void and adjudges that they are canceled. Again, a new estimate and call having been made and presumably new certificates of sale having been issued, it would lead to great confusion and uncertainty to construe the judgment to mean that the certificates were not to be declared void unless payment was made by the landowners. With such an interpretation of the judgment the appellants have nothing of which to complain.

Therefore the judgment should be, and it is, affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

136 Cal.App. 632

PEOPLE v. HAYMAN.

Cr. 2442.

District Court of Appeal, Second District, Division 2, California.

Feb. 8, 1934.

Hearing Denied by Supreme Court March 8, 1934.

Licenses ⚿42(4).

Evidence *held* to justify conviction for violation of Corporate Securities Act by defendant who without permit sold worthless stock to innocent buyers (St. 1917, p. 673, as amended).

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Ernest P. Hayman was convicted of violation of the corporate securities act, and, from the judgment and from an order denying his motions for new trial, he appeals.

Affirmed.

J. Thomas Russell, of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was found guilty by the court sitting without a jury on four counts of an indictment charging four separate violations of the Corporate Securities Act (St. 1917, p. 673, as amended). This is an appeal from the judgments of conviction and the order denying defendant's motions for new trials.

Appellant urges that the evidence shows that he was the owner of the stock sold, and fails to show that the transactions in question were but a subterfuge to evade the provisions of such act.

It is undisputed that appellant sold shares of stock of the Hayman Oil Company to the four persons named and that no permit was issued by the commissioner of corporations authorizing the sale of such stock.

One of the purchasers testified that appellant told her at the time she bought that the stock was his own and "that the corporation commissioner had nothing to do with him in any way, shape or form." Other witnesses testified that he said it was his private stock that he was selling. There was other evidence showing that the books of the Hayman Oil Company were kept in appellant's office in Los Angeles; that the certificates of stock were there issued, and that he was the owner of the land on which the supposed "37 producing wells" were located; that the meetings of the directors were held in such office, the only ones present being appellant, who was the president, and his employee, Miss Spalione, the secretary; that the minutes of the directors' meetings were dictated by appellant, were written up and signed by Miss Spalione as secretary, and that they were in fact meetings on paper only; that the Hayman Oil Company had no bank account, but that all deposits were made in either the account of E. P. Hayman or that of the E. P. Hayman Company; and that the expenses of the corporation were paid out of such account. It also appears that appellant employed the office force and directed the business of the corporation. The employee who issued the company certificates testified that at appellant's request he issued one certificate to appellant for 2,000 shares, which he charged to capital stock and credited to appellant; but apparently that certificate was not canceled when the ones mentioned here were issued, and the court might well conclude that the four certificates above mentioned were of the treasury stock of the corporation. In our opinion, it was reasonable for the court to have inferred from the evidence that all four transactions alleged were but part of a scheme on the part of appellant to evade the provisions of the Corporate Securities Act in selling a worthless security to innocent and trustful persons.

Judgments and orders affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

CITY OF LOS ANGELES v. ALLEN et al.*

Civ. 7804.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1934.

Hearing Granted by Supreme Court April 13, 1934.

Eminent domain ⚿136.

Where undivided 38.6-acre tract, abutting on street, had depth of 2,000 feet, and a part 107 feet deep, susceptible to subdivision, had higher unit value than remainder, adding estimated value of such part to value of remainder and using average square foot value of entire tract as basis for determining value of condemned strip 38.5 feet wide *held* not error under statute requiring court to find separately value of each parcel condemned (Gen. Laws 1931, Act 8198, § 10).

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 611.

Such method of arriving at value was not erroneous, where witnesses testified that amount of award as recommended by them was fair and reasonable value of property taken, since ultimate question was value of land taken as it was, being part of undivided tract under single ownership, as against contention that as element of computation witnesses had charged owner with increased value of new frontage on street when widened and that owner would be subjected to an assessment of benefits which law did not authorize.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Condemnation proceeding by the City of Los Angeles against Walter Allen, the Harold Lloyd Corporation, and others. From an unsatisfactory interlocutory judgment in its favor, second named defendant appeals.

Affirmed.

R. C. Gortner, of Beverly Hills, for appellant.

Erwin P. Werner, City Atty., of Los Angeles, for respondent.

CONREY, Presiding Justice.

This is a condemnation proceeding in which plaintiff proposes to take from appellant a strip of land for the purpose of widening Santa Monica boulevard, under the Street Opening Act of 1903. The court approved the award of the referees to appellant of $8,614, and entered interlocutory judgment accordingly. Defendant appeals from said interlocutory judgment upon the ground that the amount of the award was not in conformity with the statute, which requires that the court shall find separately "the value of each parcel of property sought to be condemned," and that the law entitles the owner to that value.

Appellant owns approximately 38.6 acres of land, bounded on the south by Santa Monica boulevard, and about 800 feet in length along that highway, and extending about 2,000 feet to the north. The width of the strip of land which is to be taken varies from 33.5 feet at the west end to 33.58 at the east end of the strip. There appears to be no direct evidence of the value which this parcel would have if separately owned, and thus unconnected with the remainder of the tract. This results from the tacit assumption on both sides that a piece of land of such slight depth could not be put to any very valuable use. It seems to be conceded that, since the strip to be taken is part of a larger tract under a single ownership, the market value of the strip in question must be ascertained under the operation of some reasonable process whereby its value when considered as part of the entire tract may be ascertained. According to the testimony of witnesses, the tract does not derive its value equally from all parts thereof. The acreage remote from Santa Monica boulevard is of less value than that which is nearer to the boulevard frontage. The land west of this tract (separated therefrom by Selby avenue) has been subdivided into lots having a depth of about 107 feet and running to an alley. Appellant's tract of land is susceptible to similar subdivision. Taking these facts into consideration, and as an aid toward establishment of a valuation for the entire tract, the witnesses, duly qualified as experts on value, gave to the area included in the 800-foot frontage with a depth of 107 feet, an estimated value of $1.64 per square foot. To the remainder of the tract they gave a value of $11,000 per acre, or approximately 25 cents per square foot. Apparently the referees added together the values thus estimated, and thus determined the value of the entire tract, reduced first to a valuation per acre and then to a valuation per square foot. In this manner their valuation of the strip to be taken was made by considering it as part of the entire 38-acre tract, without giving a controlling force to the value given to the strip when considered as part of the imagined separate parcel having a depth of only 107 feet, and likewise without considering it as an independent wholly separate parcel. Having arrived at their conclusion in the manner above indicated, the witnesses Butterworth and Crippen (who were two of the three referees) testified that the amount of the award as recommended by them is the fair and reasonable value of the property taken.

When private property is taken by condemnation for a public use, the owner is entitled to receive "just compensation." The statute requires that there be found separately "the value of each parcel of property sought to be condemned." Street Opening Act of 1903, § 10, as amended, Deering's Gen. Laws, 1931 Ed., Act 8198. It is contended by appellant that the method adopted by the referees and by the court for ascertaining the value of the parcel to be taken is unsound, and that the value thereof has not been ascertained in accordance with the requirements of the law. The gist of the argument seems to be that, as an element of their computation, the referees have charged against the owner the increased value of the new frontage of appellant's property on the street when widened. This, appellant claims, was an assessment of benefits, which the law does not authorize. But we think that this argument is itself unsound. The line between the two portions of the tract was arbitrarily chosen. This was a purely mental operation, used by the witnesses for the purpose of analysis of their problem. The ultimate question before them, and the only question which they were authorized to answer, was: What is the value of this parcel of land, as it lies before us, being part of an undivided tract under single ownership? We have their answer, which was accepted by the trial court. It does not appear that any rule or principle of law has been violated by the finding of the court, or by the referees and witnesses in the method by which they made their estimate and formed their judgment concerning the value of the property.

The judgment is affirmed.

I concur: YORK, J.

HOUSER, Justice (dissenting).

I dissent. In condemning land either for the purpose of the opening or the widening of a street, ordinarily the final compensation to be awarded to the owner of property taken should be reached from a consideration of three principal elements; that is to say, the market value of the land taken, to which may be added the amount of damage suffered by the owner to the remainder, if any, of his land by reason of its severance from the part thereof actually taken, and from the sum of such two elements of damage an amount of money assessed as benefits, if any, which will accrue to the property not taken, may be deducted.

In the instant matter neither of the last two elements is involved. The sole question for determination is limited to the first proposition; that is, to an ascertainment of what was the market value of the property actually taken, without reference either to any damages, or to any benefits, which might or did result to the property not taken. In other words, measured by well-established rules of procedure and practice, as far as the present inquiry is concerned, it is limited to a determination of the market value of the property taken.

To my mind, whether to the rear of, abutting upon, or adjoining the property taken, the owner thereof also owned 38 acres, or 10,000 acres, which was of comparatively lesser value than that of the property that was taken, should not be given consideration in arriving at the market value of the 33-foot strip that was taken from his frontage on the street. I am of the opinion that to do otherwise is to depart from the enforcement of the rule respecting compensation legally to be awarded.

In effect, the procedure pursued by the lower court, and proposed by this court to be affirmed as correct, as between the respective owners of adjacent properties, is to penalize one owner because he owns more property than does his next door neighbor. As an example of what I have in mind, let it be supposed that each of two men owns a lot that fronts on a designated street; that one of such lots adjoins the other; that one of such lots has a depth of 107 feet, and that the other has a depth of 250 feet. The method employed by the lower court perhaps admits of the result that because the owner of the one lot has more property than has the owner of the other lot, or, concretely, because the depth of the one lot is greater than the depth of the other, the owner of the lot having the greater area is not entitled to receive as great a compensation for the 33 feet taken from the front of his lot as is the owner of the other lot, with its smaller area, for the identical quantity of land taken from him. It is plain that, if such a measure of market value of land taken for the opening or the widening of a street is to prevail, a differential in compensation to be awarded respective owners of lots fronting on a proposed street-widening improvement will obtain, to be ascertained in amount, not by or through the actual value of the property taken, but dependent upon the varying depths of each of the affected lots. In other words, should the front ten feet of three adjoining lots, of equal width, each owned by a separate individual, be the subject of a condemnation proceeding, one of such lots having a depth of 100 feet, the second, of 110 feet, the third, of 120 feet, by the operation of the proposed system, as compensation for the 10 feet taken, the owner of the first lot would receive one-tenth of the value of his entire lot, the owner of the second, one-eleventh, and the owner of the third one-twelfth. From which illustration it becomes clear that the method of determining compensation adopted by the lower court will result, not as the law requires, in compensation being made on a basis of the market value of the property taken, but on a basis either of what amount of damage has been suffered or sustained by the owner of the property, or what the property taken actually was worth to its owner.

But specifically, and as affecting solely the facts in the instant case, the proponents for the proposed system assert that, notwithstanding the character of the illustrated lots respectively is identical one with the other back to a depth of 107 feet, the compensation or market value to be awarded for the 33 feet taken should be measured by its value, reached by an average of the square foot value of the entire tract. And so, as applied to the two lots hereinbefore instanced, if for a depth of 107 feet the 250-foot depth lot were identical with the other lot, but for the remainder of its depth its character is such that it is absolutely worthless, the necessary result in an award of compensation for the market value of the 33 feet taken off the front would be that the owner of the 250-foot depth lot would receive much less than that which the owner of the 107-foot depth lot would receive. Applying the principle to an enlarged area, supposing that, instead of the 38-acre tract that was herein affected, the tract had an area of 10,000 acres, but that, as hereinbefore assumed in the other illustration, back and beyond the depth of 107 feet the remainder of the 10,000-acre tract of land was practically worthless, would it be "just" compensation to the owner of the 10,000-acre tract to pay to him for the area of the 33 feet taken off the street frontage of his property at the rate of the average of the square foot value of the area of the 10,000 acres of nearly worthless land, and which in fact would be but a very small fraction of the amount that was awarded to his next door neighbor for his 33 feet that was taken from the front of a single lot with a depth of 107 feet?

But let a reverse of the foregoing situation be considered: Supposing that both the 33-foot strip proposed to be taken for street purposes and the remainder of the 107-foot lot lay in a gulch averaging 250 feet in depth and having very steep sides which were covered with huge boulders and other undesirable objects, so that intrinsically, neither the 33-foot strip nor the remainder of the lot was of any value whatsoever. But over and beyond the gulch the remainder of the 38 acres, or the 10,000 acres, as the case might be, was quite valuable; let us say of the same value as was testified by the experts in the instant case, to wit, $11,000 per acre. Many times it has been said that "it is a poor rule that won't work both ways." Therefore, in such conditions, in arriving at the fair "market" value of the 33-foot strip, would it be conceded by the proponents of the rule that its "market" value would be calculated on the average value per square foot of the entire 38-acre or the 10,000-acre tract, to wit, at approximately $11,000 per acre?

In time of war, even in traversing friendly or allied territory, in order to provide food for soldiers, the officer in charge of a detachment thereof may be obliged to commandeer supplies. As an example existing under such conditions, let us say that from one farmer who owned exactly 100 first-class sheep his entire flock was taken; from another farmer, who owned 5,000 sheep, nearly all of which were sick, lean, and scrawny, an equal number of 100 first-class sheep were selected and taken. When the time for compensation for the sheep arrived, the method employed was like that adopted by the trial court in the instant action; that is to say, the farmer who owned 100 sheep only was paid at the rate of $3 per head; but for the asserted reason that the 4,900 remaining sheep that were the property of the second farmer were in an unfit condition and consequently were worth but $1 per head, the average worth of the sheep of the entire flock was but $1.04 per head, and that was the compensation that was made for the 100 first-class sheep that were taken. Would any right-minded person contend that such a system produced just results?

Supposing that before the condemnation action herein was commenced the owner of this 38-acre tract had subdivided his 800 feet of frontage on the street into lots each having a width of 50 feet, to a depth of 107 feet, but had left the remainder of the 38 acres unsubdivided. In such circumstances, would it be contended that, because he also was the owner of an acreage that abutted against or upon the rear of the subdivided lots that had a frontage on the street, he should properly be awarded a less compensation for the 33 feet taken for street purposes than should his next door neighbor? In other words, would the fact that the owner of the 38-acre tract had subdivided his frontage on the street affect the amount of compensation to which he would be entitled?

In order to sell his land, or any part thereof, the law may not necessarily compel an owner to subdivide it into lots and record a map of his subdivision. Supposing that, without an actual subdivision of record, the owner of the 38-acre tract had sold by "metes and bounds" description all but 50 feet of his frontage on the street back to a depth of 107 feet, would it still be contended that because the rear of his remaining lot abutted upon what was left of his 38-acre tract, the compensation to be awarded to him should be affected by the value of the remainder of the 38-acre tract?

The law says that the owner of condemned property shall be compensated for the market value thereof. To my mind, it does not say, nor does it contemplate, that such market value shall be in any way affected by the fact of whether or not he owns other property (irrespective of its value) that abuts upon, or is adjacent to, land that is taken from him. In a condemnation proceeding, as compensation for a parcel of an affected lot, to pay one price to the owner thereof, and at the same time, for an identical parcel, to pay a lesser price to the owner of an adjoining likewise affected lot, does not appeal as being "even-handed justice."

136 Cal.App. 691

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. EASTER et al.

Civ. 5044.

District Court of Appeal, Third District, California.

Feb. 14, 1934.

Rehearing Denied March 16, 1934.

Hearing Denied by Supreme Court April 13, 1934.

1. Executors and administrators 🔑315(4).

Statute declaring final decree of distribution under will conclusive does not divest equity court of jurisdiction to correct erroneous distribution or construe declaration of trust if decree was procured by fraud or mistake or is sought to be modified by interested parties' consent (Probate Code, § 1021).

2. Trusts 🔑193½.

Ordinarily, equity court cannot direct sale of realty in contravention of explicit terms of trust created by will or deed.

3. Wills 🔑467.

It is policy of law to respect and enforce solemn explicit declarations of testator's wishes in his last will.

4. Trusts 🔑193½.

Equity court, under proper circumstances, may direct sale of property contrary to express terms of trust to save estate from serious loss or destruction, but not as mere matter of expediency or because sale is deemed beneficial to parties interested.

5. Trusts 🔑193½.

Equity court should not order sale of realty contrary to express declarations of express testamentary trust except on clear satisfactory proof of necessity therefor to preserve estate and carry out testator's intention.

6. Trusts 🔑193½.

Before ordering sale of realty contrary to terms of express trust and reinvestment of proceeds, court should require showing of possibility of sale for reasonable price and nature and security of proposed investment.

7. Trusts 🔑193½.

Equity court order to sell realty, contrary to terms of express testamentary trust, and reinvest proceeds, *held* unauthorized, in absence of present market value thereof and showing of character or security of property in which he proposes to reinvest proceeds.

Appeal from Superior Court, Los Angeles County; J. J. Trabucco, Judge.

Action by the Security-First National Bank of Los Angeles against Ephraim B. Easter, Catherine Rupell, and others. From a judgment for plaintiff, defendants Easter and others appeal.

Reversed.

Craig & Weller, of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondent Security-First Nat. Bank of Los Angeles.

Joseph Scott, of Los Angeles, for respondent Catherine Rupell.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

Certain beneficiaries of a trust estate created by means of a final decree of distribution pursuant to the terms of a will have appealed from a judgment rendered in an equitable action directing the sale of real property contrary to the express prohibition of the trust. The question which is involved in this appeal is whether a court of equity may direct a sale of real property and authorize a reinvestment of the proceeds therefrom contrary to the express terms of a trust, in the absence of consent thereto by the beneficiaries, and without satisfactory proof of the failure of the trust and reasonable assurance of a profitable sale and reinvestment of the proceeds thereof.

Alfred Easter died testate. He was possessed of real property situated in Los Angeles, including a group of houses known as Catalina court, of the approximate value of $85,000. The deceased left surviving him his widow, Catherine Easter, now Catherine Rupell, and the appellants who are his children by a former wife and his grandchildren. His will was admitted to probate, and a final decree of distribution of his estate was entered October 3, 1923, from which no appeal was taken. This decree, pursuant to the terms of the will, distributed Catalina court, together with other real property, to the plaintiff in trust for the benefit of the widow and the children of the deceased. With relation thereto, the decree contains the following provisions:

"Said trustee shall possess, manage, control, sell, convey, lease, rent, assign, transfer and invest and reinvest the proceeds of any property sold, or any substitute therefor, as to it may seem best, * * * upon the following conditions, to-wit: That Catherine Easter, surviving widow of said deceased, shall have the use, rent free, of one of the units of the property known as Catalina Court, so long as she may desire to occupy the same. * * *

"During the lifetime of the said Catherine Easter, notwithstanding the power of sale hereinbefore given, the said trustee shall not sell the property known as Catalina Court, located on Catalina Street in the City of Los Angeles, * * * or in any manner dispose of said properties. * * *

"Out of the net income arising from the properties held in trust by said trustee, it shall pay unto the said Catherine Easter, the sum of $300.00 per month for and during the term of her natural life, and the balance of the net income, if any, shall be paid by said trustee in the proportion of one-third thereof to Ephraim B. Easter, son of said deceased, for and during the term of his natural life, and the other two-thirds shall be paid by said trustee in equal shares unto Kate B. Gherky, Elizabeth B. Marriott and Martha B. Todd, daughters of said deceased. * * *

"Upon the death of the said Catherine Easter, the trust hereinbefore referred to shall terminate and all of the property in the hands of the trustee or in its possession or control, shall go to and vest in the heirs at law of the said Alfred Easter, deceased, in accordance with the statute of succession of the State of California."

For a period of time the widow occupied one of the apartments in Catalina court and was regularly paid the monthly sum specified in the decree. She subsequently remarried. The financial depression so reduced the income from the property in question that the trustee was unable to regularly make the payments in full to the beneficiaries as required by the will and decree. This suit in equity was then commenced to procure a judgment directing the sale of Catalina court. The complaint asserts the creation of the trust by means of the decree of distribution pursuant to the terms of the will, the depreciation of the value of the property, and the inability of the trustee to pay the monthly installments from the income thereof as provided by the trust. It also alleges that a sale and reinvestment of the proceeds thereof will enable the trustee to fulfill the requirements of the trust. The answer of the appellants, who are all of mature age, and who represent all of the heirs at law of the deceased and all of the beneficiaries of the trust, except the widow, denies the material allegations of the complaint, and sets up the terms of the trust prohibiting the sale of the property during the lifetime of the widow. It also sets up the final decree of distribution as an estoppel, alleging that the plaintiff and the widow are bound thereby. The court found that the trust was created as above related by the rendering of the decree of distribution, from which no appeal was taken; that the value of the property had depreciated to such an extent that there was not sufficient income therefrom with which to pay the widow and the other beneficiaries the sum specified by the trust; that the Catalina court property, consisting of ten units, was in need of repairs; "that the remaining property of said estate does not provide sufficient income to carry out the purposes of said trust or to provide any appreciable income for the beneficiaries thereof; * * * that the proceeds from the sale of said property, when reinvested, will provide sufficient income to carry out the purposes of said trust; that unless said property is sold and the proceeds therefrom reinvested, the trustee cannot carry out said purposes." The court thereupon rendered judgment directing the sale of the property "for the best price obtainable," and authorized the reinvestment of the proceeds thereof. From this judgment all beneficiaries except the widow have appealed.

[1] Section 1021 of the Probate Code, which provides that "such order or decree, when it becomes final, is conclusive as to the rights of heirs, devisees and legatees," does not divest a court of equity of its jurisdiction to afford a remedy for an erroneous distribution of property or to construe a declaration of trust when it appears the decree of distribution was procured by fraud or mistake, or when it is sought to modify the decree by consent of all the interested parties. Estate of Walker, 160 Cal. 547, 117 P. 510, 36 L. R. A. (N. S.) 89; Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 187 P. 425; Bacon v. Bacon, 150 Cal. 477, 89 P. 317, 321; Whittingham v. California Trust Co., 214 Cal. 128, 4 P.(2d) 142; 10 Cal. Jur. 486, § 28. In the case of Bacon v. Bacon, supra, it

is said: "We conclude that the provisions of section 1666 (Code Civ. Proc. now section 1021 of the Probate Code) do not prevent a review of a decree of distribution by a suit in equity, in a proper case."

[2] In the present case, the judgment of the court of equity authorizing the sale of real estate is in direct violation of the express terms of the trust, which provides that "during the lifetime of the said Catherine Easter, notwithstanding the power of sale hereinbefore given, the said trustee shall not sell the property known as Catalina Court, * * * or in any manner dispose of said properties." Ordinarily, a court of equity has no power to direct the sale of real estate in contravention of the explicit terms of a trust created by will or deed. 65 C. J. 730, § 594; 2 Perry on Trusts (7th Ed.) p. 1306, § 764. Section 870 of the Civil Code provides that: "Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void." In the case of Anderson v. Mather, 44 N. Y. 249, it was held that a statute similar to section 870 of our Civil Code merely prescribes a restriction upon the powers of trustees, and that it is not a limitation upon the jurisdiction of a court of equity in a proper case. There is reputable authority holding that a court of equity may authorize the sale of real property contrary to the express terms of a trust when all the interested parties have consented thereto, when unforeseen events threaten to totally destroy the value of the trust property, and when the chief purpose of the trust has failed through the exigency of changed conditions, but which may be carried out or substantially improved and the interested parties benefited by such sale. 65 C. J. 746, § 612; Young v. Young, 255 Mich. 173, 237 N. W. 535, 536, 77 A. L. R. 963, and note at page 971; Johns v. Johns, 172 Ill. 472, 50 N. E. 337; Upham v. Plankinton, 166 Wis. 271, 165 N. W. 18; Mann v. Mann, 122 Me. 468, 120 A. 541; Weakley v. Barrow, 137 Tenn. 224, 192 S. W. 927, 929. In the Young Case, supra, the trust property consisted of a valuable hotel in Grand Rapids which was insured for $50,000. It was totally destroyed as the result of a fire. The annual taxes against the property were $3,000. The insurance money was grossly inadequate to reconstruct the building. The purpose of the trust was practically destroyed by the burning of the hotel. All income therefrom ceased. The taxes would eventually consume the value of the lot. The estate was offered $125,000 for the land. All of the beneficiaries, devisees, legatees, and heirs who were interested in the property were made party defendants in the suit. Thirty-one of these defendants consented to the order of sale. The court said: "Not a single defendant objected to the sale." Under such circumstances, it was held a court of equity had the authority to direct the sale of the property notwithstanding the express prohibition of the trust. Under somewhat similar circumstances, in the case of Johns v. Johns, supra, a court of equity first refused to order the property sold, but upon a rehearing said: "The facts here present the alternative of modifying the trust agreement or else losing the entire trust estate." Upon such a showing the property was ordered to be sold. In the case of Mann v. Mann, supra, it appears the property was ordered to be sold pursuant to a special statute of the state of Maine, empowering a court of equity to authorize a sale of property contrary to the express terms of a trust. In the case of Upham v. Plankinton, supra, the trust property became entirely unproductive and was rapidly deteriorating. The maintenance and repair of the property cost over $4,000 a year. It produced no income. The entire purpose of the trust was thereby defeated. Upon that showing the property was ordered to be sold. In the case of Weakley v. Barrow, supra, where the sale of property was restricted by the terms of a trust embodied in a deed, it was held that a court of equity had the power to authorize the sale of real property contrary to the terms of the trust "when, by reason of some exigency arising from unforeseen and unanticipated circumstances, the property held in trust will fail to answer the primary purposes of the trust." The court then adds that, while "it is entirely proper to look to that paramount purpose when the court comes to determine the implied intent of the settlor * * * it cannot be allowed to override and render nugatory the intention to restrict the power of sale as vested in his wife; that is to say, 'the corpus shall remain unimpaired.'"

[3-6] It has always been the settled policy of the law to respect and enforce the solemn explicit declarations of the wishes of a testator which are embodied in the terms of his last will. The Supreme Court of the United States says in Shelton v. King, 229 U. S. 90, 33 S. Ct. 686, 690, 57 L. Ed. 1086: "There is no higher duty which rests upon a court than to carry out the intentions of a testator when the provision is not repugnant to settled principles of public policy and is otherwise valid." While it is undoubtedly true that a court of

equity has the power under proper circumstances to direct the sale of property contrary to the express terms of a trust for the purpose of saving the estate from serious loss or destruction, on the theory that it is helping to fulfill the ultimate purpose of the trust, such an order may not be made as a mere matter of expediency, or even because the sale may be deemed to be beneficial to the parties interested. In view of the seriousness of interfering with the express declarations of an express trust prohibiting the alienation of property for a limited time, a court of equity should not order the property to be sold except upon clear and satisfactory proof that it is necessary to do so to preserve the estate and carry out the intention and purpose of the testator. A court has no right to speculate upon the mere probability that such a sale will ultimately inure to the benefit of the beneficiaries. In the present unsettled financial condition of affairs, it is generally conceded that all investments are highly speculative. Real estate may now ordinarily be sold only at a ruinous sacrifice. It is a perplexing problem to determine what investments may be fairly safe or reasonably profitable. This illustrates the fact that greater care should be exercised under such circumstances to determine the necessity for a sale of real property when it conflicts with the express terms of a trust. Certainly, before real estate is ordered to be sold contrary to the terms of an express trust and the proceeds therefrom are directed to be reinvested, the court should require some showing of the possibility of a sale for a reasonable price and of the nature and security of the proposed investment.

[7] In the present case it does appear that the income from the property in question has decreased on account of the present financial depression approximately 40 per cent. since the creation of the trust in 1923, that the income is now barely sufficient with which to pay the taxes, repairs, and maintenance of the property, and that for several years the trustee has been unable to pay to the beneficiaries any substantial sums upon the declaration of trust. Still it appears that most of the property is constantly occupied at a decreased monthly rental which practically pays the expense of maintaining the property at the present time. There was no showing that the trustee would be able to secure a reasonable price or any sum whatever for the property in the event of a sale. There was absolutely no attempt to show in what character or value of property the trustee proposed to reinvest the proceeds of sale.

Mr. Sherman Grail, an officer of the plaintiff trustee, testified that there was no present sale for the property at any price whatever. He said in that regard:

"Q. What do you think this property would sell for at the present time? A. I seriously doubt if it is salable at the present time.

"Q. In other words, you would almost have to give it away to dispose of it at the present time? A. I think so, yes.

"The Court: No market value? A. I wouldn't go so far as to say no market value. As a matter of fact, we haven't endeavored to sell it for some time. My general opinion is it would be extremely difficult to get anything in the present market."

The record contains no evidence to the contrary. It therefore appears without conflict that there is no present market for the property at any price. It seems like a radical departure from the meticulous rule justifying a court of equity in interfering with the explicit provisions of an express trust to give the trustee carte blanche authority to sell real property and reinvest the proceeds therefrom without any assurance that a reasonable price can be procured for the property and without any showing as to the nature or security of the proposed reinvestment. We are of the opinion an order of a court of equity to sell real property and reinvest the proceeds thereof contrary to the terms of an express trust under such circumstances is unauthorized.

Assuming, without so deciding, that the facts of this case would otherwise authorize a court of equity to make an order to sell the real property in question and reinvest the proceeds, it does affirmatively appear there is no present market value for the property. It does not appear the trustee can procure a reasonable value, or any value whatever, for the property. There is absolutely no showing regarding the character or security of the property in which the trustee proposes to reinvest the proceeds in the event of a sale. The finding "that the proceeds of the sale of said property, when reinvested, will provide sufficient income to carry out the purposes of said trust" is not supported by the evidence.

The judgment is therefore reversed.

We concur: **PULLEN, P. J.; PLUMMER, J.**

136 Cal.App. 638

McGEORGE v. CHARLES NELSON CO.

Civ. 9151.

District Court of Appeal, First District, Division 2, California.

Feb. 9, 1934.

Rehearing Denied March 10, 1934.

Hearing Denied by Supreme Court April 9, 1934.

1. Seamen ⚿29(5).

In action for injuries while working on vessel owned by defendant, whether employee, assisting plaintiff and striking plaintiff with sledge hammer, exercised ordinary care under circumstances, *held* for trial court.

2. Seamen ⚿29(5).

In action for injuries while working on vessel owned by defendant, evidence *held* to support finding for defendant covering allegations respecting alleged failure to supply certain tools and appliances.

3. Seamen ⚿29(2).

Owner of vessel was not required to furnish workman best and safest possible tools, but its duty was discharged by furnishing tools reasonably safe and fit for purpose for which they were used.

4. Seamen ⚿29(5).

In action for injuries while working on defendant's vessel, evidence supported finding for defendant on plaintiff's allegation that use of chisel bar and sledge hammer was made necessary by failure to furnish apparatus for using wrench.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action for damages for personal injuries by Arthur McGeorge against the Charles Nelson Company. From an adverse judgment, plaintiff appeals.

Affirmed.

H. W. Hutton, of San Francisco, for appellant.

John H. Black and J. Hampton Hoge, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought to recover damages for personal injuries sustained while working on the Castle Town, a vessel owned and operated by defendant. The cause was tried by the court sitting without a jury, and from a judgment in favor of defendant, plaintiff appeals.

The cause was previously tried by the court sitting with a jury. That trial resulted in a judgment in favor of the defendant, which judgment was reversed on appeal because of error in the instructions. McGeorge v. Charles Nelson Co., 107 Cal. App. 148, 290 P. 75. The evidence on the first trial tended to prove certain facts, which facts are set forth in the opinion on the former appeal. On the second trial all of the evidence produced on the first trial was introduced by stipulation. It is therefore unnecessary to set forth all of said facts herein. We may point out, however, that on the former appeal this court was not passing upon any questions of fact and while the evidence was conflicting in many particulars only certain conflicts are specifically referred to in the opinion. The decision on the former appeal merely held that, in view of the evidence in the record, the instructions given on the subject of assumption of risk were erroneous. The present appeal involves no similar question as there was no jury on the second trial, and the court made no findings relating to assumption of risk, the decision against plaintiff resting upon other grounds.

On the second trial both parties offered evidence in addition to that produced upon the first trial, but a reading of all the evidence does not give a very clear picture of the exact situation in the engine room where the accident occurred. It appears certain, however, that when plaintiff and his assistant attempted to test the nut on the lower end of the low-pressure cylinder, they were working in a cramped position which did not permit entire freedom of action. In order to gain a clearer conception of the situation, the trial judge, pursuant to stipulation and in company with counsel, visited the ship and made an inspection. It is, of course, impossible to know what the trial judge may have observed while making said inspection. We call attention to these facts as the findings of the trial court were to the effect that there was no negligence on the part of defendant or its employees and plaintiff questions the sufficiency of the evidence to sustain the findings.

[1] We will first direct our attention to the contention that there was no evidence to sustain the findings relating to the claim of negligence on the part of Ross, the employee who was assisting the plaintiff. The trial court found that after Ross had delivered several blows on the chisel bar with the sledge hammer he "accidentally and without any negligence of any kind, struck the end of the chisel bar a glancing blow, as a result of which the sledge hammer glanced off and struck the plaintiff a glancing blow on the left side of

the face"; that "such a glancing blow is apt to happen under such circumstances notwithstanding the exercise of ordinary care and did in this instance happen without failure to use ordinary care commensurate with the circumstances and conditions existing at the time and place in question"; that "said Ross did use reasonable care and precautions under the circumstances and conditions existing to hit the chisel bar squarely, but that without fault or negligence on his part the sledge hammer glanced off the end of the chisel bar and struck plaintiff on the left cheek." We believe that these findings are amply sustained by the evidence. While there was evidence from which negligence might have been inferred, we cannot say that the trial court was compelled under the evidence to reach the conclusion that Ross was guilty of negligence. "Negligence" is a relative term, and the question of whether Ross exercised ordinary care under the circumstances was a question primarily for the determination of the trial court. In addition to having the benefit of the testimony of the witnesses, the trial court visited the engine room and actually saw the conditions under which the men were working. The conditions existing at that place were important in determining the issue of negligence, and we cannot say that the trial court erred in finding against the claims of the plaintiff.

[2] Plaintiff further contends that there was no evidence to support the findings covering the allegations relating to the alleged failure of the defendant to supply certain tools and appliances. Among these findings was a general finding that "said vessel was in all respects fully and reasonably equipped with fit and proper tools, wrenches and all other necessary and usual appliances," and a further finding "that the use of a chisel bar and sledge hammer was, under the circumstances and conditions existing at the time, the proper, customary and usual method of turning or testing the nut upon which Ross and the plaintiff were working, and said tools were the fit and proper and usual implements for the performance of said work under the circumstances and conditions existing at the time and place in question." In our opinion there was evidence to support said findings. In order to better understand plaintiff's contentions a further statement of facts is required.

It is apparently conceded that defendant furnished all of the necessary tools and appliances to disassemble the engine. The nut at the lower end of the cylinder was the same size as the one at the upper end and the wrench which was used to test the upper nut could have been used to test the lower nut in the event that certain portions of the engine had been first removed. On the occasion in question the vessel was out at sea and the parties were concerned with making emergency repairs to remove a knock in the engine. It appears that it was not practical to disassemble the engine because of the possible danger while the vessel would lie helpless during the time required for that purpose. Plaintiff and his helper therefore used the chisel bar and sledge hammer to test the nut without disassembling. In the original complaint plaintiff claimed that defendant was negligent solely because of the failure to supply a wrench for this purpose. The evidence showed that no wrench could be purchased on the market which was suitable for testing the lower nut under the conditions existing without disassembling the engine. There was a conflict as to whether any such wrench could be specially designed and made. Plaintiff's witness Barletta designed a wrench which he claimed could be used for that purpose, but upon actual test it failed to sustain his claims. He thereafter designed another wrench and testified that this last-mentioned wrench would be suitable. Plaintiff lays stress upon the fact that one of defendant's witnesses conceded that it would be possible, although extremely difficult, to use a wrench of that design. The witnesses' testimony on this subject was as follows: "A. I would say that it is possible, but extremely difficult to use it. It goes up into place, and the space that is left to strike that with the maul is so small that the wrench wouldn't be very efficient. It is possible to strike it, but a very light blow. The reason is that there is a grating just about, I should judge, four inches below the line of that wrench. It goes across between the cylinders, and the distance from the side of the handle on the wrench, 'Exhibit E', I think it is, to the side of the column is about nine inches, and then from the side of the column over to the grating is about twelve inches, which makes a total of twenty-one inches from the side of the wrench to the edge of the grating; and the length of the maul that is introduced in evidence there is about eight inches, so that there is about thirteen inches of a swing possible between the side of the grating and the side of the wrench."

[3] But even assuming that a wrench of special design could have been made and effectively used for the purpose of testing said

nut in an emergency, it does not follow that defendant was under obligation to furnish such wrench. Defendant was not required to furnish the best and safest possible tools, but its duty was discharged by furnishing tools which were reasonably safe and fit for the purpose for which they were used. Cincinnati, N. O. & T. P. R. Co. v. Gossett, 230 Ky. 240, 18 S.W.(2d) 986; Smith v. United Fuel Gas Co., 91 W. Va. 52, 112 S. E. 205; 16 Cal. Jur. 1602. There was testimony to show that the chisel bar and sledge hammer were customarily used and were reasonably safe and fit tools for use under the circumstances. In our opinion all of the findings above set forth find support in the evidence.

[4] After the determination of the former appeal, plaintiff filed an amendment to his complaint in which it was alleged that although there was a wrench on board the vessel that could be used upon said lower nut, it could only be employed "by the use of an apparatus called a slip or a strong back and thereby hang up the said piston rod and piston and drop the connecting rod all in said low pressure cylinder." It was further alleged that no such slip or strong back was furnished and that use of the chisel bar and sledge hammer was thereby made necessary. The trial court found "that it is not true that the use of said chisel bar and sledge hammer for the purpose of tightening up said nut at the lower end of the piston rod of the low-pressure cylinder was necessitated or occasioned through any lack or absence of a slip, strongback or other apparatus"; that "it is true that there was a wrench aboard the vessel which would fit the said nut under certain circumstances, but it is not true that the use of said wrench was prevented or made impractical because of the lack of any appliances or devices of any nature or description aboard said vessel; it is not true that no apparatus had been furnished by the defendant aboard said vessel for the purpose of hanging up the piston and piston rod of said low pressure cylinder." The slip or strongback is an appliance used in disassembling the engine, but the evidence showed that it was not practical to disassemble the engine for emergency repairs at sea. Furthermore, even if practical to disassemble the engine under the circumstances, the evidence showed that the vessel was equipped with a chain fall and wire strip which could have been used for this purpose, and further showed that this particular portion of the engine could have been disassembled without any of said appliances, but merely with the aid of a "wood block underneath the crosshead." We are therefore of the opinion that the findings covering the allegations contained in plaintiff's amendment are supported by the evidence.

The remaining contentions of the plaintiff relate to the alleged insufficiency of the evidence to sustain the findings respecting plaintiff's injuries. These contentions need not be discussed, as the foregoing conclusions sustaining the findings which absolve the defendant from liability require an affirmance of the judgment.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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136 Cal.App. 617

CRAWFORD v. LAMBERT et al.

Civ. 1491.

District Court of Appeal, Fourth District, California.

Feb. 6, 1934.

1. Appeal and error ⟹197(1).

Inconsistency between pleadings and findings *held* not reversible error where evidence sustaining findings was admitted without objection to sufficiency of pleadings.

2. Appeal and error ⟹197(1).

Objection that variance exists between pleadings and proof must be presented to trial court or it is waived.

3. Pleading ⟹398.

Variance between pleading and proof is not deemed "material variance" unless it has actually misled adverse party to his prejudice in maintaining action or defense upon merits.

[Ed. Note.—For other definitions of "Material Variance," see Words & Phrases.]

4. Pleading ⟹237(6), 239(3).

Where variance between pleading and proof is not material, court may find facts according to evidence or may order immediate amendment without costs.

5. Easements ⟹36(3).

Evidence in action to establish ownership of right of way over defendant's land appurtenant to plaintiff's property sustained finding that plaintiff's use of way with defendants' predecessor in title was under claim of right.

6. Easements ⟹9(1).

Use of way under claim of right, while necessarily hostile, need not amount to ouster or exclusion of owner of servient tenement from its use.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Effie M. Crawford against Ray Lambert and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Rutan & Mize, of Santa Ana, for appellants.

Harvey & Harvey, of Santa Ana, for respondent.

MARKS, Justice.

In 1898 Will O. Crawford, husband of plaintiff, acquired title to 5 acres of land in Orange county. He died in 1912, and the property was distributed to his wife in the probate of his estate. C. B. Lewis was the owner of the property adjoining the Crawford land on the north. Title to the Lewis land passed through mesne conveyances to the defendants in 1931.

From 1898 to 1931, the owners of the two adjoining properties used a way between the two tracts. This way was 392 feet in length and extended from the center of a public road on the west to a toolhouse near the north line of plaintiff's property.

The complaint is in the form usually found in actions to quiet title. It alleged ownership in the plaintiff of a way 6 feet in width over the defendants' land. The findings of fact found a right of way 4 feet in width over defendants' land appurtenant to plaintiff's property. Judgment was entered following the findings.

The findings were served upon defendants' counsel four days prior to their being signed and filed. The provisions of section 634 of the Code of Civil Procedure, as in effect at the time of the trial, where it was required that findings which the court had ordered prepared must be served on the adverse counsel five days before being signed by the court, have been held to be directory only. Hammond Lumber Co. v. Henry, 87 Cal. App. 231, 261 P. 1027.

The findings of fact followed very generally the allegations of the complaint, except the finding that the easement was appurtenant to plaintiff's property. Defendants maintain that, as plaintiff was relying upon adverse possession for her title, the court should have found the various facts upon which the title was based. Findings of fact in form similar to those made in the instant case were held sufficient in Richert v. City of San Diego, 109 Cal. App. 548, 293 P. 673.

[1] Defendants maintain that the findings and judgment are not supported by the pleadings, in that the pleadings allege an easement in gross, while the findings described an easement appurtenant to plaintiff's property. Assuming this to be true, it does not constitute reversible error under the record before us. The case was tried upon the theory that the easement was appurtenant to plaintiff's property. The evidence was admitted without objection that there was a variance between it and the allegations of the complaint.

[2-4] An objection that there was a variance between the allegations of the pleadings and the proof offered at the trial must be presented to the trial court or it is waived. Martin v. Della, 211 Cal. 74, 293 P. 25. Where a case is tried without objection as to the sufficiency of the pleadings, and where the findings are justified by the evidence, we cannot, on appeal, consider an objection that the findings are not within the issues made by the pleadings. Spellacy v. Dauterman, 122 Cal. App. 416, 10 P.(2d) 114. "Variance between the allegations in a pleading and the proof is not to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. * * * Where a variance is not material, and does not actually mislead the adverse party to his prejudice, the court may find the facts according to the evidence, or may order an immediate amendment without costs." Murnane v. Le Mesnager, 207 Cal. 485, 279 P. 800, 804.

[5, 6] Defendants contend that the evidence was insufficient to support the findings and judgment, urging that the use of the way was under permission and not under claim of right.

Both Mr. Lewis and Mr. Crawford were dead at the time of the trial. Plaintiff was the only witness who had knowledge of the circumstances surrounding the commencement of the use of the way. She testified that as far as she knew there was no agreement between Mr. Lewis and Mr. Crawford concerning the use of the way; that the two might have discussed the matter, but that she did not know what was said; that Mr. Lewis used the way over the two parcels of property without objection from her husband or herself, and that she and her husband enjoyed a like use of the way over the Lewis property without any objection from him; that the way was used continuously whenever needed by either of the joint owners with no interruption in its use until after title to the Lewis property was acquired by defendants in 1931. It is also in evidence that the way was graded and coated with gravel on several occasions and at one time was oiled by one of plaintiff's employees.

The use of the way under a claim of right, while necessarily hostile, need not amount to an ouster or the exclusion of the owner of the servient tenement from its use. Humphreys v. Blasingame, 104 Cal. 40, 37 P. 804; Silva v. Hawn, 10 Cal. App. 544, 102 P. 952; Bashore v. Mooney, 4 Cal. App. 276, 87 P. 553. The question of permissive use of a right of way was before the court in the case of Alper v. Tormey, 7 Cal. App. 8, 93 P. 402, 404, where it was said:

"Appellant claims that the evidence shows that the use was only 'permissive' and not 'adverse.' There is some confusion in many of the cases in the use of the term 'permissive,' as an adverse possession in a sense must be by permission or acquiescence of the one against whom it is invoked. But, imputing to the term the meaning clearly intended of a license exercised in subordination to appellant's claim and ownership, still it is a question of fact to be determined by the trial court, and under the well-established rule its determination against appellant's contention is binding upon us, if it finds any substantial basis in the evidence.

"Appellant insists that the burden is upon plaintiffs to prove the easement citing American Co. v. Bradford, 27 Cal. 361; De Frieze v. Quint, 94 Cal. 663, 28 Am. St. Rep. 151, 30 P. 1; Ball v. Kehl, 95 Cal. 613, 30 P. 780; San Francisco & S. J. V. Ry. Co. v. Leviston, 134 Cal. 412, 66 P. 473.

"But he seems to lose sight of the fact that it is not a question here of who has the burden of proof, or whether the issue has been established by a preponderance of the evidence, but that the only consideration concerning us is whether there is any evidence to support the finding of the trial court.

"In reviewing the action of the lower court the following obvious reflections must be taken into account: A grant of an easement will be presumed on proof of use and enjoyment for a time corresponding with the local period of limitation for quieting titles to land. Am. & Eng. Ency. of Law, supra. This, of course, is equivalent to the presumption that the use was under a claim of right, as the grantee holds adversely to the grantor, and not in subordination to the latter's title. This presumption is itself evidence which is sufficient to support the finding."

The evidence in this case supports the findings and judgment of the trial court, and, there being no reversible error, the judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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136 Cal.App. 644

HELVEY v. LILLIS et al.

Civ. 1293.

District Court of Appeal, Fourth District, California.

Feb. 9, 1934.

Hearing Denied by Supreme Court April 9, 1934.

1. Adverse possession 🔑71(1).

Decree of distribution of land and quitclaim deeds conveying land constituted color of title in those who in good faith claimed title founded upon decree and deeds, though such instruments were not connected up with patentee to land (Code Civ. Proc. § 323).

2. Adverse possession 🔑114(1).

Evidence showed that occupation of lands used for pasturage was hostile, exclusive, continuous, and uninterrupted for statutory period, warranting judgment quieting title in adverse claimants as against grantee of patentee to land (Code Civ. Proc. § 323).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by A. C. Helvey against Helen C. Lillis and another, wherein defendants filed a cross-complaint. From a judgment for defendants, plaintiff appeals.

Affirmed.

Clarence H. Wilson, of Hanford, and Anderson & Anderson, of Los Angeles, for appellant.

Barbour, Kellas & Backlund, of Fresno, for respondent Lillis.

Feemster, Perkins & McCormick, of Visalia, for respondent Welsh.

BARNARD, Presiding Justice.

This is an action to quiet title to two quarter sections of land in what is known as the Kettleman Plains, being partly in the county of Kings and partly in the county of Fresno. The surrounding country is sparsely settled, and this land, together with large tracts of land around it, has been used for many years only for the purpose of pasturing stock. Patents covering the two parcels were issued by the United States to Edward B. Perrin in 1908. Beginning in 1909 and continuing to 1917, one S. C. Lillis, as lessor, leased the land each year to a tenant for pasturage purposes. On January 17, 1918, a decree of distribution was entered in the estate of S. C. Lillis, distributing the property to Lucy E. Lillis and Helen C. Lillis, the decree, however, recognizing that H. H. Welsh had an interest in the property. On January 18, 1918, Lucy E. Lillis and Helen C. Lillis, by quitclaim deeds, conveyed a one-half interest in the land to H. H. Welsh. These deeds were recorded on May 20 and May 21, 1924, respectively. Under date of January 22, 1918, Lucy E. Lillis conveyed all her interest in the property to Helen C. Lillis, the deeds being recorded on January 31, 1918. On January 24, 1931, the plaintiff obtained a quitclaim deed covering these properties from Edward B. Perrin and, shortly thereafter, commenced this action to quiet his title. A cross-complaint was filed on behalf of Helen C. Lillis and H. H. Welsh asking that title be quieted in each of them to the extent of a one-half interest in the property. The court found in all respects in favor of these cross-complainants, and from the judgment entered, the plaintiff has appealed.

[1] It is first contended by the appellant that the evidence is not sufficient to show any "color of title" in the respondents. It is argued that the decree of distribution and the deeds referred to are not sufficient for this purpose since they are in no way connected up with the patentee. This contention is without merit. If the instruments relied on for such a purpose were properly connected up, they would show full title and not merely color of title. The claim of respondents is founded upon the decree of distribution and the deeds referred to. We think these are sufficient to constitute a claim of title founded upon a written instrument, judgment, or decree, within the meaning of section 323 of the Code of Civil Procedure. The respondent Lillis testified that she entered into possession of the land under this decree of distribution, that thereafter tenants were in possession under lease from her, that she took possession, paid the taxes, and received the rents believing that she had acquired full title through the decree of distribution and the deeds, that she continued in this belief until this action was filed, and that she leased the property, paid the taxes, and received the rents for the benefit of herself and of the respondent Welsh. Whether or not the respondents' predecessor had acquired title to the land by grant or by adverse possession, after his death the respondents for the first time claimed title to the land under the instruments referred to, and their good faith not being attacked, it must be held that these instruments were sufficient to constitute color of title within the rules applying in such a case. Owsley v. Matson, 156 Cal. 401, 104 P. 983; Akley v. Bassett, 189 Cal. 625, 209 P. 576; Brind v. Gregory, 122 Cal. 480, 55 P. 250; Gregory v. Gregory, 102 Cal. 50, 36 P. 364; Winterburn v. Chambers, 91 Cal. 170, 27 P. 658; Gavin v. Phillips, 12 Cal. App. 34, 106 P. 424. We think this is especially true since the circumstances were such as to peculiarly warrant the respondents in believing that they had acquired good title to the land through the instruments referred to. The decree of distribution in the estate of S. C. Lillis recited that the land stood of record in the name of S. C. Lillis, but that H. H. Welsh had an undivided equitable one-half interest therein under an oral agreement of trust whereby S. C. Lillis held the legal title to said undivided one-half interest for H. H. Welsh. It appears that the original patents which had been issued to Perrin were in the possession of the respondents, as they produced them at the trial. S. C. Lillis, as lessor, had leased the property to tenants each year from 1909 until 1917. He had paid the taxes on the property at least after 1912, and it was stipulated that the respondents had these tax receipts covering each year from 1912 to 1917, inclusive. It was also stipulated that the respondents held tax receipts for each year from 1918 to 1930, inclusive, except for one parcel for the year 1922. Helen C. Lillis testified that she paid the taxes for the year 1922 on both properties and all taxes for each year from 1918 to 1930, inclusive.

[2] The only other point raised is that the occupation of these lands by the respondents was not hostile, exclusive, continuous, or uninterrupted. In effect, it is urged that the general public allowed sheep and cattle to roam over the land at will and that no such occupation or possession for pasturage purposes as is contemplated by the Code section was proved by the respondents. The respondent Lillis testified that she took possession of the property under the decree of distribution and, for herself and the other respondent, leased the land during the years

from 1918 to 1931, inclusive; that a tenant was always in possession for the respondents during all those years; and that no one else claimed any rights thereon during that time. It not only appears that these lands were used by tenants of the respondents and their predecessor for twenty-three consecutive years, but that the same tenants used the land over long periods. The lands were used by two tenants, jointly, from 1909 to 1914, and from 1915 to 1931 they were used by one tenant, a man named Kimble. There is ample testimony given by the tenants, and others, to the effect that these tenants were in possession of the land at all times when any feed was available thereon and when pasturage could be carried on; that ordinarily they were there with their stock from November or December until the next May or June; that during the rest of the year no pasturage was available, it being a dry country; that during the remainder of the year, aside from feed, stock could not be cared for without making special arrangements for water; that in some years all of the feed was not used in the spring, but a portion was saved for the fall; and that at such times some one was kept there to see that no one else pastured the land. There was also testimony that when these tenants were not on the job other stockmen in the vicinity would notify them in case anyone trespassed, that they then ordered the trespasser off, and that they always departed immediately. There was considerable testimony that all of the stockmen in the vicinity knew that these lands were leased by these particular tenants and that the feed was theirs; that they would not allow their stock to trespass on this property; and that they all assisted in seeing that transients who passed along the roads did not stop for pasturage, but kept their flocks moving. There is ample evidence that during all of these years no other stock was permitted on the land except for a few strays which were promptly driven off, and except for one or two occasions when a tenant had permitted another stockman to pasture there after he had himself taken all the feed he wanted. The appellant relies on other testimony to the effect that transients frequently camped on the land and allowed their stock to pasture there; that the neighbors had often allowed their cattle and sheep to run there; and that during these years as much as one-fourth of the feed had been taken by parties other than the tenants. This evidence merely raises a conflict, which has been passed upon by the trial court.

In view of the character of the land and the uses to which it might be put, the evidence is sufficient to show the sort of pasturage which is contemplated by the Code section, and supports the findings and judgment. It fully appears that the occupation and use of these lands through these many years was well known and well recognized by all those living and doing business in that section of the country. We think the situation, thus long continued, was sufficient to put the record owner on his guard with respect to the rights claimed by the respondents. It is significant that the patentee made no claim for more than twenty years and paid no taxes for at least eighteen years, although another party had taken possession of the land the next year after the patents were issued, and that after the lapse of all those years his only action was to quitclaim the property to another.

For the reasons given, the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

136 Cal.App. 709

PEOPLE v. ROBERTS.

Cr. 1739.

District Court of Appeal, First District, Division 1, California.
Feb. 16, 1934.

1. Criminal law ⚿1209.

Superior court's modified probation order, requiring probationer, detained in girls' home for about 3 months under original order, to serve year in county jail, *held* not invalid as imposing additional punishment (Pen. Code, § 1203).

2. Criminal law ⚿979(2).

Court's jurisdiction over probationer is not exhausted by its original probation order, but it may exercise control over him throughout probationary period (Pen. Code, § 1203).

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Helen Roberts was convicted of burglary, and from an order modifying the conditions of probation granted her, she appeals.

Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Justice.

This is an appeal from an order modifying the conditions of probation theretofore granted appellant following her conviction on a charge of burglary.

The following are the circumstances leading up to the making of the order: Appellant, a young married woman who lived part of the time with her husband in Redwood City, was caught burglarizing a department store on Mission street in San Francisco. She gained entrance during the night by lowering herself into the store from a dental office with a rope; but during her activities she fell and broke her ankle, and when the store was opened in the morning she was found hiding under a counter in possession of a number of articles of stolen merchandise. She pleaded guilty to the charge of burglary which was placed against her, and was granted unconditional probation for two years. Six weeks later she was caught burglarizing the Emporium in San Francisco. She entered the store before closing time on a Saturday evening and remained inside until Monday morning, collecting goods of the value of $390 from two floors, most of which she had packed in traveling cases stolen also from the store stock. On Monday morning she was found concealed in the ladies' washroom ready to walk out of the store with the packed traveling cases. Again she was charged with burglary, and when brought before the superior court, the order theretofore made releasing her on probation on the prior conviction was revoked and she was sentenced to imprisonment in the penitentiary. However, a stay of execution was granted for a week, and during that period it was ascertained that between the date of her release on probation in connection with the Mission street store burglary and the time she was caught burglarizing the Emporium, she burglarized the Emporium on four other occasions. The first time was less than a week after her release on probation. At that time, as later, she entered the store before closing time on Saturday night and remained inside until the following Monday morning. She then walked out with the stolen goods and checked them at a nearby stage office. She entered the store again that evening before closing time and on Tuesday morning took out more stolen goods. She repeated those operations on Tuesday and Wednesday nights, and some time during Thursday she was driven home to Redwood City by her husband, taking much of the stolen property with her. Circumstances were revealed also tending to show that appellant's husband knew the property she brought home was not obtained honestly; but it appears he was not prosecuted because it was believed the evidence was insufficient to establish his guilt. Furthermore, it was developed that earlier in her career appellant had been an inmate of a state reform school. Despite the disclosure of the commission of these four additional burglaries, an order was made, on recommendation of the assistant district attorney, that the penitentiary sentence theretofore imposed be suspended for a period of five years on condition that for one year appellant remain in the Home of the Good Shepherd in San Francisco. She stayed there for three months, but her conduct became so demoralizing to the discipline of the institution that at the end of three months the management refused to allow her to remain any longer; whereupon she was again brought before the trial court and the order of probation was modified by annulling the condition that appellant remain in the Home of the Good Shepherd, and in lieu thereof a condition was imposed that appellant serve one year in the county jail in the city and county of San Francisco; and it is from that order this appeal has been taken.

[1] The point urged for reversal is that since appellant was detained in the Home of the Good Shepherd for approximately three months under the original order, the modified order requiring her to serve a year in the county jail was in effect the imposition of an increased and additional punishment in violation of "a constitutional state and federal immunity, not to be twice imprisoned for the same offense, and not to receive double punishment for the same offense, and, violates due process of law." There is no merit in the point.

[2] Section 1203 of the Penal Code vests in a trial court broad and almost unlimited powers in dealing with probationers, in cases where the statute allows probation to be granted. Speaking generally, under its provisions the court may impose such conditions, including jail imprisonment or payment of a fine, as it may determine are fitting and proper to the end that justice may be done and for the rehabilitation of the probationer. Furthermore, if at any time during the probationary period, which may extend over the maximum term of imprisonment fixed by the statute as a punishment for the crime committed,

the interests of justice so require, or the court in its judgment shall have reason to believe that the person so placed on probation is violating any of the conditions of his probation or engaging in criminal practices, or has become abandoned to improper associates or a vicious life, it may modify the conditions of probation or revoke the same entirely, and upon such revocation may, if the sentence has been suspended, pronounce judgment of imprisonment for any time within the longest period for which the defendant might have been sentenced; or if judgment has been pronounced and the execution thereof suspended, it may revoke such suspension, whereupon the judgment shall be in full force and effect and the person shall be delivered over to the proper officer to serve his sentence. In other words, the jurisdiction of the trial court over the probationer is not exhausted when it imposes the original conditions of probation; but, on the contrary, at all times during the probationary period, it may exercise control over him, even to the extent of revoking all previous orders and in felony cases commit him to the penitentiary. About the only limitation which seems to be placed upon the exercise of the trial court's power is that if "on final judgment" the court shall deem it just or necessary, in felony cases, to commit the probationer to the penitentiary, then and in that event any period of time which such probationer may have served in jail or other place of detention under the terms and conditions of his probation, shall be taken into consideration as a part of his punishment, and be deducted from such term of imprisonment.

Therefore, in the present case, the condition imposed by the trial court in its original order directing that appellant be confined in the Home of the Good Shepherd for one year was in no sense the pronouncement of a judgment of sentence as appellant seems to contend; it was merely the imposition of a condition of probation which, as pointed out, the court had power under said code section to change, modify or alter at any time during the probationary period.

The federal case emphasized by appellant in her brief is not in point for the reason that there the modified order complained of was made after the expiration of the probationary period; and neither of the other cases cited by her involved questions of probation.

The order appealed from is affirmed.

We concur: CASHIN, J.; TYLER, P. J.

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136 Cal.App. 713

GLASCOCK v. WATTERS et al.

Civ. 9224.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1934.

1. Appeal and error 🔑761.

Where new trial was granted on all issues, brief arguing only that court erred in granting new trial for insufficiency of evidence *held* insufficient.

2. New trial 🔑70.

Trial court may in its discretion grant new trial for insufficiency of evidence though evidence is sufficient to support judgment in event of denial of new trial.

3. Appeal and error 🔑977(3).

Order granting new trial for insufficiency of evidence will not be disturbed on appeal except for abuse of discretion.

4. New trial 🔑70.

Granting of new trial on all issues in action by person struck by handle of passing automobile while near his own car *held* not error where evidence as to defendants' negligence was slight and evidence as to plaintiff's contributory negligence was abundant.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by W. L. Glascock against Lucille Watters and others. From an order granting defendants a new trial, plaintiff appeals.

Affirmed.

Hubbard & Hubbard, of Oakland, for appellant.

James M. Koford, of Oakland, for respondents.

SPENCE, Justice.

Plaintiff sued to recover damages for personal injuries. Upon a trial by jury plaintiff had judgment against defendants for the sum of $1,500. A motion for new trial was made in the trial court and from the order granting said motion, plaintiff appeals.

[1] The only point argued by appellant is that the trial court erred in granting a new trial on the ground of insufficiency of the evidence. The motion was made upon several grounds and the order was not based solely upon the ground mentioned, but also "upon all issues." Respondents argue that the order was properly made upon the ground of

error in the instructions as well as the ground of insufficiency of the evidence. It is therefore apparent that appellant's brief is inadequate to show error in the trial court's ruling. Weaver v. Shell Oil Co. of California, 129 Cal. App. 232, 18 P.(2d) 736.

[2, 3] We have nevertheless considered the ground of insufficiency of the evidence and are satisfied that the trial court's ruling was proper upon that ground alone. The rules which govern the trial courts in passing upon motions for new trials on the ground of insufficiency of the evidence and the rules which govern the appellate courts on appeals from orders granting such motions are well settled. Buck v. Borchers, 203 Cal. 210, 263 P. 226; Rosenberg v. George A. Moore & Co., 194 Cal. 392, 229 P. 34; Gordon v. Roberts, 162 Cal. 506, 123 P. 288; Green v. Soule, 145 Cal. 96, 78 P. 337; Malloway v. Hughes, 125 Cal. App. 573, 13 P.(2d) 1062; Moss v. Stubbs, 111 Cal. App. 359, 295 P. 572, 296 P. 86; Morgan v. Los Angeles Pacific Co., 13 Cal. App. 12, 108 P. 735. From the authorities cited, it is clear that a trial court may, in its discretion, grant a new trial on the ground of insufficiency of the evidence even in a case where there is sufficient evidence to support the judgment on appeal in the event that a new trial is denied. It is also clear that an appellate court may not disturb the order granting such motion unless it clearly appears that there has been an abuse of discretion.

[4] In the present case there was but little conflict in the testimony, but, upon the peculiar state of facts, the most that can be said in favor of appellant is that conflicting inferences might have been drawn on the issues of negligence and contributory negligence. The accident happened at about 8:45 p. m. Appellant's car was parked near the curb without lights. Respondents' car was being driven at a speed of about 25 miles per hour on the same side of the street. As respondents' car approached appellant's car, appellant was walking from the sidewalk across the front of his car with the intention of entering his car on the side toward the center of the street. Respondents' car cleared appellant's car by a distance of three or four feet as it was passing, but appellant, with his left hand on the left front fender of his own car, was struck on the right arm by the handle on the door of respondents' car and was thrown to the street. Appellant admitted that no portion of respondents' car struck him except the side thereof and it appeared that the fenders of said car extended several inches beyond the door handle. The occupants of respondents' car did not see appellant before the accident occurred, but upon feeling a jar, they stopped and offered aid to appellant. The testimony showed that appellant had "quite an odor" of alcoholic liquor on his breath and he admitted that he had had a "couple of highballs before dinner." The blackboard diagram used by appellant in illustrating his testimony is not before us, but it appears from the testimony found in the transcript that the evidence, if any, tending to show negligence on the part of the driver of respondents' car was slight and that the evidence tending to show negligence on the part of appellant was abundant. In appellant's written statement made prior to the trial he said, "I went back to the car, parked heading up the street, and walked in front of it. I put my left hand on the left front fender and started to step around to the left-hand door when there was a blinding flash. The next I knew some people were trying to help me up." No doubt the trial court was of the opinion that appellant swung around from the front of his car just as respondents' car was passing and that the accident happened solely by reason of appellant's negligence without any negligence on the part of the driver of respondents' car. There was ample evidence to support this view and it certainly cannot be said that the trial court abused its discretion in granting the motion.

The order granting a new trial is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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136 Cal.App. 624

SUDBROCK v. KROENER et al.

Civ. 1471.

District Court of Appeal, Fourth District, California.

Feb. 7, 1934.

1. Frauds, statute of 🔑6.

Marriage is not such performance of oral antenuptial agreement as to take agreement out of operation of statute of frauds (Civ. Code, § 1624, subd. 3).

2. Fraudulent conveyances 🔑57(3).

Where transfer of property renders transferor insolvent, insolvency is contemplated by very act of making transfer (Civ. Code, § 3442).

3. **Fraudulent conveyances** 🔑80.

Person cannot, as against existing creditors, transfer all his property in consideration of future support (Civ. Code, § 3442).

4. **Fraudulent conveyances** 🔑57(3), 271(3).

Where debtor transfers all his property so that, by making transfer, he becomes insolvent, transfer is made in contemplation of insolvency and is presumptively fraudulent (Civ. Code, § 3442).

5. **Fraudulent conveyances** 🔑95(11).

Postnuptial settlement between husband and wife pursuant to antenuptial agreement is not binding on existing creditors.

6. **Frauds, statute of** 🔑127.

Oral antenuptial agreement declared invalid by statute cannot be validated by postnuptial contract (Civ. Code, § 1624, subd. 3).

7. **Fraudulent conveyances** 🔑74(3).

Where oral agreement to transfer property, under statute of frauds, will not support action to compel transfer, conveyance pursuant to agreement must be considered voluntary in determining whether transfer is fraudulent as to creditors (Civ. Code, § 3442, and § 1624, subd. 3).

8. **Fraudulent conveyances** 🔑95(11).

Postnuptial transfer of certificate of deposit and notes by husband to wife pursuant to oral antenuptial agreement *held* void as to existing creditors where it was voluntary, and made in contemplation of insolvency and constituted all property of husband (Civ. Code, § 3442, and § 1624, subd. 3).

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Frank Sudbrock against Elizabeth Kroener, wherein the defendant filed a cross-complaint against the plaintiff and Mae L. Sudbrock, and obtained a judgment on such cross-complaint. The cross-defendant filed a third party claim to certain property levied on by the sheriff, and the defendant filed a petition to have the interests of the parties, and title and ownership of the property, determined. From a judgment determining that the property was owned by the cross-defendant, and from an order directing the sheriff to return the property to her, the defendant appeals.

Reversed.

Allen & Lyon, of Fullerton, and Forgy, Reinhaus & Forgy, by S. M. Reinhaus, all of Santa Ana, for appellant.

Harry C. Westover and D. G. Wettlin, both of Santa Ana, for respondent.

WARMER, Justice pro tem.

On or about March 7, 1932, Frank Sudbrock, as plaintiff, instituted suit against Elizabeth Kroener, as defendant on a promissory note for $600, dated March 23, 1927, and due one year thereafter, to recover the principal sum thereof with interest.

Elizabeth Kroener filed an answer and cross-complaint, by which cross-complaint she prayed judgment against plaintiff and cross-defendant for services performed between January 1, 1921, and the 7th day of March, 1932. Upon the trial of the cause, the court rendered its opinion on or about the 14th day of December, 1932, finding a balance due the cross-complainant from cross-defendant in the sum of $1,055.78. Findings were made and judgment was entered accordingly on or about December 27, 1932. A motion for new trial was denied January 20, 1933. No appeal was taken, and hence the judgment has become final. At the time of the commencement of the action, Frank Sudbrock was a single person of the age of 70 years, and entirely deaf. In March, 1932, he became engaged to Mae L. Sudbrock, and on August 22, 1932, they were married. An agreement was entered into between them during the month of March, 1932, to the effect that, if the said Mae L. Sudbrock would marry said Frank Sudbrock and care for him during the rest of his life, he would turn over to her all of his worldly possessions.

Frank Sudbrock, at about that time, took Mae L. Sudbrock to a bank and exhibited to her certain of his possessions, including a certificate of deposit issued by the bank and two promissory notes for $100 each, made payable to Frank Sudbrock. At the time of their marriage Mae L. Sudbrock relied on the promise of Frank Sudbrock to turn over to her his property as agreed. At the time of the marriage the notes and certificate of deposit were payable to Frank Sudbrock. On or about October 21, 1932, the certificate of deposit was turned in to the bank and a new certificate of deposit was issued by the bank payable to Frank Sudbrock in the sum of $2,750. On or about December, 1932, this certificate of deposit was turned in to the bank and a new one issued for the same amount, made payable to Frank Sudbrock and Mae L. Sudbrock, as joint tenants. Frank Sudbrock objected to the certificate of deposit so issued being made payable to him and his wife as joint tenants, and returned same to the bank, whereupon, and at his request, the bank canceled said certificate and issued another in the same amount made payable to Mae L. Sudbrock on or about December 27, 1932, and on the same day Frank Sudbrock indorsed said two notes and delivered them to Mae L. Sudbrock. Both said certificate of deposit and notes were retained by Mae L. Sudbrock. The sheriff levied on said certificate of deposit under and by virtue of the aforesaid judgment. Mae L. Sudbrock filed a third party claim for the property so levied upon. Elizabeth Kroener furnished and filed a bond with the sheriff requiring him to keep the property so levied upon. Elizabeth Kroener filed a petition to have the interest of the parties, and title and ownership of the property, determined. Upon the hearing of said petition, the court made findings and conclusions and entered its judgment and order that said property was the property of Mae L. Sudbrock, and ordered the sheriff to return same to her. From such judgment and order the petitioner has appealed.

The question presented on this appeal is whether or not the transfer of the property by Frank Sudbrock to Mae L. Sudbrock prior to the levy thereon by the sheriff was such a performance of an oral antenuptial agreement as to avoid the statute of frauds and the provisions of section 3442 of the Civil Code.

An agreement made upon consideration of marriage other than a mutual promise to marry is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged. Section 1624, subd. 3, Civ. Code.

Marriage, from the earliest period of the common law, has ever been held to be a sufficient consideration for a conveyance of land, and such conveyances have ever been regarded as being entitled to as full protection as conveyances made on the most ample pecuniary consideration. Otis v. Spencer, 102 Ill. 622, 40 Am. Rep. 617, cited in 41 A. L. R. 1164; Cohen v. Knox, 90 Cal. 266, 273, 27 P. 215, 13 L. R. A. 711.

[1] However, such is not the question here presented. At the time of the transfer of the certificate of deposit and two promissory notes, the marriage had already been consummated, and the transfer was made in the carrying out of an oral antenuptial agreement and not in consideration of marriage, even though the marriage was agreed to and the marital relation entered into on the oral promise that such transfer would, in fact, be made. Until the marriage was consummated the claimant herein (Mrs. Sudbrock), wife of Frank Sudbrock, had the right to exact from him a written agreement, and thus avoid the inhibitions of section 1624, subd. 3, of the Civil Code, or to demand the transfer of the property before marriage and to refuse to consummate the marriage until the transfer had been accomplished, or to proceed with consummation of the marriage and rely upon his willingness and ability to make the transfer—in the latter case, assuming on her part full responsibility for any legal difficulty that might affect his ability to make the transfer. This course she chose. Any opinion as to any question that might arise from any course of conduct different from the course followed by the parties to the contract is not here involved. Marriage by the parties is not such a performance of an oral antenuptial agreement as to accomplish the removal of the contract from the effect of the statute of frauds. Section 1624, subd. 3, Civ. Code.

In Hughes v. Hughes, 49 Cal. App. 206, 210, 193 P. 144, 145, the court says: "The fact that the parties were afterwards married does not operate to lift the bar of the statute. 'A promise made in anticipation of a marriage, followed by a marriage, is the exact case contemplated by the statute. It is plain that the marriage adds nothing to the very circumstances described by the statutory provision which makes a writing essential; in fact, until a marriage takes place, there is no binding agreement independent of the statute, so that the marriage itself is a necessary part of every agreement made upon consideration of it, which the Legislature has said must be in writing' "—citing cases. See, also, Peek v. Peek, 77 Cal. 106, 19 P. 227, 1 L. R. A. 185, 11 Am. St. Rep. 244; Trout v. Ogilvie, 41 Cal. App. 167, 182 P. 333.

In the proceeding in which this appeal was taken the court found in part as follows: "That at the time the agreement was made by the said Frank Sudbrock and Mae L. Sudbrock in March, 1932, and at various times thereafter, said Mae L. Sudbrock did not know that Elizabeth Kroener was a creditor of said Frank Sudbrock; that on the 22nd day of August, 1932, when said Frank Sudbrock and Mae L. Sudbrock were married said Mae L. Sudbrock did not know that Elizabeth Kroener was a creditor of said Frank Sudbrock; that at the time of the making of said pre-nuptial agreement and at the time of the marriage of said parties, said Mae L. Sudbrock had no intent to defraud the said Elizabeth Kroener; that at the time the said Frank Sudbrock entered into said agreement with said Mae L. Sudbrock he was not conscious of any indebtedness to said Elizabeth Kroener or any other person, and that he entered into said agreement in good faith to secure the services and care of said Mae L. Sudbrock and without any intent to defraud said Elizabeth Kroener or any other creditor; that said prenuptial agreement between said Mae L. Sudbrock and Frank Sudbrock was not in writing, but was oral, but that said prenuptial agreement was consummated and executed on or about the 27th day of December, 1932, when said Frank Sudbrock transferred and turned over to Mae L. Sudbrock all of his said property."

The transfer of said certificate and notes was a valid transfer unless inhibited by the provisions of section 3442 of the Civil Code, which reads: "In all cases arising under section twelve hundred and twenty-seven, or under the provisions of this title, except as otherwise provided in section thirty-four hundred and forty, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration; provided, however, that any transfer or encumbrance of property made or given voluntarily, or without a valuable consideration, by a party while insolvent or in contemplation of insolvency, shall be fraudulent, and void as to existing creditors."

Since the proviso in said section was added by the Legislature in 1895, the effect thereof has been determined by our Supreme Court. In Hemenway v. Thaxter, 150 Cal. 737, 90 P. 116, 117, the court said: "That the conveyance, if voluntary, was in fraud * * * scarcely requires argument. Section 3442 of the Civil Code provides (quoting above proviso). Hemenway admits that by this conveyance he divested himself of all property liable to execution; that he became thereby, and has ever since remained, insolvent. The consequence of this conveyance being, then, to render Hemenway insolvent, he will be presumed to have intended its natural consequence, from which follows an intent to become insolvent, or contemplated insolvency, in the language of the act."

[2-4] The rule is stated in 12 California Jurisprudence, p. 1019, § 60, thus: "By express provision, a voluntary conveyance made by an insolvent, or by one in contemplation of insolvency, is now conclusively presumed to be fraudulent as to existing creditors. The insolvency of the voluntary grantor is conclusive of fraudulent intent, and no other facts can control, influence or overcome this presumption. The question of an actual intent is immaterial." See, also, Hanscome, etc., v. Ainger, 71 Cal. App. 735, 236 P. 325, and cases cited. Where the transfer renders one insolvent, his insolvency is contemplated by the very act of making the transfer. Knox v. Blanckenburg, 28 Cal. App. 298, 152 P 59. Against existing creditors, no one can transfer all his property in consideration of future support so as to defeat any such creditor in enforcing his claim, for under such circumstances the law presumes the act to be done with fraudulent intent—to hinder and delay the creditor in the collection of his debt. This is by reason of the fact that every person is presumed to know what the direct result of his acts will be. Baxter v. Baxter, 19 Cal. App. 238, 125 P. 359; Benson v. Harriman, 55 Cal. App. 483, 204 P. 255, 258. Where the transfer is of all the property owned by the transferor, by the making of the transfer he became insolvent. Hence that the transfer was in contemplation of insolvency will admit of no doubt. Southwick v. Moore, 61 Cal. App. 585, at page 590, 215 P. 704, and cases there cited. In the case of Benson v. Harriman, supra, the Supreme Court, in denying a hearing in that court said: "It was an action to recover * * * a debt owing by him to plaintiff on agreement. * * * The judgment therein was proof that the defendant was indebted to plaintiff on the contract at the time the action was begun. The fact that the debt was for the reasonable value of the services, and to that extent unliquidated, was immaterial on the question of the right of the plaintiff to maintain this action to set aside the fraudulent conveyance."

In the case of Lefrooth v. Prentice, 202 Cal. 215, at page 228, 259 P. 947, 952, the court says: "It must be borne in mind that, under section 3442 of the Civil Code (quoting the proviso of said section). Under such a showing, the fraudulent intent on the part of the grantee of such transfer is immaterial. (Citing cases.) It is also true that in such case the intent to defraud creditors is not required. See Atkinson v. Western D. Syndicate, 170 Cal. 503, 506, 150 P. 360, 361, where we said: 'If these conditions, to wit, a grant made without consideration by a person insolvent or in contemplation of insolvency, are present, the intent of the grantor is immaterial and the transfer, regardless of the actual intent, is void as to creditors.'"

[5-7] Where the rights of a creditor are involved, the view accepted by all the courts is that a postnuptial settlement in pursuance of an antenuptial agreement is not binding on an existing creditor. 41 A. L. R. 1169. Where a statute declares an oral antenuptial agreement void, it cannot be validated by a postnuptial contract. To hold that it could be so

held valid would announce a doctrine that would, in effect, work a judicial repeal of the statute. Fischer v. Dolwig et al., 39 N. D. 161, 166 N. W. 793; Rowell v. Barber, 142 Wis. 304, 125 N. W. 937, 27 L. R. A. (N. S.) 1140; 27 C. J. 542, § 238. If the agreement to make the transfer or conveyance cannot be made the basis of an action to compel the conveyance of the property, because the agreement is void under the statute of frauds, then any conveyance in pursuance thereof is voluntary. 27 C. J. 542.

Counsel for the respondent rely on the cases of Freitas v. Freitas, 31 Cal. App. 16, 159 P. 611; Hussey v. Castle, 41 Cal. 239; Martin v. Pritchard, 52 Cal. App. 720, 199 P. 846, 848. These cases are readily distinguishable from the holding herein. In the case of Freitas v. Freitas, supra, there is no question of a creditor involved, and hence it is not authority on the rights of an existing creditor at the time of the transfer. The case merely holds that as between the parties, if a transfer is made in conformity with, and in pursuance of, an antenuptial oral agreement, the same is consummated and the statute, in such instance, has no application. Hussey v. Castle, supra, was decided prior to the amendment to section 3442 of the Civil Code, and is therefore not authority on the question here presented since said amendment. In Martin v. Pritchard, supra, the following quotation from Hussey v. Castle, supra: "As the antenuptial contract is alleged to have been completely executed, the same is not assailable by the parties thereto, or by third parties, on the ground that it was not in writing, as prescribed by statute," is pure dicta.

[8] For the foregoing reasons the transfer of the certificate of deposit and notes, in pursuance of the antenuptial oral agreement at a time subsequent to the marriage, did not constitute an executed oral agreement so as to avoid the effect of the statute of frauds. Hence it was not a transfer that could have been enforced after marriage. It was a voluntary transfer without consideration, and, inasmuch as it was a transfer of all the property of the transferor, it was in contemplation of insolvency. Elizabeth Kroener being an existing creditor, the transfer as to her was void.

Judgment reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 554

LEWIS v. REINBERG.

Civ. 9096.

District Court of Appeal, First District, Division 2, California.

Feb. 2, 1934.

1. Negligence 🔑136(22).

In action for injury in steam bath alleged to have been caused by soap accumulating on steps, nonsuit *held* properly granted under evidence.

Evidence did not show that any soap had accumulated on steps, but that plaintiff slipped on step which was hazardous only by reason of presence of soapy water. It was also shown that danger to be anticipated from presence of soapy water in steam room was known to plaintiff.

2. Negligence 🔑66(1).

Patron of steam bath, with knowledge of danger from presence of soapy water in steam room, could not recover for injury due to such hazard.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Mrs. Bertha Lewis against Alfred Reinberg, individually and doing business as the Berkeley Steam Baths, to recover damages for personal injuries. Judgment for defendant, and plaintiff appeals.

Affirmed.

Morris M. Grupp and Bernard B. Stimmel, both of San Francisco, for appellant.

Kirke La Shelle, Jr., of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff was injured when she slipped and fell in a steam room in the Berkeley Steam Baths, an institution owned and operated by defendant, Reinberg. Upon the trial, defendant's motion for nonsuit was granted at the close of plaintiff's case, and from the judgment of nonsuit plaintiff appeals.

[1, 2] Plaintiff and her friend, Mrs. Steinberg were occasional patrons of said baths. The steam rooms, which adjoined dressing rooms and shower rooms, were about six or eight feet square. At the back of room 6 there was a wooden platform about three or four feet high with a railing on the front thereof and with steps leading up thereto. There was a corrugated rubber mat fastened upon each of said steps. A bench was locat-

ed upon the platform against the back wall, and it was upon this bench that the patrons sat for the purpose of enjoying the steam and also for the purpose of lathering themselves with soap, using water furnished in buckets placed upon the platform. The platform sloped slightly toward the front of the room in order that water would drain off the platform and would ultimately flow into the drain in the floor. Both plaintiff and Mrs. Steinberg occupied room 6 on the day in question. They brought their own soap, lathered themselves freely, and thereafter rinsed themselves while on said platform after Mrs. Steinberg had descended the steps to get clean water for that purpose and had returned. When plaintiff subsequently started to descend the steps, she slipped on the first step and sustained her injuries. It was claimed that she slipped on "something slippery oozing out" from under the rubber mat. Mrs. Steinberg, called as a witness for plaintiff, testified that she examined the step and saw there something "like soapy suds." On cross-examination she admitted that what she saw there was "colorless" and was "just like water." In the complaint it was charged that the injuries were caused "solely by reason of soap being accumulated on said steps and that said soap was negligently allowed to be accumulated by the defendant Alfred Reinberg."

In our opinion, the nonsuit was properly granted, as plaintiff failed to present any evidence to sustain the essential allegations of her complaint. It was not shown that any "soap" had accumulated on said steps, but it affirmatively appeared from the evidence offered by plaintiff that she slipped upon a step which was hazardous only by reason of the presence of soapy water. It would seem that the hazard caused by the presence of soapy water is one which is assumed by patrons entering a room used for the purposes described, but in any event it was at best purely a matter of conjecture as to whether the soapy water in question was there by reason of the activities of plaintiff and her friend or by reason of some act or omission on the part of defendant. In fact, the evidence offered by plaintiff on this subject showed that the steps appeared to be in perfect condition when she ascended before taking her bath and that she felt the soapy substance only at the time she slipped, which was after she and her friend had spent some time in lathering and rinsing themselves on the small platform above the steps.

In an endeavor to present some evidence tending to show negligence on the part of defendant, plaintiff offered testimony showing that defendant's wife had told her on a previous occasion that each room was thoroughly cleaned with the hot water hose after each patron had left "to make it safe so that no soap would accumulate anywhere" and plaintiff further offered testimony to show that said room 6 was not so cleaned by defendant on the day in question. It appeared that on said day room 6 was occupied by another patron when plaintiff and Mrs. Steinberg arrived; that they were so informed, and decided to wait until that room was vacated; that, when the party using said room had left, plaintiff and Mrs. Steinberg entered and rang for the attendant; that, when the attendant failed to appear immediately, they themselves proceeded to clean the room with the hose, and thereafter took their baths without awaiting any assistance in the cleaning. We do not believe that said testimony was helpful to plaintiff. It affirmatively showed that the danger to be anticipated from the presence of soapy water in the steam room was as well known to plaintiff as it was to defendant. Under these circumstances the rule stated in Mautino v. Sutter Hospital Association, 211 Cal. 556, 296 P. 76, is controlling, and bars plaintiff's recovery.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

136 Cal.App. 699

PEOPLE v. YOUNG.

Cr. 257.

District Court of Appeal, Fourth District, California.

Feb. 14, 1934.

1. Municipal corporations ⟹594(2).

City ordinance prohibiting public display of "any flag, standard or symbol, emblematic of any nation, organization or doctrine which is likely to provoke a riot or breach of the peace," *held* void for indefiniteness.

2. Assault and battery ⟹13.

Police officers' attempts to arrest persons guilty of rioting or breach of peace in officers' presence were lawful and resistance thereto unlawful, though they mistakenly believed that carrying of certain banners on streets by persons sought to be arrested violated city ordinance (Pen. Code, §§ 692–694).

3. Criminal law 🔑1144(13).
Evidence must be reasonably construed in support of judgment appealed from.

4. Criminal law 🔑1159(3).
Judgment supported by competent, material evidence must be affirmed, though truth of conflicting evidence seems more probable.

5. Criminal law 🔑556.
Defendant's and his witnesses' evidence may be accepted in support of judgment of conviction.

6. Arrest 🔑63(3).
Police officers, in whose presence breach of peace and riot were started, had right to arrest offenders without waiting for warrants or informing them of cause of arrests (Pen. Code, §§ 836, 841).

7. Assault and battery 🔑91.
Evidence *held* sufficient to support conviction of simple assault.

8. Criminal law 🔑1170(5).
Exclusion of testimony as to undisputed matters and facts corroborating evidence already introduced by defendant *held* not prejudicial to him, in view of his conviction of lesser offense than that charged (Const. art. 6, § 4½).

9. Criminal law 🔑711.
Trial judge has right to exercise reasonable discretion in limiting length of counsels' arguments.

10. Criminal law 🔑711.
Trial court's limitation of time for counsels' arguments to three hours for each side *held* not abuse of discretion, where relevant facts were not particularly involved and counsel discussed and permitted witnesses to discuss immaterial matters.

11. Criminal law 🔑814(1).
Instruction as to provisions of city ordinance in trial for assault on police officer attempting to arrest violators thereof *held* erroneous as unnecessary.

12. Criminal law 🔑1172(6).
Unnecessary instruction as to provisions of city ordinance in trial for assault with deadly weapon on police officer attempting to arrest violators *held* not prejudicial to defendant convicted of simple assault.

WARMER, Justice pro tem., dissenting.

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Frank Young was convicted of simple assault, and he appeals.

Affirmed.

Leo Gallagher, of Los Angeles, and W. Breeden, of San Diego, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Victor C. Winnek, Deputy Dist. Atty., both of San Diego, for the People.

MARKS, Justice.

The evidence in this case discloses that a group of five hundred or more people, members of various organizations, journeyed in a motor caravan from the city of Los Angeles to the City of San Diego on May 30, 1933, for the purpose of meeting to protest against "imperialistic war." They assembled in Newton Park in the city of San Diego on the afternoon of the day in question. Speeches were made, and at the close of the meeting the chairman announced that an application had been made to the city council of the city of San Diego for permission to parade, but that the request had been refused. He called for a vote as to whether or not a parade should be held. No negative votes were cast, and the leaders commenced to form the assembly into a column of four or five persons abreast. They were carrying many banners mounted on sticks or staffs which had been displayed during the meeting. During the formation of the column for the parade a riot ensued, which members of the San Diego police force attempted to quell. During the course of the riot Police Officer Agnew was struck with a club and very seriously injured, one of his shoulders being crushed and his wrist broken. Police Officer Jensen was struck on the head and on the shoulder with a club and injured. The defendant was arrested and charged with assault with a deadly weapon upon these two officers. He was acquitted of the assault on Officer Agnew, and convicted of a simple assault on Officer Jensen and sentenced to serve sixty days in the county jail. He is here on appeal from this judgment and from an order denying his motion for new trial.

The principal ground urged by the defendant for a reversal of the judgment is that the police officers, including Officer Jensen, made unlawful and unprovoked assaults on the members of the assembly and attempted to make unlawful arrests and were about to injure members of the assembly; that as the officers were committing unlawful assaults upon the members of the assembly and making unlawful arrests, defendant, under the provisions of sections 692, 693, and 694 of the Penal Code, had a right to resist such unlawful assaults and arrests and come to the assistance of the persons about to be injured or unlawfully arrested. It therefore becomes most important to determine whether a breach of the peace or other public offense was committed by civilians in the presence of these officers which justified their intervention and the arrest of the civilians with the use of such force as might be necessary.

[1] An ordinance of the city of San Diego provided in part as follows: "No person shall publicly display any flag, standard or symbol, emblematic of any nation, organization, or doctrine which is likely to provoke a riot or breach of the peace." The ordinance further provided that any person violating any of its provisions was guilty of a public offense.

The members of the assembly in Newton Park carried various banners emblematic of radical organizations, some of which expressed opposition to certain policies of our government. It is clear from the record that the members of the police department present at Newton Park were of the belief that these banners and the sentiments expressed upon them were likely to provoke a riot or breach of the peace if displayed upon the public streets of the city of San Diego.

The defendant urges that the ordinance is unconstitutional and void; that in its attempt to describe a public offense its provisions are vague and uncertain; that the ordinance is a violation of the guarantee of free speech contained in section 9 of article 1 of the Constitution of the State of California. We agree that the section of the ordinance quoted contains no definite language from which it is possible to determine with any degree of accuracy the flag, standard, or symbol, the display of which it attempts to prohibit. A banner which might meet with hearty approval in one locality might cause serious disturbances in another. In this respect the ordinance cannot be sustained. In re Hartman, 182 Cal. 447, 188 P. 548; People v. Bella Mintz, 106 Cal. App. 725, 290 P. 93; Whitney v. People of State of California, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095; Stromberg v. People of State of California, 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484.

[2] The evidence is clear as to the happenings at Newton Park up to the time of the attempt to form the parade. The testimony is confusing as to the happenings from the moment the disturbance started and furnishes no clear picture of the subsequent events or the sequence in which they occurred. The testimony of several of the officers would indicate that they attempted to stop the parade in which the banners were to have been carried because they believed that the carrying of such banners on the streets of the city of San Diego was contrary to the provisions of the ordinance in question and likely to provoke a breach of the peace or a riot. It has been held that if a public offense has actually been committed in the presence of an officer, and he attempts to make an arrest, though at the time he mistakenly believes a different offense has been committed, he is justified in making the arrest. People v. Craig, 152 Cal. 42, 91 P. 997. If, therefore, the evidence supports the conclusion that a riot or breach of the peace was committed in the presence of the officers before they attempted to interfere and they thereupon attempted to make arrests of those guilty of either of these offenses committed in their presence, their attempts to make the arrests would be lawful and resistance to them would be unlawful.

[3-5] The evidence must be reasonably construed in support of the judgment. If there is competent and material evidence supporting the judgment, it must be affirmed even though the truth of conflicting evidence would seem more probable. Much of the evidence supporting the judgment was furnished by the defendant and his witnesses. We see no reason why this evidence should not be accepted by us in support of the judgment. The jury must have accepted much of it as true.

Practically all of defendant's witnesses described the first attack made upon the assemblage about as follows: That a marine sergeant, named Glick, charged the would-be marchers as they formed in parade, striking them with his fists and a club or billy. The marchers were equipped with sticks and staffs which they used promiscuously together with their fists. One of the witnesses described the start of the riot by Glick as follows:

"A. Well, I say he stood there listening to the speaker and he didn't look east either as I particularly took notice of it. They were all standing with their faces towards the speakers and they were making sarcastic remarks towards the speakers.

"Mr. Whelan: I object to that— A. (continuing) They said they didn't like some of these banners and they would see they would not get outside of the park.

"Mr. Whelan: Who said that? A. Sergeant Glick said that, and then after the votes were taken and all agreed that we would parade peacefully without obstructing the traffic to the Congregational church at Sixth and A for the indoor mass meeting, the order was given to form in a column and I stepped back about two feet into the line, leaving me about six feet from Sergeant Glick and Officer Bonnet and Officer Jensen and they were watching at the head of the line and all of a sudden, it seemed like a signal from the front, Glick says, 'Let's go,' and the next thing, in less than a minute, why he came dashing through the middle of the parade forming, striking right and left just like a roaring bull, and I had to spread to let him out, from being hit myself, and he certainly did not go to the aid of any Sergeant Pickering at all or Officer Pickering.

"By Mr. Gallagher: Can you tell me whether or not he had anything in his hand? A. I can't say as to that, but I know he was swinging desperately to the right and left and hitting the people in front of him with his fist.

"Q. And did you see him after that? A. Yes, I seen him around in the crowd."

According to this witness, upon Glick's charge into the crowd, the mêlée was on, the would-be marchers striking with fists, clubs and sticks. Glick was followed by the police officers who used their clubs on the rioters.

[6] It seems evident from this testimony, and that of other defense witnesses, that before the police officers intervened the trouble had started and a riot was taking place. At least there was a large-sized disturbance of the peace and a general fight. Glick was not a member of the police force of San Diego. As a breach of the peace and a riot had been started in the presence of the police officers, it became their duty to quell the disturbance and arrest the offenders without waiting for any warrants. Section 836, Pen. Code. As the rioters were actually engaged in the commission of an offense in the presence of the officers, it was not necessary for them to inform the arrested persons of the cause of the arrest. Section 841, Pen. Code. In People v. Pool, 27 Cal. 572, at page 576, it was said: "Where a party is apprehended in the commission of an offense, or upon fresh pursuit afterward, notice of the official character of the person making the arrest or of the cause of the arrest is not necessary, because he must know the reason why he is apprehended."

[7] The particular events surrounding the assault on Officer Jensen may be briefly described as follows: The defendant armed himself with a club described as a two-by-three, between three and one-half and five and one-half feet long. He was seen to strike into six different groups of persons. He struck Officer Agnew, causing the injuries we have already described. Officer Jensen was engaged in a struggle with, or was retreating from, two rioters who were striking him with sticks. The defendant came up behind him and struck him a blow over his temple which caused an abrasion of the skin and cerebral concussion. The blow forced him to his knee. A second blow was struck which hit him on his shoulder, leaving a scar which was visible at the time of the trial. After striking Officer Jensen the defendant fled and was arrested about two blocks from the scene of the riot. There is no evidence in the record that the defendant had been assaulted or threatened with arrest prior to the time he struck Officer Jensen, and that he was not carrying a banner is clearly established. It would seem clear from the evidence that he armed himself with a club and proceeded to promiscuously assault those with whom he came in contact. The injuries to Officer Agnew were particularly serious. His body was in a plaster cast when he testified at the time of the trial. He was more seriously injured than any other person participating in the mêlée. The evidence is ample to support the conviction of the defendant. Indeed, he may consider himself fortunate in not having been convicted of the felonies with which he was charged.

[8] The defendant urges that the trial court committed prejudicial error in limiting the number of witnesses which he desired to call. The record discloses that every witness who had, or claimed to have, any knowledge of the actual assault upon Officer Jensen was permitted to testify. A large number of witnesses were called by the defendant who knew nothing of this assault but testified concerning the events preceding it, including the speeches made, the formation of the parade, and the inception of the riot. The witnesses whom the defendant desired to call would, according to the proffer of evidence made, have testified concerning the assembly at the park, the substance of the speeches, the character of the banners displayed, the attempt to form a parade, and the starting of the riot. None of these matters were in dispute as far as the evidence before us discloses except the exact manner in which the riot started. On this question, there was a sharp conflict between the parties. According to the proffer, the witnesses who were not permitted to testify would have corroborated the evidence already introduced by the defendant as to the manner in which the affray commenced. In view of the verdict returned, the jury must have accepted as true the testimony of the

defendant's witnesses upon this particular phase of the case. Under these circumstances we cannot see how the defendant suffered any prejudice by the refusal of the trial court to permit these additional witnesses to testify. Under the provisions of section 4½ of article 6 of the Constitution of California, the error, if any, was not prejudicial.

[9, 10] The defendant complains because the court limited his counsel in the length of his argument. Counsel for defendant requested two days in which to argue the case. The trial court granted each side three hours. It is the duty of the trial judge to regulate the proceedings in his court and he has the undoubted right to exercise a reasonable discretion in limiting the length of the arguments of counsel. People v. Morrell, 28 Cal. App. 729, 153 P. 977; People v. Prewett, 40 Cal. App. 416, 180 P. 844. While it took a number of days to try the case, the pertinent and relevant facts were not particularly involved. Counsel for both parties unduly and unnecessarily extended the time of the trial by permitting witnesses to discuss, and themselves discussing, the political beliefs and doctrines of some of the organizations whose members participated in the meeting at Newton park. We cannot see how this evidence could have been material or competent in the case. Counsel for the defendant devoted much time to a discussion of these beliefs during his argument to the jury. Had he chosen to discuss the material evidence only, it would seem to us that he would have had ample time to review it in the three hours in which he addressed the jury. We can find no abuse of discretion in the action of the trial court in limiting the time for the arguments of counsel to three hours for each side.

[11, 12] The defendant complains of the following instruction given by the trial court: "One of the ordinances received in evidence in reference to that, being Ordinance No. 7561, which is open to your inspection, reading from section 1 thereof: 'No person shall publicly display any flag, standard or symbol emblematic of any nation, organization or doctrine which is likely to provoke a riot or breach of the peace.' And from section 5: providing that any person violating any of the provisions of this ordinance is guilty of a public offense."

Immediately preceding the questioned instruction the court gave the following:

"You are instructed that every person, who without authority of law, wilfully disturbs or breaks up any assembly or meeting, not unlawful in its character is guilty of a public offense.

"You are instructed that the right to parade is a right which persons have unless prohibited or in some way regulated by law. You are further instructed that a denial of a permit by the city council where no permit is required by law is not a law within the meaning of the previous instruction. Where no instruction is given you on whether or not a permit is required to parade, you are not to consider whether or not there is an ordinance or law covering parading, but are to consider the question of the right to parade on the theory that there is no law requiring a permit to parade."

The trial court very carefully instructed the jury on the right of assembly, the right of free speech, the right to resist attack and the right to resist unlawful arrest, as well as on all other material phases of the case. He did not give any other instruction on whether or not a permit to parade was required in San Diego.

It must be conceded that the questioned instruction was entirely unnecessary and should not have been given. However, under the facts before us we cannot see how it could possibly be prejudicial or have influenced the jury in returning the verdict which it did.

We have considered the other assignments of error and can find no merit in them.

The judgment and order appealed from are affirmed.

I concur: BARNARD, P. J.

WARMER, Justice pro tem. (dissenting).

I dissent. I will not make any statement of the facts, as I conceive them to be disclosed by the record, because I do not think such a statement necessary to present my view of the question in issue here.

I am in accord with the majority opinion in holding the ordinance in question unconstitutional. However, with the conclusion holding such instruction unnecessary and not prejudicial, I cannot agree.

Unquestionably, during the whole trial, the prosecution sought to justify the arrest, when the assault occurred, by such ordinance, and the court instructed the jury that the acts attempted to be prohibited by the void ordinance were in fact prohibited by terms of a penal law, and in effect, thereby, instructed the jury that if they found the person sought to be arrested was doing any act forbidden by said ordinance, he was thereby committing a misdemeanor. Inasmuch as it appears that the person sought to be arrested at that time and place was admittedly carrying a banner which, it is claimed, was a violation of said ordinance and that he was doing so in the presence of a police officer who attempted to arrest him then and there, the effect of the instruction was to tell the jury that the act of carrying the banner, if it was a banner the display of which was forbidden by the said ordinance, was a misdemeanor and subjected him to arrest, that he had no right to resist the lawful arrest; and therefore the defendant had no right to assist him in his resistance.

An unconstitutional ordinance cannot be declared to establish any right. It is void. It is apparent, from the fact that the ordinance was placed in evidence as a justification for the attempted arrest and the instruction approving the same, that the jury must consider it and under the admitted facts it is highly probable that it was, in fact, the real issue upon which the verdict was returned.

I do not see how any jury could possibly have returned a verdict other than one of guilty, as they did, with such an instruction before them. However, without such an instruction, I am of the opinion, after a careful consideration of the whole record, that it cannot be determined whether the jury would or would not have returned a verdict of guilty. This being so, I think this error in giving the instruction approving an unconstitutional ordinance was highly prejudicial to the defendant, and of such a serious nature that even the salutary provisions of section 4½, article 6, of the Constitution, cannot be given application to uphold the judgment. People v. MacPhee, 26 Cal. App. 218, 146 P. 522.

I, therefore, think the judgment should be reversed, and the cause remanded for a new trial.

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136 Cal.App. 634

YOUNGS et al. v. WRIGHT et al.

Civ. 1496.

District Court of Appeal, Fourth District, California.

Feb. 8, 1934.

Hearing Denied by Supreme Court April 9, 1934.

1. Appeal and error 🔑994(3), 1012(1).

Weight and sufficiency of evidence and credibility of witnesses are for trial court.

2. Appeal and error 🔑1011(1).

Appellate court cannot disturb judgment because of conflict in evidence.

3. Mortgages 🔑319(3).
Novation 🔑12.

In action to foreclose mortgage, finding negativing novation and payment of delinquent interest installment by giving of crop order after default *held* supported by evidence.

4. Mortgages 🔑463.

In action to foreclose mortgage, evidence *held* to support finding that mortgagees did not in writing agree for valuable consideration to extend time for payment of interest installments nor waive right to foreclose mortgage.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by D. Jerry Youngs and another against A. M. Wright and another. Judgment in favor of the plaintiffs, and the defendants appeal.

Affirmed.

O'Melveny, Tuller & Myers, J. W. Chance, and L. M. Wright, all of Los Angeles, for appellants.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

MARKS, Justice.

This action was brought to foreclose a mortgage given by appellants to secure the payment of a promissory note in the principal sum of $15,000, dated March 1, 1929, due five years after date, with interest at the rate of 7 per cent. per annum, payable semiannually. Both the note and mortgage contained acceleration clauses operative upon default in the payment of any installment of interest. This appeal is taken from the decree of foreclosure.

The installment of interest due on March 1, 1932, was not paid. On that date Mr. Wright sent the following letter to Mr. Youngs: "I regret very much that I am unable to meet that interest payment due today. I have some three or four deals on hand that look pretty good and if any one goes through I will have the money to pay you. I made one cash sale in January and got enough money to pay the city taxes and the first instalment of county taxes. I got almost nothing out of last year's valencias and thirty cents per box for the navels this time. So if you can be patient with me I will do the best I can. If you are down in Orange County call around and hoping the next letter will be more substantial." On March 10th Mr. Youngs replied as follows: "We are glad you were able to pay the taxes and hope this spring will be better for you and real estate generally. Money is short with us and you have always paid promptly so we counted on it this time too, but will get along and know you will feel badly until it is paid." On April 1st respondents called on appellants. They called again on the 5th of the same month. Their object was to obtain additional security for the unpaid installment of interest. They asked for an order on the packing house for the money to become due for the sale of the orange crop. Appellants told respondents that an order had been given to a bank for one-half of the proceeds of the crop, and that out of the balance there were bills for irrigating water, fertilizer, and labor and materials used in spraying the orange trees that would have to be paid. They offered to give an order for the money remaining after the payment of the first order and the bills above described. Respondents told them to have such an order prepared, send it to them, and they would take it under consideration. Such an order was sent on April 12, 1932. They retained it, but received no money on it. They came again to the home of appellants on April 17th and informed them that the "crop order that you have sent us is worthless; we can't accept it." A fourth conference was held on April 19th, and the action to foreclose the mortgage was instituted on April 20th.

[1, 2] The facts which we have outlined are gathered from the testimony of respondents, which was contradicted in many particulars by evidence offered by appellants. This created a conflict which the trial court resolved in favor of respondents. The trial court is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses. We cannot disturb the judgment because of a conflict in the evidence.

[3] Appellants urge that by giving the crop order there was a novation and payment of the interest installment due March 1, 1932. They admit that the evidence is conflicting on this question, but urge that the evidence of respondents is not worthy of belief. We have studied the record carefully, and have concluded that the findings are supported by ample, competent, and material evidence. If the trial court had resolved this question in favor of appellants, there would be serious doubt of such a finding having sufficient evidentiary support.

[4] Appellants next urge that there was a waiver by respondents of the payment of interest due on March 1, 1932. Respondents reply that waiver is an affirmative defense that must be pleaded (Wienke v. Smith, 179 Cal. 220, 176 P. 42), and that the evidence supports the finding that no such waiver occurred.

The allegations of the amended answer upon which the defense of waiver must be predicated are as follows: "That the plaintiffs, by a memorandum in writing, and for a valuable consideration, agreed to extend the time for the payment of the instalment of interest due March 1, 1932, under the terms of said promissory note until such time as the 1932 crops on the mortgaged premises are harvested and marketed. As a part of said transaction and agreement, and pursuant to the terms thereof, the defendants, on or about April 12, 1932, did execute and deliver unto said plaintiffs a crop order whereby Anaheim Citrus Fruit Growers' Association was and is directed to pay over unto said plaintiffs one-half of the proceeds derived from the sale of all of the 1932 crops of citrus fruits grown on or produced from the orange grove covered by the mortgage described and alleged in Paragraph III of the complaint." This attempts to plead an express written contract executed for a valuable consideration to extend the interest payment for a defined period. No such contract or consideration for one was proved.

Respondents admit writing the letter of March 10, 1932, which we have quoted. It is a fair and reasonable inference from their testimony that on April 1, 1932, they decided to obtain security for the interest overdue if a further extension of time for its payment was given; that this was communicated to appellants on April 1st and again on April 5th; that appellants offered the crop order as security for the payment; that respondents agreed to consider this offer; that they concluded that, after paying the earlier crop order and the bills mentioned, the money to be received for the crop would be exhausted, leaving nothing to be applied on the interest; that this was communicated to appellants on April 17, 1932, and their offer rejected; that appellants made no other effort to provide security and did not pay the interest; that the foreclosure action was instituted on April 20, 1932. From these facts the trial court was justified in finding that respondents had neither agreed in writing for a valuable consideration to extend the time for interest payment nor waived their right to foreclose the mortgage. From the conversations had on April 1st and again on April 5th, appellants should have realized that, unless they furnished satisfactory security for the payment of the interest due, respondents would not long delay foreclosure proceedings.

The other grounds presented by appellants relate to rulings of the trial court on objections made to the admissibility of evidence. They need not be considered in detail, as there is no reversible error in them.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

136 Cal.App. 649

CITY OF PASADENA v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9395.

District Court of Appeal, Second District, Division 1, California.

Feb. 10, 1934.

1. Master and servant ⚷419.

Respecting additional compensation, "new and further disability" is established when condition of original injury changes from temporary to permanent disability.

[Ed. Note.—For other definitions of "New and Further Disability," see Words & Phrases.]

2. Master and servant ⚷419.

Evidence tending to show change from temporary to permanent disability sustained commission's finding of new and further disability justifying additional compensation notwithstanding limitation statute.

Proceeding under the Workmen's Compensation Act by Fred E. Silka, claimant, opposed by the City of Pasadena, employer. The claimant, having been discharged as cured, filed over a year later his application for adjustment of his claim, and, to review an award of additional compensation by the Industrial Accident Commission, the employer brings certiorari.

Affirmed.

Harold P. Huls, City Atty., and Leonard A. Diether, Asst. City Atty., both of Pasadena, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

HOUSER, Justice.

On review of certain proceedings had before the Industrial Accident Commission, in essential particulars it appears that, in the course of and arising out of his employment with the city of Pasadena, one Silka sustained certain injuries that disabled him for a period of several months, during which time he was paid compensation. More than one year after Silka was discharged as cured of his said injuries, he filed with the respondent commission his application for adjustment of his claim of compensation against the city of Pasadena. It is conceded that the determinative question of whether the proceeding before the respondent commission was barred by the statute of limitations is dependent upon the principal issue of whether the evidence produced at the hearing was legally sufficient to sustain its finding that "said injury caused new and further disability. * * *"

From the several "reports" made by physicians relative to the original injuries that were sustained by Silka, it appears that they consisted of "cerebral concussion; traumatic injury to back; * * *" Later, and within a period during which he was paid compensation, a bursa on his right knee developed, which bursa was subsequently excised. Thereafter, according to later "reports" by each of several attending or consultant physicians to Silka, his physical and mental condition was declared by one of them as evidencing no "disability relative to that (cerebral concussion) * * * except his subjective complaint of persistent fullness in the head and some loss of memory." Another physician gave it as his opinion that "it might be inconvenient for Mr. Silka to resume any occupation where any kneeling is required, but otherwise I think he is capable of working." Included within the "report" of a third physician was the statement that "it is my opinion that this man has completely recovered from the effects of his injury, and should be able to carry out his regular work. There is no evidence of any back injury. I believe he is not having the pain and weakness he claims. I believe he has also recovered completely from any cerebral concussion which he may have sustained."

The evidence upon which the finding by the respondent commission that a "new and further disability" resulted to Silka may be summarized from the several "reports" of physicians as follows: That Silka complained of "dull headache, constant with a feeling of pressure about his head; mental confusion, stating that it is impossible for him to continue any train of thought; 'tiring' pain in his back following any physical exertion; recurrent pain and stiffness in his right knee, which leads to unsteady walking and a rapid tiring."

In addition thereto, by the "report" of the first of such physicians, it appears that his opinion is that "in reviewing the progress of this man since the date of his injury and from my own observations at the time of this examination, I am of the opinion that this man is permanently partially, if not totally, disabled." And the evidence shown by the "report" of the second physician disclosed the conditions and opinion respectively, that "his mental processes seem to be slow and dull. * * * The range of his back motion is limited in all directions, but I believe this is due mostly to his build and age. Straight leg raising could be carried to seventy-five degrees on each side. When forced, he complained that this caused pain in the back of knees. I got the impression of exaggeration in this respect. * * * He has some complaints referred to the right knee, but the objective examination findings in this region are negative, except for the scar due to operation for removal of a bursa. Motion in the right knee is the same as in the left. No crepitus was detected. * * * Unless the opinion of a neurologist holds to the contrary, I feel that this man is partially disabled because of complaints referred to the head. * * *"

[1] In the case of Associated Oil Co. v. Industrial Accident Commission, 214 Cal. 358, 5 P.(2d) 420, in substance the principle of law was announced (syllabus) that "it is only when there is a change in the condition of the original injury, from a temporary to a permanent disability, that a 'new and further disability' is established. * * *" And in Cowell L. & C. Co. v. Industrial Accident Commission, 211 Cal. 154, 294 P. 703, 72 A. L. R. 1118, it was ruled (syllabus) that "a permanent disability from an injury which follows a temporary disability from said injury is a new and further disability within the provisions of the Workmen's Compensation Act."

[2] Reverting to the evidence adduced on the hearing in the proceeding before the respondent commission, it may be noted that not only immediately following the date when the injuries were sustained by Silka, but as well at the time when he was discharged as cured, his injuries were regarded as of a temporary nature only; but that, after a period of more than one year had elapsed following such discharge of the patient, the opinion of one physician relative to the mental and physical condition of Silka was "that this man is permanently partially, if not totally, disabled." And that the qualified opinion of another physician was "that the man is partially disabled." Although no direct evidence was submitted regarding the question of whether the changed condition in the patient was attributable to his original injuries, the theory on which the hearing was conducted, as well as all deductions and inferences suggested by the interested parties to the proceeding, were to that effect.

Relative to the governing principle, as announced in the case of Associated Oil Co. v. Industrial Accident Commission, 214 Cal. 358, 5 P.(2d) 420, 421, to which reference hereinbefore has been had, to the effect that a "new and further disability" is established where it appears that the condition of the patient has changed from that of a temporary ailment to one that is permanent in its nature, it would seem that the evidence to which attention hereinbefore has been directed was legally sufficient to support the conclusion of which complaint is here made.

It is ordered that the award made by the respondent commission, and which is the subject of the present inquiry be, and it is, affirmed.

We concur: CONREY, P. J.; YORK, J.

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136 Cal.App. 687

BOGGS v. CAPWELL CENTRAL MARKET.

Civ. 9185.

District Court of Appeal, First District, Division 2, California.

Feb. 14, 1934.

Rehearing Denied March 16, 1934.

Hearing Denied by Supreme Court April 13, 1934.

1. Landlord and tenant ⟹164(7).

Notice of obvious danger of stepping on glass panel in frail marquee maintained by lessor to shelter pedestrians need not have been given by lessor to lessee who, as invitee in use of marquee to erect sign, stepped on glass panel which broke causing lessee to fall to sidewalk.

2. Landlord and tenant ⟹168(1).

Lessee could not assume that frail marquee, made of glass panels and maintained by

lessor to shelter pedestrians, could bear her weight when, as invitee in use of marquee to erect sign, she stepped on glass panel which broke causing her to fall to sidewalk.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Anna Loyko Boggs against the Capwell Central Market, a corporation. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Edward E. Craig, of Berkeley, and Earl M. Ripley, of Oakland, for appellant.

Brown, Ledwich & Rosson, of Oakland, for respondent.

SPENCE, Justice.

Plaintiff sued to recover damages for personal injuries. A motion for nonsuit was granted at the close of plaintiff's case, and from the judgment of nonsuit plaintiff appeals.

Plaintiff, a lessee of defendant, conducted a beauty shop on the mezzanine floor above defendant's market. Said market was located on the ground floor on the corner of Telegraph avenue and Williams street in the city of Oakland. For the protection of customers walking upon the sidewalk in the vicinity of the market, defendant maintained what the parties term a "marquee" over the sidewalk. The marquee was constructed with a steel frame with reinforced wire mesh glass panels placed in between the steel ribs of the frame. It was located at about the same level as the floor of plaintiff's beauty shop and was supported by steel rods running back to the building above the frame at an angle of about 45 degrees. The marquee was constructed solely for the purpose mentioned. It was not designed or used as a pedestrian way and there was no door leading to it. Access thereto could be gained from the building only through the windows which were located about 27 inches above the level of the mezzanine floor.

Plaintiff had occupied the premises for many months before the accident occurred and during all of said time said marquee was in full view from the street and from the windows of plaintiff's shop. Plaintiff had had some difficulty with the representatives of defendant over certain objectionable advertising signs which she had displayed upon the building. It was subsequently agreed that she might construct a sign of a certain type and hang it on the outside of the building above the marquee. Defendant's representatives told plaintiff that defendant had a sign painter who would do this work but plaintiff engaged a sign painter of her own choosing. He made the sign and put it in place. Shortly after he had finished his work, plaintiff procured a stool, placed it near the window, climbed through the window and stepped down on to one of the glass panels in the marquee. The glass panel broke and plaintiff fell to the sidewalk below sustaining her injuries.

The complaint was drawn upon the theory that plaintiff was an invitee in the use of said marquee and that defendant failed "to have said marquee and said reinforced wire mesh glass contained in said marquee properly constructed and in a safe and sound condition" and failed to give plaintiff "any notice of a dangerous and unsafe condition of said marquee and the reinforced wire mesh glass contained in said marquee." The same theory was stated in the opening statement to the jury, but there was no testimony introduced tending in any way to support any claim of negligence in construction and no mention of that claim is made in plaintiff's briefs. We must therefore assume that said marquee was properly constructed for the purposes for which it was built and we will direct our attention to the claim relating to failure to give notice.

[1] We will not pause to discuss the conflicting contention of the parties as to whether plaintiff was an invitee or a mere licensee in the use of the marquee. Assuming, without deciding, that plaintiff was an invitee, we are nevertheless of the opinion that the motion for nonsuit was properly granted, as there was no evidence tending to show any negligence on the part of the defendant. The invitation, if any, was merely to make use of a portion of the building, not designed or used as a pedestrian way, for the purpose of erecting a sign. We fail to find any evidence tending to show that there was any duty upon defendant to give plaintiff notice of any kind. We have already indicated that there was no evidence of any faulty construction. The picture of the marquee, which was introduced in evidence, shows that it was frail in appearance and was the type of structure commonly made of metal and glass. The danger which might arise from stepping upon the glass portions thereof was an obvious danger or at least one which should have been obvious to anyone

exercising ordinary care. Under these circumstances no liability can be fastened upon the defendant merely because of the alleged failure to give notice of a danger which could only result from stepping upon said glass.

[2] Plaintiff cites and relies upon Dobbie v. Pacific Gas & Electric Company, 95 Cal. App. 781, 273 P. 630, but that was a typical case involving hidden danger. There the defendant had permitted the skylight to become covered with several inches of cinders and soot which had been discharged from its gas generators. The testimony showed that the skylight was completely covered "giving it an appearance similar to that of the roof proper." A person may ordinarily assume that the roof of a building will bear his weight at any place but no such assumption may be indulged in with respect to a frail marquee erected solely for the purpose of sheltering pedestrians on the ground below. While there was evidence here to show that the glass in the marquee had become dirty, it is entirely apparent from the photograph in evidence that there was but a thin film of dirt which did not in any way conceal the general type of construction. It had none of the appearance of a solid roof, but clearly showed the metal ribs in the form ordinarily used to support a glass shelter. There was no claim of negligence here in permitting the thin film of dirt to accumulate upon the glass and the evidence conclusively showed that the danger of stepping upon the portion between the metal ribs should have been apparent to anyone exercising ordinary care. There was therefore no evidence of a hidden danger giving rise to any duty upon defendant to give plaintiff notice thereof. Plaintiff also cites Mendelsohn v. Van Herick (Cal. App.) 24 P. (2d) 878, but that case is clearly distinguishable. It involved an injury to an invitee who was using an ordinary pedestrian way, to wit, a stairway which was not well lighted. There the injured person fell over some trash which the owner had negligently permitted to accumulate upon said stairway. Other authorities are cited, but in each of them the injury was incurred in a place ordinarily used as a pedestrian way.

The conclusion which we have reached makes it unnecessary to discuss defendant's further contention that plaintiff was guilty of contributory negligence as a matter of law.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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136 Cal.App. 657

PEOPLE v. REESE et al.

Cr. 2291.

District Court of Appeal, Second District, Division 1, California.

Feb. 13, 1934.

Hearing Denied by Supreme Court March 15, 1934.

1. False pretenses 🔑7(3, 5).

False representation, as basis for grand theft committed by obtaining property through false pretenses, must relate to present or past fact, and must not be mere expression of opinion, or representation of act performable in future.

2. False pretenses 🔑49(3).

Evidence disclosing nature of false pretenses consisting of representations made to obtain property and money for mining enterprise, *held* insufficient to support conviction of grand theft under designated counts of indictment.

3. Criminal law 🔑1186(4).

Misconduct of trial judge does not warrant reversal, unless clearly prejudicial to defendant's substantial rights and probably resulting in miscarriage of justice (Const. art. 6, § 4½).

4. Criminal law 🔑1186(4).

In prosecution for grand theft based on obtaining of money and property through false pretenses, misconduct of trial judge consisting of irrelevant and jocular statements during trial *held* prejudicial, warranting reversal of conviction under counts as to which evidence was weak and unsatisfactory (Const. art. 6, § 4½).

5. Criminal law 🔑1186(4).

Misconduct of trial judge consisting of irrelevant and jocular statements during trial *held* not so prejudicial as to warrant reversal of conviction under certain counts of indictment charging grand theft, counts charging violations of Corporate Securities Act, and counts charging conspiracy, in view of evidence sufficiently sustaining conviction under such counts (St. 1917, p. 673, as amended; Pen. Code, § 182; Const. art. 6, § 4½).

6. Licenses 🔑42(4).

Evidence showing sale without permit of undivided shares in mining partnership which owned mine, that real intention was to sell stock in corporation, and that certificates of ownership were mere subterfuge, *held* to support conviction of violation of Corporate Securities Act (St. 1925, pp. 962–964, § 2, par. 7, subd. (b), par. 8, subd. (a).

7. Criminal law 🔑543(1).

Admission of transcript of testimony given by witness at former trial, where witness was absent from state and service of subpœna was prevented by witness' absence, *held* not error.

8. **Criminal law** ⚿593.

Refusal to grant defendant short continuance to enable her to secure counsel, *held* not error, under facts showing her rights were protected by counsel for codefendant during impaneling of jury, and that defendant was represented by counsel during trial.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Henry A. Reese and another were convicted of conspiracy, grand theft, and violation of the Corporate Securities Act, and they appeal.

Judgments of conviction and orders denying motions for new trial reversed in part, and judgments of conviction and orders denying motions for new trial affirmed in part.

Richard L. North, R. E. Parsons, and Joseph L. Fainer, all of Los Angeles, for appellant Carter.

Kirtland I. Perky, of Los Angeles, for appellant Reese.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

PER CURIAM.

This appeal of the defendants is from judgments of conviction against each of them, and from orders denying their motions for new trial. They were both convicted by verdicts of the jury on an indictment against them, including one charge of conspiracy, ten counts of grand theft, and six counts of violation of the Corporate Securities Act (St. 1917, p. 673, as amended).

The sufficiency of the evidence to sustain the judgment as to each of the several counts on which the defendants were convicted of the crime of grand theft is challenged. In that connection, an inspection of the record reveals the fact that the incriminatory evidence, as it affected the offense charged in count 9 of the indictment, in substance was that one Castle was the owner of a ranch that was incumbered by a mortgage of $14,500, and that a Mrs. Twedell was the owner of a bungalow court that was incumbered by a mortgage of $8,000. The owners of said respective properties agreed to an exchange thereof on the basis that the $8,000 on the bungalow court would be increased to $12,000, and that Castle would receive 4,000 shares of stock in a mining company. Pursuant to the terms of the escrow that was made by the parties to the exchange agreement, and of which Castle not only was cognizant but actually had personal knowledge, the $4,000 realized from the increase of the loan on the bungalow court was paid, not to either of the defendants herein, but was paid $3,500 thereof to Mrs. Twedell, and the remaining $500 to one Mitchell. In no way was it shown that either of the defendants received any benefit in any way from the exchange, or from the transaction in general, other than that long after the exchange had been made the defendants became the owners of the incumbrances on each of the exchanged properties. According to the testimony of the complaining witness, the only way in which the defendants were connected with the transaction was that on one occasion, when negotiations for the exchange were pending, Mrs. Carter was present, at which time "she said if they could get money enough to go ahead they would start to mine, and this $4,000—she didn't mention this $4,000—if they could get enough money together they would start mining in sixty to ninety days. * * * They were going to use it to install machinery * * *. She said that they were going to use the money to install bigger machinery in the mine and that the mine would start in sixty to ninety days on a 100-ton production."

Regarding the question of the sufficiency of the evidence as it affects count 10 of the indictment, it appears from the testimony given by the complaining witness that defendant Mrs. Carter asked to "borrow" $500 from her for thirty days, for which Mrs. Carter agreed to pay 10 per cent. interest and give the complaining witness 500 shares of stock as a bonus; that at that time Mrs. Carter said she wanted the money "to put the mine on production, * * * trying to raise money to put the Virginia Dale Mine on production." But other evidence introduced with reference to the commission of the alleged offense has the effect of creating considerable doubt as to whether Mrs. Carter ever borrowed any money from the complaining witness, or that Mrs. Carter or defendant Reese ever received the benefit of any money lent by the complaining witness. It was shown very clearly, if not conclusively, that one Blehm was the borrower; that he, together with the defendants and

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

one other person, signed a promissory note; that it was Blehm's own stock in the company that was given as a bonus; that he alone gave the complaining witness a "memorandum contract," and that it actually represented a fractional interest of his own undisputed interest in the mine; and that when the complaining witness delivered the money or her check it was not to either of the defendants, but to said Blehm.

As to count 11 of the indictment, it appears that a Mrs. Lasher, who was a woman well advanced in years and whose testimony was given approximately three years after the transaction of which she complained occurred, and whose various statements were confused, inconsistent, and at times contradictory one with the other, was to the effect that she let Mrs. Carter have a lot and some cash, for which the father of Mrs. Carter gave to Mrs. Lasher his promissory note; that later, at the request of the complaining witness, defendant Reese gave to her nephew a "conveyance memorandum" of a fractional interest in the mine. In connection with this count, the alleged false pretenses of the defendants consisted in the following: "She (Mrs. Carter) thought the mines were all right—she thought the mines were all right, and she wanted to borrow my money to put in the mines, and she wanted to put some machinery in, so she could run it night and day."

And as to whether the complaining witness relied upon the statements made to her by Mrs. Carter, the sum total of the incriminatory evidence was:

"Q. Did you believe Mrs. Carter when she told you she wanted your money to put in new machinery at the mine? A. I never had confidence in anybody better than I had in her.

"The Court: That might be true, but that doesn't tell us whether you believed in her, or not. You might not believe in anybody. A. I did believe in her.

"Q. And you relied on her statements in giving her this money and these lots? A. I did.

"Q. Would you have given them to her if you had not believed in those statements and relied upon them? A. Well, I don't know as I would.

"Q. Would you or would you not, if you had not believed her? A. Well, it was good interest; I was getting 10 per cent interest, and I thought that was pretty good.

"Q. Would you have given her the money if you had not believed what she told you? A. I don't know as I would.

"Q. Pardon me? A. I don't think I would.

"Q. You can tell me whether you would or would not, can't you? A. I had to believe——

"Mr. Kelby: We submit that is an answer to the question.

"The Court: If there has been an answer, I haven't heard it.

"By Mr. Blalock: Will you answer the question 'yes' or 'no' for me? Would you have given Mrs. Carter this money and this lot if you had not believed her? A. No, I would not."

Regarding count 12 of the indictment, and upon the charges of which the defendants were convicted, the evidence of the alleged false pretense of the defendants in substance was as follows:

"He (Reese) told me that the mine was all right. He said the hazard had gone out of it now, because they had it thoroughly examined, and had drilled holes every sixty —I don't know whether it was sixty feet or something like that, to see if the vein went through, and he said that the mine was perfectly all right, and it would not be very long that our investment would be a success. * * * He said this (exhibiting a small gold brick) came out of the mine, and we intend to get them into $10,000 bricks, instead of these little bricks, and it will not be very long, because what we want to do is to double the capacity of the mine." Mrs. Carter said: "We have a good thing, Emil, and we want all our friends to get in on this. * * * First we got our relatives in, and we found we couldn't make it, so we have to take in our relatives' friends and our friends and we are going to make a million out of it before we know it."

The witness testified that *after* the money had been delivered, "Mrs. Carter grabbed it from Reese because I handed it to Reese and I thought it looked kind of funny to me, and then she gave the money back to Mr. Reese, and she said, 'Don't worry; this is like a big family.' He said, 'Your money, my money, everybody's money is going to that one thing,' he says, 'to that mine.'"

On respective representations made by the defendants thereafter, the witness gave to the use of the defendants various amounts ranging between $100 and $275, at which times respectively it was stated that: "It sure came in handy, because the men were up there (at the mine) starving, and they had to have some groceries for them; * * * they had to have it real bad; * * * they were in a pinch again."

A summary of the alleged false pretenses as applied to each of the foregoing counts of grand theft, discloses the following facts upon which the conviction of the defendants must ultimately depend:

As to count 9: That with reference to the $4,000 which was realized by one of the owners of the exchanged properties from the increase of a mortgage on property exchanged by her, of which sum no part actually was received by defendants, one of the defendants, who had gratuitously given to the other party to the exchange 4,000 shares of stock in the mine, stated that "if they could get enough money together they would start mining in sixty to ninety days; * * * they were going to use it to install machinery, * * * bigger machinery for the mine, and that the mine would start in sixty to ninety days on a 100-ton production."

As to count 10: That as to the $500 which one of the defendants "borrowed" from the complaining witness, which in fact apparently was actually borrowed by another person, one of the defendants stated that she "wanted the money to put the mine on production; * * * trying to raise money to put the Virginia Dale Mine on production. * * *"

As to count 11: Even assuming the correctness of the story of the complaining witness, or that it was true (which in fact is extremely doubtful), that in lending the money to one of the defendants the complaining witness believed in and relied upon statements made to her by said defendant and thereby was induced to part with her money, from the record it appears that all that said defendant stated to such witness was that "she thought the mines were all right, that she wanted to borrow my money to put in the mines, and she wanted to put some machinery in, so she might run it night and day."

As to count 12: The alleged false representations consisted substantially in the following statements made by one of the defendants to the complaining witness: "That the mine was perfectly all right, and it would not be very long that our investment would be a success; * * * because what we want to do is to double the capacity of the mine. * * * We have a good thing, * * * and we are going to make a million out of it before we know it."

And *after the money had passed*, one of the defendants said: "Your money, my money, everybody's money is going to that one thing; * * * to that mine."

Later, at different times, none of which was the subject of the indictment herein, one of the defendants stated that the small sum of money then given by the complaining witness to said defendant "came in handy," etc.

[1, 2] From a consideration in gross of the several alleged false pretenses made by the defendants, it will thus unmistakably appear that in effect all that the defendants said may be reduced to a statement in substance that they were attempting to raise money and that the money would be used for the purpose of installing machinery in the mine; thus place it on a greater production basis; or to buy groceries for the use of men who were working in the mine; or to relieve the mining company from a "pinch."

It is more than doubtful that any one of any such representations, or all of them combined, as applied even to each of the several counts (9, 10, 11, and 12), may be said to measure up to the standard defined by judicial interpretation of the statutes which relate to the crime of theft committed by means of false pretense. In 12 California Jurisprudence, at page 452, the rule is declared to be "that the representation must be of a present or past fact, not a mere expression of opinion, *or a representation of an act to be performed in the future*, as a mere promise to pay or *perform some act*. * * *" Even if a construction of the assumed representation made by either of the defendants will admit of a conclusion that what they promised was that the money which they either borrowed or received from either of the complaining witnesses would be used for the purpose of placing the mine on production, still it is insufficient as a basis for a conviction of the crime charged.

In the case of People v. Mace, 71 Cal. App. 10, page 21, 234 P. 841, 845, wherein it appeared that the defendant had procured money upon his representation that he would use it for a particular purpose, the court said: "* * * While the defendant's false statement that he needed the money to finish making payments on the purchase price of the X-ray machine, and his false promise that he would use the money to make such payments and then give Preston a mortgage upon it and other property, coupled with his subsequent acts of mortgaging the X-ray machine to secure money from another person, and increasing the existing incumbrance upon the other property, *are not of themselves sufficient to sustain the charge*, they tend strongly to establish the fraudulent intent necessary to constitute the crime. * * *" See, also, People v. White, 85 Cal. App. 241, 259 P. 76.

In a notation occurring in 24 A. L. R. at pages 401, 402, and where the authorities therefor are cited, the rule is stated that: "Under the rule that the false pretenses must relate to a past or existing fact, and that the crime is not committed where the inducement is a promise to perform some act in the future, a person is not guilty of the crime of obtaining money by false pretenses where he obtains a loan of money solely by means of false pretenses concerning the use to be made of the money. (Citing authorities.) Thus, it has been held that a person was not guilty of obtaining money by false pretenses where the false pretense relied on was the statement that the loan was to be used to pay rent. (Citing authority.) And it has been held that a person was not guilty of obtaining money by false pretenses where the facts showed that he obtained the loan by the statement that he intended to open a public house." (Citing authority.)

To the same effect, see People v. Kahler, 26 Cal. App. 449, 147 P. 228; People v. Green, 22 Cal. App. 45, 133 P. 334; In re James, 47 Cal. App. 205, 190 P. 466; People v. Walker, 76 Cal. App. 192, 205, 244 P. 94, and authorities there cited.

But even though, weighed by the foregoing authorities, the legal sufficiency of the evidence in each of said four counts of the indictment should be conceded, it is apparent that, even without considering the force of opposing evidence, the case of the people, resting as it did upon the flimsiest and most unsatisfactory proof, was woefully weak. Considering such a condition, the charge here made by appellants that because of the misconduct of the court that occurred on the trial of the action the defendants were not accorded a fair trial, becomes of great and serious importance.

Although not embracing a complete list of the separate occasions on each of which it is asserted by appellants that the trial court was guilty of misconduct in the trial of the action, an inspection of the specifications of error in that regard reveals the fact that the attention of this court is directed to not less than sixty-eight separate violations of proper decorum on the part of the trial judge. A few of such specifications will suffice:

On the first day of the trial of the action, in giving the required statutory admonition to the jury, and in especially cautioning them to have nothing to do with the attorneys on either side of the case, the judge made the following remarks: "So just be a little bit careful, please. I don't want you to think that these gentlemen all have leprosy, or smallpox, that you have to get from them, but just kindly figure that they have all got the measles, or something you don't want to be exposed to. It is just a little tip, ladies and gentlemen, because I don't want anything talked around such as I have indicated. * * *"

Referring to objections by counsel for defendant to the reading of testimony given by a witness on a former trial of the action, and to the fact that the witness might return to the state before the trial could be completed, the trial judge said: "If he is (has returned to the state), anyone that wishes can put him on the stand, but the idea is to get the facts before this jury, and not to play a game to see how many points either side can win."

Without any apparent underlying reason for the statement, at one time the judge said: "We can put on enough side-shows in this court of our own, without going into Judge White's court and copying his part of it."

Apparently with the same thought in mind, following a recess of the court and a stipulation that the jury was present, the judge remarked: "All right, proceed. Both sides of the show are here. We might just as well go ahead."

It appears that one of the attorneys representing one of the defendants was looking into a "bag" which was the property of one of the other attorneys in the case, and the judge said: "Judge Perky's bag; we want to make sure which judge you are talking about. I only hope it doesn't leak on you, Mr. Lawson."

When a complaining witness had testified that he had paid the sum of $20,000 to one of the defendants in connection with the sale of shares of stock, the attorney for the people asked him: "Q. Did you get anything for that $20,000? A. Not a thing." The judge then interposed the following question: "You got experience, didn't you? A. Plenty of that."

On another occasion, the court made the following remark to a witness on the stand: "Mr. Robinson, you are just a little too eager to answer questions without giving either side a chance to object. If you see either of these gentlemen going through gesticulations or motions that indicate that they are about to give birth to an objection, just stop a moment."

At a time when one of counsel for defendants was examining one of the witnesses on cross-examination, the judge interrupted and began to examine the witness himself. After several questions had been asked by the court, one of the attorneys for one of the defendants interposed the following remark:

"If your Honor please, I prefer to examine my own witness.

"The Court: I dare say, but when it appears that the witness is becoming confused in matters, I am going to take a hand in order to get the thing straightened out and the facts before the jury. We are not playing a game to get the witness balled up on the witness stand."

In criticizing one of the attorneys for his manner in asking questions, the judge said: "I think we might make better time if Mr. Blalock would supply Judge Perky with one of these old-fashioned street-car bells, to let him ring it when he wants to go ahead."

During the reading of certain testimony, Mr. Perky and Mr. Kelby took turns in reading from the transcript, and upon one occasion, as Mr. Kelby was about to take up the reading, the judge made the following comment: "All right; we will listen to the reading of the Word from the Reverend Kelby now."

With reference to the proposed reading of each of several checks which had been introduced as exhibits on the trial of the action, the judge made this remark: "There is no heart or sex appeal in reading checks."

On another occasion the judge addressed the following remark to one of the attorneys for one of the defendants: "I am not particular for too much decorum in the court room, but I have never yet allowed any attorney to stand on his head; he will have to stand on his feet."

Following the cross-examination of one of the witnesses introduced by the defendants, the judge had this to say: "Are you gentlemen all through with Mr. Mort, with what is left of him? * * * All right, Mr. Mort, I guess if they are all through with you, you have been here a couple of days, and what is left of you can be excused."

One of the attorneys for one of the defendants having stated to the court that he would prepare proposed instructions for one of the defendants as soon as he could obtain a copy of the instructions offered by the people, the judge made the following remark: "Yes, do so, as soon as you can. The idea of most instructions seems to be to confuse the jury, or to try to confuse them as far as possible."

It appears that counsel for the people had a book which belonged to Judge Perky, who was one of the attorneys for one of the defendants, and that Judge Perky had made an inquiry for it; whereupon the judge remarked: "Well, I don't think anyone would want to take a date book away from you, Judge Perky, particularly if it contained any live telephone numbers."

At a time when the court had commented upon the testimony given by one of the witnesses for the prosecution to the effect that he did not think that the attorneys for the defendant "should put a sort of shotgun statement to her answer," without any objection thereto having been interposed by either of the attorneys for either of the defendants, the judge said: "If you want an exception, however, I will give you an exception. In fact, I will give you another exception for good measure on account of the depression." To which remark one of the attorneys said:

"Well, I wish to take an exception to the statement of the court.

"The Court: Well, I will give you another one on that; only one on that, however. I cannot give you too many bargains."

In cross-examination of a witness on attempted impeachment by one of the attorneys for defendant, he asked a question which had a tendency to distinguish between two persons who bore the same name. In connection therewith, the judge made the following remark: "Well, it is assuming facts not in evidence. In the first place, it is assuming that she is particular. We don't know whether she is or not. * * *"

During the examination of a witness, reference was made to the kind of work which he was doing and the court said: "What was he doing, flagpole sitting?"

Referring to another witness, the court said: "Well, he has made his explanation of why he made a certain remark, indicating a tendency, perhaps, to commit the crime of mayhem."

Referring to the fact that one judge may not agree with another with reference to some question of law, the judge of the trial court made the following disparaging remark: "He (Judge White) might have made a different ruling on some question than I might have made. We do not always agree, and that is why we have Supreme Courts, and rubber mats on the cuspidors. * * *"

As indicating what the judge of the trial court thought of the mine in question, the following remark of the trial judge may be cited: "In other words, you don't contend that

that *hole in the ground* had ore in it, or didn't have ore in it."

Commenting upon certain proposed exhibits in the case, the judge remarked: "Are you about to introduce the three wise monkeys as an exhibit here?" Whereupon counsel for the prosecution said:

"There is only one prosecution counsel.

"The Court: Gentlemen, it is practically twelve o'clock, and I think that is a happy thought to adjourn with."

[3, 4] Extended comment would seem to be unnecessary. In cases too numerous to properly admit of citation thereof, because of judicial misconduct that was insignificant compared to that which so unmistakably appears in the instant case, the respective judgments therein were reversed. But flagrant as misconduct of the trial court in a given case may be, unless it clearly appear that its probable effect was prejudicial to the substantial rights of the party affected by the litigation, and that probably it resulted in a miscarriage of justice because thereof, an appellate tribunal is forbidden to set aside the judgment or to grant a new trial. Section 4½, art. 6, Const. However, as to counts 9, 10, 11, and 12 of the indictment herein, and as to which the evidence adduced on the trial of the action was weak and unsatisfactory, aside from the legal insufficiency of the evidence to support a verdict of guilt as hereinbefore set forth, when the opposing evidence in each of such counts, together with the misconduct of the trial court is considered, it becomes a practical certainty that without, or in the absence of, such misconduct a verdict of "guilty" would not have been returned by the jury against either of the defendants as to either of such counts.

[5] In relation to the remaining counts 2, 3, 4, 5, 8, and 13, charging grand theft; and counts 14, 15, 16, 17, 18, 19, charging violations of the Corporate Securities Act; and count 1, charging the crime of conspiracy, in violation of section 182 of the Penal Code—the evidence is so much more clear and strong in proof of the alleged offenses, that the errors which have been discussed in the foregoing pages would not alone justify a reversal of the judgment of conviction on those counts, nor a reversal of the order denying the motion for a new trial. There are, however, other assignments of error to which we think some attention should be given.

[6] Referring to the charges of violation of the Corporate Securities Act, appellants contend that "under no view of the law as it existed during the period covered by the indictment could the defendants, or either of them, be guilty of violation of the Corporate Securities Act." In the absence of a clear statement of the questions presented or of the errors asserted, it is necessary to read the briefs with pencil poised in air, to find and mark the points which should have been separately stated under appropriate headings as the rules of court require. It appears that appellants are contending that they were, as owners of mining property, a mining partnership subject to the law of mining partnerships in California; that under that law they had the legal right to sell, transfer, and convey undivided interests in mining property owned and operated by them, without leave, let, hindrance, or permission from any source; in other words, that the Corporate Securities Act has no application to mining property owned by a mining partnership. Appellants further contend that the undivided interests which were sold by them were not "securities" within the meaning of the Corporate Securities Act, as the word "securities" therein was defined prior to the amendment thereof which became effective August 14, 1929 (St. 1929, p. 1251). Appellants refer to paragraph 8 of section 2 of the Corporate Securities Act as amended in the year 1925, defining the word "security," in so far as it applies to "individuals," as follows: "(a) Any instrument offered to the public by an 'individual' evidencing or representing any right to participate or share in oil, gas or other hydrocarbon substances or other minerals of any sort, as yet undeveloped, or in the proceeds of sale thereof." And in paragraph 7, subdivision (b), the same definition is found, of a "security" offered to the public by a "company." St. 1917, pp. 673, 674, as amended by St. 1925, pp. 962, 964. The particular point suggested is that since it was a conceded fact that the Virginia Dale Mine was a fully developed mine, the certificates issued by them prior to August 14, 1929, representing a right to share in the minerals contained in said mine, were not "securities" within the meaning of the statute. The charges set forth in counts 14, 16, and 18 relate to sales made prior to August 14, 1929. But counts 15, 17, and 19 are founded upon sales made in the year 1930. The amended section 2, as found in the Statutes of 1929 (pp. 1251, 1252), in paragraph 7 of the section, includes in the word "security," any "certificate of interest in an oil, gas or mining lease, collateral trust certificate, preorganization certificate, preorganization subscription, any transferable share, investment contract, or beneficial interest in title to property, profits or earnings or any other instrument commonly known as

a security." In this 1929 amendment the former distinction between mining property "as yet undeveloped," and other mining property, seems to have been omitted.

Appellants, in discussing the law upon this aspect of the case, quoted at length from People v. Pace, 73 Cal. App. 548, 562, 238 P. 1089, as supporting their right (without any permit obtained from the corporation commissioner) to convey to purchasers undivided interests in mining property, subject to the contemplated organization of a corporation for the purpose of carrying on the business of said mining partnership, and with intention to issue certificates of stock representing the interests thus conveyed. People v. Pace, supra, is one of a series of cases in which the courts were asked to explore and find the limits of legislative authority to regulate the business of selling securities. These cases were considered, and their application to the statute was more definitely limited, in People v. Craven (Cal. Sup.) 27 P.(2d) 906. Craven was convicted of violation of the Corporate Securities Act. Craven had sold and issued certificates of interests in oil and gas leases (his own property) without securing a permit therefor from the commissioner of corporations. Three counts of the indictment against him related to sales made in June, 1929, a time when the 1929 amendments to the statute were not yet in force. In this respect the said three counts against Craven and some of the transactions in the case at bar are alike; that is, they were prosecuted as violations of the Corporate Securities Act, and particularly of section 2, paragraph 8, subdivision (a) thereof, prior to amendment in 1929. The difference between these cases is that Craven sold certificates of interests in "oil and gas leases" of property as yet undeveloped for oil or gas, whereas the sales made by Reese and Carter were sales of certificates representing interests in a mining property which had been worked to the point where it was not "undeveloped." Thus it would seem that if the convictions in this case, of violations of the Corporate Securities Act prior to August 14, 1929, are to be sustained, there first must be proof of something more than a mere sale of certificates of interests in the mining property without having obtained a permit therefor. This burden of proof, however, respondent contends, has been sustained by the evidence, and with this contention we agree. The evidence tends to prove, and the jury had the right to find, that the real intention of the defendants was to place upon the market and sell shares of stock in a corporation, and that the form of the certificates issued by them was a subterfuge adopted in order to defeat the purposes of the Corporate Securities Act. The operation of the law may not thus be circumvented. People v. Ratliff, 131 Cal. App. 763, 772, 22 P.(2d) 245.

[7] Appellants claim that the court erred in permitting to be read in evidence the testimony of the witness Pat Adams (given at a former trial), over the objection of appellants that sufficient diligence had not been shown in the effort to find him and serve him with a subpœna. Before said transcript of testimony was received in evidence, it was shown that the witness Adams was absent from the state of California, and that although a subpœna had been issued thirty days before the present trial, service thereof had been prevented by the witness' absence from the state. These facts justify the ruling of the court by which the testimony at the former trial was admitted. People v. Day (Cal. Sup.) 27 P.(2d) 909.

Point IV of appellant Carter: That the court "erred in sustaining an objection to the offer of proof." Under this vague and mysterious heading the brief contains numerous pages of narrative out of which we are supposed to select those which show an offer of proof and the court's ruling thereon. The gist of the contention seems to be that the court erroneously restricted the defendants in their effort to present the evidence of "the entire history" of their activities in connection with the Virginia Dale mining property prior to the year 1928, and therefore prior to the period when the alleged illegal activities of the defendants occurred. Just what terms of an offer of testimony were before the court, at the time when it made its ruling (if any was made), is not shown by the statement in the brief. From all that does appear we are of the opinion that there was no abuse of discretion and no error in ruling on the part of the court in said matter.

[8] Point I of Carter brief: That the court erred in not granting to said appellant Carter a short continuance to secure counsel. At the time when the case was called for trial the defendant Carter was represented by attorneys of record, but pursuant to a statement made by them they were permitted to withdraw. Not only did Mrs. Carter make no objection, but it appeared that at least two days before the day of trial she knew of the prospective withdrawal of her attorneys and was negotiating with Mr. Kelby and Mr. Lawson to take their place. Thereupon the court appointed the public defender to represent Mrs. Carter, and a deputy of that officer came into court, but he did practically nothing except

to make representations which resulted in his excuse from further attendance. The court, being then about to proceed with the selection of a jury, suggested that if Mr. Kelby and the deputy public defender desired to take a little more time before proceeding he would let the case go over until 2 o'clock if that would help them out. To which Mr. Kelby replied: "It would be of some assistance." After the recess and some further discussion, Mr. Perky, the attorney for the codefendant Reese, suggested that his client was willing that he should represent Mrs. Carter during the impaneling of a jury. The court then said: "Mr. Perky will represent Mrs. Carter during the impaneling of the jury." Presumably Mr. Perky performed that duty. Before adjournment the court said to Mrs. Carter: "Do you think by tomorrow you will have arranged for some one?" To which she replied: "We will do our best." At the opening of court on the following day the jury was completed and sworn to try the cause. It appears from the record that Mr. Kelby was present representing Mrs. Carter at that time, and thenceforth he and Mr. Lawson acted for her throughout the trial. There was no formal motion for a continuance, and there was no showing of grounds for a continuance other than the facts above summarized. We think that the court committed no error in proceeding with the trial, as it did proceed, under the circumstances shown by the record.

Appellant Reese asserts that the court erred in its instructions to the jury, and in refusing instructions requested by appellants and in modifying some of the instructions requested by them. In presentation of the argument under these assignments of error, appellant in his brief has referred to various instructions by their numbers and by very incomplete suggestion of their contents, without in any instance presenting the full text of the instruction. Neither does he present, in connection with the instructions which he says were erroneously refused, the other instructions given by the court bearing upon the subjects covered by the refused instructions. Section 3 of rule VIII of the rules governing practice in this court was ignored by the writer of the brief. In the absence of any more definite criticism concerning the instructions, we are satisfied that they were free from serious error. Apparently that was the opinion of codefendant Carter, who has made no claim of error of the court in the matter of instructions to the jury.

For the reasons herein set forth, it is ordered that the judgments of conviction herein upon counts 9, 10, 11, and 12 of the indictment are, and each of them is, reversed, and the orders denying motions of appellants for a new trial upon those four counts are reversed; and it is further ordered that the judgments of conviction upon the other counts in the indictment be, and each of them is, affirmed, and the orders of the court denying motions of defendants for new trial as to those counts other than 9, 10, 11, and 12 are affirmed.

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136 Cal.App. 534

MAYER v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 8071.

District Court of Appeal, Second District, Division 2, California.

Jan. 31, 1934.

Rehearing Denied Feb. 26, 1934.

Hearing Denied by Supreme Court March 30, 1934.

1. Limitation of actions 🔑**34(2), 58(2).**

Petition of ex police officer for mandamus to compel reinstatement, not filed within three years after dismissal, *held* barred by limitations, since petitioner's cause of action accrued immediately on failure of superiors to permit petitioner to perform his duties (Code Civ. Proc. § 338).

2. Mandamus 🔑**187(9).**

On appeal from judgment granting mandamus compelling reinstatement of ex police officer, reviewing court presumed that evidence supported finding petitioner was not guilty of laches where evidence was not before it.

3. Mandamus 🔑**151(2).**

Ex police officer's petition for mandamus to compel police commission and commissioners to pay back salary *held* insufficient, since neither commission nor commissioners have any financial liability for police officers' salaries.

CRAIG, J., dissenting.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Petition by George P. Mayer for mandamus to compel the Board of Police Commissioners of the City of Los Angeles and others to restore petitioner to duty with the police department and to direct payment of accrued salary. Judgment for petitioner, and defendants appeal.

Reversed.

Rehearing denied; CRAIG, J., dissenting.

Erwin P. Werner, Frederick Von Schrader, and G. Ellsworth Meyer, all of Los Angeles, for appellants.

Paul Taylor and Richard Kittrelle, both of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

From a judgment rendered pursuant to trial upon a petition for a writ of mandamus, directing that the respondent be restored to duty upon the police department of the city of Los Angeles and that he be paid accrued salary from the date of his alleged attempted suspension therefrom, the board of police commissioners of said city has appealed.

By this petition the respondent alleged and the trial court found that on or about February 2, 1926, he was suspended from duty by the chief of police, and on the 13th day of the same month he was removed from office, upon the ground that he had been charged with the commission of a felony and that he was guilty of conduct unbecoming a police officer, but that he was never served with notice thereof *as provided by the city charter* in either instance, *and that therefore neither the attempted discharge nor suspension was effective as such.* He further alleged, and it was found by the court, that on the date first mentioned he was charged by a complaint filed in the municipal court with the crime of perjury; that said charge was dismissed on April 25, 1928, and that no further proceedings were had thereon; that he thereupon applied to said board of police commissioners for reinstatement, which application was denied; that he applied therefor on numerous occasions at intervals of not less than six months nor more than nine months, at each of which times his application was denied, and that at no time was a hearing afforded him nor evidence taken; that the charge in the municipal court was insufficient to warrant his removal from office and was adjudged to be no offense nor cause for such charge. The trial court found that "having heard evidence on behalf of petitioner, and no evidence having been offered on behalf of defendants, it having been stipulated by counsel for the respective parties that the facts set forth in the petition and brought out by the evidence were true," conclusions of law and judgment should be entered as heretofore stated.

Appellants contend that their demurrer, duly made and overruled, should have been sustained because of the bar of the statute of limitations and of laches; also that the petition is not sufficient to state a cause of action for plaintiff's back salary in that it contains no allegation that he ever filed his claim therefor as prescribed by sections 361 to 376, inclusive, of the Los Angeles City Charter. The appeal is on the judgment roll alone.

The above statement of fact, excepting that only which appears in italics, which is ours, was prepared by Mr. Justice CRAIG, but being unable to agree with his conclusions, we substitute our own in place thereof.

[1] Appellants' first contention: *The statute of limitations bars recovery.* Section 338, Code of Civil Procedure, provides that the action must be instituted within three years from date it accrues. We think the petition was subject to the demurrer that the statute of limitations had run. This shows clearly on the face of the petition, for inasmuch as neither the attempted suspension nor discharge was legal the petitioner's right to file the same accrued immediately upon failure of his superiors to permit him to engage in his regular duties and upon their failure to certify his name upon the monthly or semimonthly pay roll. Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682; Curtin v. Board of Police Commissioners, 74 Cal. App. 77, 239 P. 355, and cases cited therein.

[2] Appellants' second contention: *The petition shows laches.* We are not in accord with this claim, as the allegations of the complaint do not necessarily establish laches; and since the evidence is not before us, it must be presumed to support the finding that there have been no laches.

[3] Appellants' third contention: *Petition does not state cause of action for back salary.* We think the petition does not state a cause of action against the commission nor its members for the payment of back salary. Of course, under proper circumstances the writ might command the commissioners to authorize the issuance of pay warrants, but we have already seen that the statute has run against the use of the writ of mandate to compel the board to act. It should be noted that the city of Los Angeles is not made a party to the proceedings, and therefore the notices provided for by sections 361 to 376, inclusive, relating to claims against the city, have no place in this proceeding. Both the petition and the judgment are in form against the commission and the commissioners, but as neither has any financial liability to police officers for their salaries, the judgment against them cannot stand. We are aware that, so far as the judg-

ment roll speaks, the application of the statute of limitations works an injustice, as it seems like visiting a penalty upon petitioner for not pressing for reinstatement during the pendency of the criminal charge against him. However, we think we are given no option in the matter.

Judgment reversed.

I concur: ARCHBALD, Justice pro tem.

CRAIG, Justice (dissenting).

I dissent. The court's opinion holding that the general demurrer should have been sustained ignores the original suspension of the petitioner, at which time the petition alleges that a charge of perjury had been made against the petitioner. Authority is hardly needed to sustain the proposition, to my mind self-evident, that until such charge was removed the petitioner was subject to suspension and could not ultimately or even in the particular proceeding here, had it then been begun, have compelled the board of police commissioners to restore him to regular employment. The mere pendency of the criminal charge against him justified his suspension. Los Angeles City Charter, art. XIX; 46 C. J. p. 982, § 142; 43 C. J. p. 651, §§ 1077, 1084. However, even if because of lack of proper notice or other irregularities in the proceeding of attempted suspension petitioner herein might have contested such action of the board at the time, it is obvious that such a contest would then have been idle, for while the criminal charge was pending the board need only have immediately taken the same action over again and proceeded properly to accomplish the same temporary result. It is true that the petition states that neither the attempted discharge nor removal were effective as such and for the purposes of this decision this must be accepted as true; also, we must accept the further allegation that the charge in the municipal court was insufficient to warrant petitioner's removal. However, it will be noted that this allegation does not apply to his suspension and the petition nowhere avers that such charge did not legally justify suspension, and therefore we must assume that this is conceded. These facts are shown on the face of the petition. The law neither contemplates nor requires idle acts. The petitioner could not have actually at that time secured restoration to employment, nor until the termination favorably to himself of the criminal proceeding. His right to accomplish this result did not accrue until that was done, which, according to the petition, occurred on April 25, 1928; three years did not elapse from that date until this proceeding was begun, in March, 1931. In my opinion the claim of petitioner, whose rights admittedly have been grossly ignored and violated by the respondents, cannot be waived aside by the mere statement that his right to "file" this particular petition accrued immediately upon failure of his superiors to certify his name on the regular pay roll. It is elementary that, dependent on the type of case involved, there are other legal considerations which may determine when a statute of limitations begins to run than the mere one as to when an action might have been "filed." Mistake, fraud, incompetency, need for demand, etc., are examples of such considerations. Here the facts alleged in the petition preclude the running of the statute of limitations, regardless of the right to "file" the proceeding. Again, it is not enough, where a demurrer is based on an alleged bar of the statute, that the action may be barred. "It must appear affirmatively that, upon the facts stated, the right of action is necessarily barred." Pike v. Zadig, 171 Cal. 273, 152 P. 923, 925, and cases there cited." Both Shannon v. City of Los Angeles, 205 Cal. 366, 270 P. 682, 684, and Curtin v. Board of Police Commissioners, 74 Cal. App. 77, 239 P. 355, cited in the opinion, are clearly distinguishable from this proceeding. But in this dissenting opinion no good purposes would be subserved by protracting the discussion in that regard.

Aside from considering the demurrer, the following is pertinent to this appeal: Upon the trial no evidence was introduced except by the plaintiff. The appeal is on the judgment roll alone. Among others, the following facts were found: That the plaintiff's cause of action did not accrue until April 25, 1928; that it was not barred by the statute of limitations; and that there was no laches. These facts are not inconsistent with the complaint. We are not in possession of the evidence. Among other facts, it is shown that the plaintiff had no notice of his attempted dismissal until April 25, 1928. There is nothing contained in the judgment roll to the contrary. If so, of course the cause of action was not barred by the statute of limitations. Nor are we warranted in saying that laches was proved against the petitioner. We must assume that evidence was introduced as to the entire transaction. Concerning laches, the circumstances under which the delay in bringing the action occurred would be determinative. These things are evidentiary, and we have not the benefit of the evidence.

Relative to the plaintiff's right to recover back salary, he was never lawfully discharged, but only originally subject to suspension, and in fact suspended; hence he was under no duty to ask an investigation as to the grounds of his discharge. Shannon v. City of Los Angeles, supra. Nor is he precluded from claiming his salary for the months during which he was illegally excluded from duty. Since his status from February, 1926, to March, 1928, was one of suspension because of the charge of perjury pending against him, upon its final determination and dismissal he was clearly entitled to his pay during that period. 46 C. J. p. 982, § 142; 43 C. J. p. 651, §§ 1077, 1084. For the period beginning with his being relieved of the charge he was in no position to present a demand as required by section 376 of the city charter. Under the plan embraced in section 364 et seq., thereof, providing for payment of salaries of officers and employees of the city, the duty is placed squarely upon the board of police commissioners to approve the salary demand of the plaintiff as one item of each monthly pay roll made under its direction. In this he could have no part and cannot be said to be in any way responsible for the board's neglect. He is not barred by reason of neglect or refusal to act of those over whom he had no control. It is so held in Shannon v. Board of Police Commissioners, supra, following the reasoning of Geimann v. Board of Police Commissioners, 158 Cal. 748, 112 P. 553. The decision in the Shannon Case does not overrule nor conflict with these authorities. In that case the remedy was sought by way of judgment against the city itself. It is there said: "he is also seeking to compel by the city of Los Angeles itself the allowance and payment of the accumulated amount of his salary from the date of his purported discharge to the date of issuance of this writ * * * nor has he made the several departments and officials of said city, whose duty it might become to comply successively with the last-named charter provision, parties to this proceeding. The special demurrer of the city of Los Angeles was therefore properly sustained, and, the petitioner declining to amend, it follows that the judgment herein as to the city of Los Angeles must be affirmed." This was the beginning and the end of the rule as to plaintiff's right to back salary as the issue was presented on that appeal. However, the same opinion does indicate further that the action of the city officials therein involved "is, after all, the action of the municipality itself," and therefore that in such a proceeding the claim that the city was improperly made a party was without merit; that the city was a proper, "though, perhaps, not a necessary party to proceedings of this character." The gist of what is indicated on this point appears to be that the department and officials whose duty it was to comply with the allowance and payment of an employee's salary must be parties to such an action as the one then before the court and as the instant one, but that the city itself is not a necessary party thereto. This would seem to meet the criticism based on the fact that the city of Los Angeles is not made a party to this proceeding.

PEOPLE v. GRANA.*

Cr. 2424.

District Court of Appeal, Second District, Division 2, California.

Feb. 15, 1934.

Hearing Granted by Supreme Court March 15, 1934.

1. Criminal law ⚷260(11).

In trial of criminal case without jury, neither court's remarks during trial, nor opinion, can be resorted to on appeal as findings, conclusions of law, instructions, or remarks as though to a jury.

2. Criminal law ⚷260(7).

Appeal in criminal case where jury was waived is based upon the record, of which judge's opinion is no part though it may be looked to as aid to proper understanding of case.

3. Criminal law ⚷260(11).

In criminal case where jury was waived, reversal must be for errors of law alone.

4. Criminal law ⚷260(11).

In criminal case where jury was waived, conviction will be reversed for errors of law in admitting or rejecting evidence where they prevented fair trial, or if evidence does not support judgment.

5. Criminal law ⚷254.

Mere use of quotation by court to illustrate duty of fiduciary during criminal trial for grand theft by fiduciary where jury was waived *held* not error, though doctrine announced in quotation was applicable only to civil case.

6. Larceny ⚷55.

Negative, vague, and unreliable evidence of beneficiary, which showed deposits of beneficiary's money in fiduciary's bank account, most of which was used for beneficiary, and civil action for accounting followed by bene-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 375.

ficiary's release of fiduciary, *held* insufficient to sustain conviction of grand theft.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Giovannina Grana was convicted of grand theft, and she appeals.

Reversed.

Le Roy Anderson, Harold A. Fendler, and Frank L. Kostlan, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts and Frank W. Stafford, both of Los Angeles, for the People.

STEPHENS, Presiding Justice.

Mrs. Giovannina Grana was charged in eleven counts with the crime of grand theft by a grand jury indictment filed December 22, 1932. A jury was waived and convictions were had on six counts. The others have been dismissed. The dates of the thefts and the sums involved in the former counts are as follows: Count I, December 11, 1928, $260; count II, December 11, 1928, $700; count IV, March 16, 1929, $962.50; count V, April 25, 1929, $540; count VIII, April 5, 1929, $2,000; count X, September 20, 1929, $928. After the denial of a motion for new trial the court sentenced defendant to state's prison on each count upon which there had been a verdict of conviction, and provided that the sentences should run concurrently. The defendant appeals from the judgments.

Appellant, Mrs. Grana, and Mrs. Maria Vitagliano first met at their church in 1923. The latter was the owner of several valuable real estate properties. The foundation of the fortune was the profit from a small store in which Mrs. Vitagliano invested a small sum. Both she and her husband "kept store." Mrs. Vitagliano could neither read nor write. She knew the separate numerals, but did not, she testified, understand any combinations thereof. She knew that two $5 bills equaled $10, and could make change. She could write her name, but that was all. Some time prior to this first meeting the husband had disappeared and a daughter, Christine, had assumed the responsibility of handling the funds and properties. The acquaintance between the elder women grew into friendship, and eventually, after advising Mrs. Vitagliano that the daughter was not properly handling her affairs, appellant assumed this duty through the years 1926 to 1929, inclusive. In the course of time dissension between the friends broke the arrangement. During the latter part of 1929 the two had words, and Mrs. Vitagliano brought a civil suit for accounting against appellant. The suit was not tried, but on December 16, 1929, a document called "release" was signed by both parties which on its face purports to settle their financial troubles. A will dated January 24, 1929, was signed by Mrs. Vitagliano in which appellant is spoken of in warm terms of affection and appreciation. It mentions that appellant had loaned the maker money on various occasions. And although these documents speak of peace, there was, in fact, no peace between the erstwhile friends, and the difficulty reached a climax in the indictment by the grand jury already mentioned.

In the grand jury proceedings and later during the trial, Mrs. Vitagliano was the complaining witness and is referred to generally in all of the proceedings as the "prosecutrix." This term may not be accurate, but for brevity we shall adopt it herein.

The people's case rests upon the theory that appellant collected rentals and deposited them in prosecutrix' bank account; that in the course of this business appellant presented certain checks to prosecutrix for signature which were not drawn to cover any payment for or advance to the latter, but, unknown to prosecutrix, were drawn to appellant; and that they, or the money for which they were drawn, reached appellant's own bank account.

Appellant argues her appeal under three separate points, but says in her opening statement of facts that the primary point for consideration is that "there is no substantial evidence to support her conviction." We think the case must be disposed of by treatment of this subject alone.

From the evidence, and we have read the whole of the transcript, it would appear that the arrangement between prosecutrix and appellant whereby the latter should assume some part of the management of the properties was very loose. In practice it would appear that the money coming into the estate was collected by appellant and deposited in bank to prosecutrix' account, and that the bills received for operation of the estate were handled by appellant who would make out checks drawn upon prosecutrix' account for their payment which, after signature by the latter, would be dispatched. There is sharp conflict as to whether the signatures were generally affixed to blank checks or to checks with the payees' names and the sums written in. For this responsible service the compensation, if any was to be paid appellant, is one of the unexplained items of the case. There is an indirect mention of $150 per month, and there is the testimony of the prosecutrix that appellant said it was for the Lord's sake. There do not seem to have been any books of account, though appellant says and prosecutrix denies that the two would sit down and go over the bills and that prosecutrix always knew the condition of her account and of her affairs. A view of the whole case shows a confused condition of affairs and inconsistent actions on the part of prosecutrix. In the will hereinbefore referred to is written a statement of great affection from prosecutrix to appellant and a statement that appellant had loaned prosecutrix money. A civil suit for accounting was then pending, although there had been a document signed by both parties whereby the total sum of $2,122.50 had been paid to prosecutrix by appellant and each party released from all further financial liability each to the other. Prosecutrix testifies that she had no understanding of this document and did not know it purported to be a mutual release, and that she knew nothing of the contents of the will except that the names of her children were read to her from the document. Appellant was with prosecutrix at a bank when some conversation about a release was had, and the two went to an attorney's office where the document was prepared and signed. In the instances of both the will and the release there is positive testimony by responsible lawyers and other third parties that the documents were carefully read and explained to prosecutrix. She insists, however, that she does not remember this and that she did not suggest, approve or know that appellant was mentioned in the will, and that she did not know of or intend to sign a release or settlement of the financial troubles of the two. Mrs. Vitagliano was 67 years old, not well and was highly nervous at the time of the trial.

There was no attempt at an accounting in the trial, although ledger sheets of bank accounts of both prosecutrix and appellant are in evidence. The withdrawals from prosecutrix' bank and the ledger sheets of appellant show that the latter checked from prosecutrix' bank to her own in the sums mentioned in the six counts upon which conviction was had. It is true there were payments by appellant from her account covering very nearly if not all of such sums. In the matter of payment of taxes this is substantiated by canceled checks; and prosecutrix admits that she requested appellant to pay them, but explains that she merely asked that this be done in the regular course out of her own funds.

Prosecutrix' testimony shows numerous inconsistencies, contradictions and palpable misstatements. She does not accuse appellant of taking any specific sum or sums of money from her, and does not say that appellant converted any funds to her own use. In fact, a statement made by one of appellant's attorneys during the trial is almost literally true: "You can go through all of her [prosecutrix's] testimony and it is negative." All of the alleged embezzlements antedate the "release."

[1-6] The trial of criminal cases before a judge without a jury has given rise to novel theories, one of which is advanced herein by appellant. In civil nonjury cases the judgment is based upon findings of fact and conclusions of law, and in civil and criminal jury cases the jury considers the facts and applies the law as given it by the court. But where the judge alone decides a criminal case nothing of this nature intervenes between the evidence and the judgment. Appellant here scans the case for remarks of the court during trial and quotes from the court's written reasons for adjudging her guilty. Her counsel argue, in effect, that such remarks and such written reasons may be considered as though the judge had made them to the jury, since the judge is the trier of facts. It seems clear to us that neither the court's remarks during trial nor his concluding "opinion" can be resorted to on appeal in any way as findings, conclusions of law, instructions, or remarks as though to a jury. When a defendant in a criminal case waives a jury he agrees that the judge shall try both law and fact according to the legal machinery at hand therefor. Any appeal therefrom is based upon the record. The judge's opinion may be of use to the appellate court as an aid to a proper understanding of the case, but it is not, strictly speaking, a part of the record. In the course of the trial the court may entertain an erroneous opinion as to the law and tentative but wrong opinion as to fact, and give expression thereto. None of these matters have any place upon appeal. In a criminal case tried by a judge alone an appellate tribunal will affirm or reverse the judgment of conviction upon errors of law alone. If errors of law in admitting or rejecting evidence have prevented a fair trial, or if the evidence does not support it, the judgment of conviction will be reversed. The court will not examine the trial court's remarks to discover whether or not it mentally applied the correct law as the case unfolded itself, or whether after com-

pletion of the evidence and argument it applied the correct law or reasoning in arriving at a judgment. (1) The case of People v. Tapia, 131 Cal. 647, 63 P. 1001, is authority for the several points made in this paragraph. In the course of its opinion the trial court used the following language: "I begin by quoting the following statement made by Mr. Justice Cardozo in a New York case [Meinhard v. Salmon, 249 N. Y. 459, 164 N. E. 545, 546]: 'Many forms of conduct permissible in a work-a-day world for those acting at arm's length are forbidden to those bound by fiduciary ties. Not honesty alone, but the punctilio of an honor most sensitive is then the standard of conduct.'" It is clear, therefore, that notwithstanding the above was, as argued by appellant, a correct rule as to a civil procedure and not as to a criminal procedure, it in nowise affects the consideration of the appeal. We do not mean to intimate that the trial judge intended or did apply the principle of the Cardozo quotation to the decision of the instant case. He used the quotation merely as an illustration of the strict conduct required of a fiduciary.

The proven unreliability of prosecutrix' testimony, together with its negative nature, renders it practically of no value whatever. See People v. Tapia, supra. We think the evidence shows that there was some, we do not know how much, commingling of accounts; that appellant, in the instances mentioned, checked from prosecutrix' account to her own, and that while there is evidence that much of said money was for the repayment of advances theretofore made for the prosecutrix, there is no evidence that any thereof was ever converted to the use of appellant. "It is sometimes held in civil cases that the deposit by a trustee of trust funds to his personal account is sufficient cause for charging him with interest; but such fact alone is not sufficient evidence to convict a man of a felony." People v. Royce, 106 Cal. 173, 37 P. 630, 39 P. 524, 525.

In conclusion, we desire to refer to the fact that there is some evidence in the case that the title to one of prosecutrix' properties was transferred to appellant and later transferred back to prosecutrix. No details of or reasons for this are given, nor is the relevancy shown in any way. Certainly there is no evidence that there was anything improper in the transaction. There is much vague and unrelated evidence in the case, and this conclusively establishes the fact that the trial judge was not given the advantage of a full disclosure as to the actual relations between prosecutrix and appellant. It would seem very possible that the working arrangement between the two women friends was not as simple as the mere collection of rentals and the drawing of checks incident to upkeep of the properties. In justice to the district attorney we may assert our appreciation of the fact that the difficulties besetting the prosecution of this case are much more apparent in retrospection than before the trial.

The judgment as to each count upon which a conviction was obtained is reversed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

136 Cal.App. 675

PEOPLE v. SHERIDAN.

Cr. 2407.

District Court of Appeal, Second District, Division 2, California.

Feb. 13, 1934.

Hearing Denied by Supreme Court March 15, 1934.

1. Witnesses 🔑319.

Credibility of accused testifying in own behalf may be tested like that of any other witness (Pen. Code, § 1323).

2. Witnesses 🔑277(4).

Cross-examination of accused testifying in his own behalf cannot extend to matters about which he was not examined in chief (Pen. Code, § 1323).

3. Criminal law 🔑1170½(5).
Witnesses 🔑277(4).

Where accused testifying in own behalf had admitted passing checks but denied they were fictitious, cross-examination as to finger prints in another state was improper, but harmless, where it was not shown by whom or for what purpose finger prints were taken (Pen. Code, § 1323).

4. Criminal law 🔑1037(1).

Where accused testifying in own behalf admitted on cross-examination that his photograph was taken in New York, prosecutor's statement that photograph was taken while accused was in penitentiary could not be objected to on appeal, where it was not objected to in trial court.

5. Criminal law 🔑430.

Record of conviction in New York, certified to by director of division of criminal identification in New York state department of correction, *held* properly admitted over objection that record was not certified by official custodian thereof (Pen. Code, § 969b; Correction Law N. Y. §§ 5, 9, 15, 18, 112, 618, 619, 621).

6. Criminal law 🔑1144(12).
Statement in record of conviction in New York concerning prior imprisonment must be assumed to have been obtained according to New York law requiring compilation of such matters (Pen. Code, § 969b; Correction Law N. Y. §§ 5, 9, 15, 18, 112, 618, 619, 621).

7. Criminal law 🔑1144(10).
Where record shows no request for process or refusal of court to issue it, contention that accused was denied constitutional right to compel attendance of witnesses must be overruled, since court will assume that accused's attorney would have issued process to secure attendance of any witnesses favorable to accused's case.

8. Criminal law 🔑655(5).
Court's statement that counsel for accused was competent and that court would not be bothered with such trifling requests by accused as that trial be stopped so that good lawyer could be obtained and that otherwise accused be permitted to represent himself *held* not error.

9. Forgery 🔑44(½).
Proof that alleged makers of checks had no accounts in banks upon which checks were drawn made out prima facie case that checks were fictitious (Pen. Code, § 476).

10. Forgery 🔑47.
Whether checks passed by accused were fictitious *held* for jury (Pen. Code, § 476).

11. Criminal law 🔑783(1).
In prosecution for passing four fictitious checks with two prior convictions, requested instruction that several accusations should not prejudice accused and that evidence on each count should be considered separately *held* properly refused, where evidence under one count might properly be regarded as seriously reflecting on accused's credibility (Pen. Code, § 476).

12. Criminal law 🔑814(17).
In prosecution for passing fictitious checks, refusal to give statement relating to circumstantial evidence was not error, where evidence presented directly involved accused (Pen. Code, § 476).

13. Criminal law 🔑808½, 1173(2).
In prosecution for passing fictitious checks, refusal to give statutory instruction concerning expert witnesses was error, but harmless, where such instruction could not have affected result (Pen. Code, §§ 476, 1127b).

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

P. H. Sheridan was convicted of forgery and of two prior convictions, and he appeals.

Affirmed.

P. H. Sheridan, in pro. per.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was charged in an amended information, containing five counts, with five separate offenses of forgery (fictitious name) and with two prior convictions, one in California and the other in New York. He admitted the prior conviction in California, but denied the one in New York, and pleaded not guilty to the forgery charges. On motion of the district attorney, count III was dismissed. The jury found defendant guilty on counts I, II, IV, and V, and of the prior conviction in New York. From the judgments of conviction entered and the orders denying his motions for new trials, he has appealed.

The evidence shows that appellant registered at the Hilton Hotel in Los Angeles as "John H. Gardner" at about 1:30 a. m. on February 21, 1933. At the time he stated he had an automobile and a chauffeur, but that he ran out of gasoline and left the car at the curb at Third and Alvarado streets. Upon being told that he might get the garage man next door to bring the car in, he went into the garage, but came back, saying, "No, I guess I will leave it there." That evening, at about 8 o'clock, he asked the cashier to cash a check for $25 for him, saying that it was his aunt's and that his father and mother were in Palm Springs and would be in the hotel the next morning, and that he was to be a guest there for months; that, if anything went wrong with the check, his father would take it up. William W. Brophy, the house officer, on being shown the check, went to appellant's room and asked where his aunt lived and for her telephone number so that they could ascertain if the check was all right. Appellant replied, "Oh, she is in Westwood. I can't think of the street number," or the telephone number, and said he did not want to be bothered any more. About 5:30 a. m. the next day appellant told the clerk of the hotel that a girl he had had in his room took his money, and said, "I want you to go with me and I will get the money and pay you back for the check," in response to which Mr. Brophy asked if he would not remain at the hotel and talk with the manager about the check. Appellant was told that no one could go with him from the hotel, but that they would get some police officers for that purpose. To this he replied: "No, I don't want no officers, I don't want anyone; if you can't go with me that is all right. I will go back to my room and wait until the manager comes down." A little later the manager arrived at the hotel and telephoned appellant's room, receiving no response. Mr. Brophy was then told to go up and see if appellant was there, but he found the room locked. Entering the room below, Brophy looked out of the window and saw an improvised rope, made of blankets and sheets, extending from the fourth floor, upon which appellant's room was located, to the third floor, where a skylight roof connected with the garage next door. Brophy then walked over the roof to the edge and saw appellant lying on the ground below. The latter was taken into the hotel by the manager and Brophy and from there to the hospital in a police ambulance.

The check so cashed purported to have been written by Margaret Lewis Gardner in favor of John H. Gardner, and was indorsed by appellant with that name prior to receiving the $25. The check was dated February 21, 1932 (apparently mistakenly so written). It was drawn on "Citizens' National Trust and Savings Bank, 1088 Westwood Ave., Westwood Village," and is the check mentioned in count I.

On February 18, 1933, appellant appeared at a grocery store with a check dated the same day, drawn on the Sixth & Alvarado Branch, Security-First National Bank, 2101 West Sixth street, payable to the order of P. H. Sheridan for $15, and told the manager of the store that he knew him quite well. The manager was not sure that he did, but thought he had seen the man before and had cashed his checks. It was early in the morning, and there was insufficient money to cash the check presented. Appellant returned the next morning, Sunday, and bought about $2.50 worth of groceries. The establishment was still short of change, so the clerk gave appellant the balance of $5 and told him to come back Monday for the $10. That was the day appellant was taken to the hospital, so he did not get back. This check purported to be drawn by "Murphy-Aldrich Co., H. L. Murphy," and is described in count II of the information.

On January 6, 1933, appellant purchased 80 cents worth of merchandise from a delicatessen store at 8905 Santa Monica boulevard, and presented a $10 check drawn to the order of "cash" on the security office of the Security-First National Bank, signed "James R. Howard," receiving the balance of such check in cash. Appellant told the proprietor of the store that he worked for James R. Howard, and he indorsed the check "P. H. Sheridan." This check is described in count IV.

Count V sets out a check purported to be drawn by "Mary Arden Sheridan" on the security office of Security-First National Bank for the sum of $50, payable to P. H. Sheridan, and dated January 21, 1933. On or about that date appellant went into a clothing store and picked out an overcoat valued at $29, saying he would take it C. O. D. He returned to the store the next morning and presented the check mentioned. The proprietor did not know him, and told him that, if he would get some one to identify him, he would cash the check. About an hour later appellant returned with "a Dr. White," who said he knew appellant and that he was "O. K." The check was indorsed by appellant and accepted by the storekeeper, who delivered the overcoat and $21 in cash to appellant.

Appellant was identified by the witnesses who cashed the various checks as the man who presented them and obtained the respective merchandise and sums of money. Evidence was introduced showing that none of the supposed makers of such checks had accounts in the banks upon which they were drawn. A handwriting expert compared the writing on each of the four checks with an exhibit proved to have been in the handwriting of appellant, and testified that it was his opinion "that the same person who wrote the handwriting on People's Exhibit 5 could have written, and probably did write, the pen and ink writing on these four checks. The amount of standard writing I have is quite limited, and that is the reason I don't feel justified in making a definite, positive statement; but I see many similarities in the writing of these checks that would lead me to believe that the same person wrote the checks who wrote the handwriting exemplar. Also, with reference to the endorsements on each one of these checks, it is my opinion those endorsements were written by the same person who wrote the handwriting exemplar." An officer testified that he had a conversation with appellant at the hospital, and that the latter said his name was Gardner. The officer showed him a draft (not involved here), and asked if that was the one he gave a Mr. Close, to which appellant said (quoting): "'Yes.' I said then, your name is Sheridan? He said, 'Yes.' He said, 'Anybody that would take one of them pieces of paper is a ——— fool.'" At a later conversation the officer testified that he showed appellant the four checks involved here, and that the latter said he made them and told the officer where he passed them.

In the course of the trial there was introduced in evidence as People's Exhibit 7 a record of conviction in the state of New York of one Andrew J. Sloan, alias Paul D. Sheridan, which, in addition to the indictment, minutes of conviction, and sentence shows the man sentenced was confined in Sing Sing prison. The prison record shows photographs and finger prints of such inmate. Appellant took the stand in his own behalf and admitted passing the four checks mentioned, but denied that they were fictitious. On cross-examination he admitted having been convicted of a felony in California, but denied having been convicted in New York. He was shown the photograph attached to the record of conviction in New York and asked if it was his. He answered that he did not know whether it was or not. He was then asked and required to answer, over his objection that it was improper cross-examination, that he had had his finger prints taken, presumably in New York. He also testified, without objection, that he had his picture taken. The district attorney may have intended to limit the query to the state of New York, but did not. Appellant urges that it was error to overrule the objection noted, and that in so doing the court compelled him to be a witness against himself, as he was examined as to a matter not testified to on his direct examination.

[1-3] If a defendant takes the witness stand at his trial, he becomes, as such witness, subject to the same rules for testing his credibility before the jury, by impeachment or otherwise, as any other witness (People v. Hickman, 113 Cal. 80, 45 P. 175), and "he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." (Section 1323, Pen. Code). The Supreme Court has said that the effect of the quoted clause of the Penal Code "is to take from the court any discretion which it might ordinarily exercise in allowing the range of a cross-examination to extend beyond the matter brought out upon the direct examination." People v. Gallagher, 100 Cal. 466, 475, 35 P. 80, 83. Applying the rule so laid down to the instant case, we are forced to conclude that there was nothing in the direct examination of defendant which the answers to the questions so objected to explained, qualified, or destroyed the force thereof in any way. In our opinion, when the witness denied that he had been convicted in New York, nothing having been brought out regarding such conviction on direct examination, the people were limited to proving otherwise than by cross-examination of defendant that he was so convicted, and thus that his denial was false.

We fail to see, however, where appellant was in any way prejudiced. He may have had many pictures taken in New York, and may have been a depositor in some postal savings bank in that state and had his finger-prints taken there as a proper means of identification. Be that as it may, the pictures on the record of conviction were such a good likeness of appellant that he would not say they were not "his pictures" on being shown them, even though he would not admit that they were; and such pictures and finger prints have such distinctive features that no mistaken comparison could possibly be made by even the most inexperienced observer. The jurors had the defendant before them, as well as finger prints admittedly made by him, and we cannot assume that they disregarded such unmistakable evidences of identify and assumed contrary thereto, if there was no similarity, that, when appellant answered that he did have his picture as well as finger prints taken in New York, he meant the pictures and finger prints shown by the prior record.

[4] After the question, "Did you have your picture taken?" which appellant answered in the affirmative, the following took place: "Q. While you were in the penitentiary. Now, calling your attention to People's exhibit 1, Margaret Lewis Gardner, who is that person? A. That is my aunt." Appellant urges that the statement "while you were in the penitentiary" constituted misconduct. It was not a question, but was apparently a voluntary statement by the prosecuting attorney. Defendant evidently did not consider that such statement was prejudicial at the time, as no objection was made nor any request that the jury be admonished to disregard it. Under the circumstances, we fail to see how the claim of misconduct can be upheld. People v. Jacobs, 73 Cal. App. 334, 349, 238 P. 770.

[5, 6] In our opinion the record of conviction in New York was properly admitted in evidence. An objection was made to its introduction on the ground that the certificate attached thereto did not contain the recital, except by inference, that the official authenticating the record was the official custodian.

The exemplified copy of the record of conviction is certified to by the clerk of the court, under the seal of the court, which rendered the judgment of conviction, and the signature of the clerk and his official character is attested by the judge of such court, whose signature and official character is in turn certified by the clerk of the county of New York under the seal of the county. Such record of the judgment of conviction would be sufficient to prove the prior conviction in New York, except for the fact that there is no evidence identifying the Andrew J. Sloan, alias Paul D. Sheridan, mentioned therein, as the Paul H. Sheridan involved here.

The prison record, above referred to, is certified to by the "Director of the Division of Criminal Identification in the New York State Department of Correction," and has attached to it a letter from the commissioner of such department transmitting the record to the office of the district attorney. No objection seems to have been made to the receipt of such letter in evidence as a part of the exhibit, but only to the fact that the record is not certified to by the "official custodian," as provided in section 969b of the Penal Code, which provides that such a record when so certified may be introduced in evidence for the purpose of establishing prima facie evidence of a prior conviction.

Under the laws of New York, the commissioner of the department of correction of the state has the superintendence, control, and management of the state prisons and of the prisoners therein (article 6, § 112, Correction Law, book 10-B, c. 43, McKinney's Consol. Laws of N. Y., p. 39), and appoints the wardens of such prisons (article 2, § 18, p. 23). Such commissioner is required to make or have made impressions of the fingers and thumbs of all prisoners in the state prisons, to cause such prisoners, in his discretion, to be measured and described in accordance with the Bertillion method for identification of criminals, and to cause such impressions and measurements and statements to be made and taken by a person or persons in the official service of the state (article 22, § 618, p. 183); and it is made the duty of the officials in charge of the penitentiaries to measure and describe said prisoners in accordance with said Bertillion system, to procure as far as possible modus operandi statements from all such inmates, and to cause duplicate records of such measurements, impressions, and statements to be transmitted daily to the department of correction (article 22, § 619, p. 184). It is also made the duty of such commissioner of correction to file, or cause to be filed, in the division of criminal identification all such measurements, statements, photographs, etc., so furnished him, and to furnish upon application such photographs, measurements, statements, etc., of any person of which there is a record in the office of the department of correction to officers of other states among others effecting reciprocal interchange of similar records with said department and peace officers of the state of New York (article 22, § 621, p. 185). Such commissioner is authorized to delegate any of his powers to direct any of his duties to be performed by the head of a division, except the power to appoint or remove officers and employees and to fix their salaries (article 2, § 5, p. 16). He is authorized to appoint such subordinates as may be necessary for the exercise of the powers and performance of the duties of the department (article 2, § 9, p. 18), and the division of criminal identification, records, and statistics is created and the commissioner is authorized to appoint a statistician and such other assistants as may be necessary in said division (article 2, § 15, p. 21). The certificate attached to the prison record is made by the director of the division of criminal identification, and in our opinion, in view of the contents of the exhibit, the certification thereon, and the law of New York, it is sufficiently identified as coming from the official custodian of such records.

So far as the pictures and finger prints are concerned, they would seem to either prove or disprove, by comparison with the proved finger prints and the subject photographed, the identity of the defendant with the prisoner confined in Sing Sing Prison and named in the certificate above mentioned, to say nothing of the statement in such certificate which shows that such person was confined in San Quentin Prison in September of 1924 for a violation of section 476a of the Penal Code of this state—issuing checks without sufficient funds—which is the prior conviction admitted by appellant here, and which statement, under the law mentioned, we must assume was obtained from the prisoner named in the record.

[7] We see no merit in the contention that appellant was denied his constitutional right to compel the attendance of witnesses. We must assume that his attorney would have issued process to secure the attendance of any witnesses favorable to appellant's case, if any, of whom he was advised could be found. Nor is there anything in the record showing a

request for such process or a refusal by the court to issue same.

[8] Neither do we see any misconduct when in response to a statement by defendant's attorney to the effect that the defendant wanted to stop the trial and get "a good lawyer," and that he (defendant) would rather represent himself than have his counsel do so, the court said: "He couldn't get a better lawyer than you, and we won't be bothered with such trifling requests on his part. Proceed with the trial." The record before us shows that the following then occurred: "The defendant: If * * * " Appellant in his brief states that what he said was: "If the court please, my objection is not to counsel, but to the fact that none of my witnesses have been subpoenaed," and that the court then said, as shown by the record, "You be seated. Go ahead." Appellant makes no claim that he could have obtained the presence of the alleged fictitious persons, but does state that "four of these witnesses were present at the scenes of these transactions and were personally acquainted with individuals and firms alleged to be fictitious." Just why such persons and not the makers of the checks were desired does not appear, if the makers were not in fact fictitious.

[9, 10] Appellant urges that there is no evidence of an intent to defraud, nor of the fictitious character of the checks. The evidence showed conclusively that the alleged makers of the checks had no accounts in the banks upon which they were drawn. Such testimony is prima facie evidence of the fictitious character of the checks. People v. Eppinger, 105 Cal. 36, 38 P. 538; People v. Thal, 61 Cal. App. 48, 214 P. 296; People v. Roche, 74 Cal. App. 556, 241 P. 279; People v. Cohen, 113 Cal. App. 260, 298 P. 114.

That he passed the checks is admitted by appellant, but he denies that he knew they were fictitious. So far as count I is concerned, the facts concerning his actions and statements in passing the check, as well as his conduct afterwards when he knew the hotel management was investigating as to its validity, were sufficient for the jury to infer that he well knew its character. We also have his confession to the officers, which, if accepted by the jury, clearly established such knowledge as to all of the checks, to say nothing of the evidence connected with the passing of each instrument and appellant's own explanation of his receipt thereof and the existence of its makers. We do not see how the jury could have arrived at any other conclusion than they must have reached as to such intent.

[11] In our opinion there was no error in giving the instructions of which appellant complains, or in modifying certain instructions requested by him. Two instructions which were requested were refused. The first in effect advised the jury that it should not be prejudiced against defendant by reason of the fact that the information contained several accusations, that such fact did not add to the weight of evidence against him on any one offense, and that each count in the information was to be considered separately and upon the evidence as to such count only, without reference to accusations or evidence of other offenses. It might well be questioned whether the instruction as presented should have been given. As a general proposition it may correctly state the law, which, however, is largely a commonplace and should be in the mind of every intelligent juror on the panel without being reminded of it. As presented, however, it might have been misunderstood. Considerable evidence was given concerning the registering of appellant at the Hilton Hotel under the name of John H. Gardner, and the stories told by appellant, under the instruction, might have been construed as applying only to count I, and in the main that is correct. They were of such a nature, however, that the jury might well have considered that they had a serious bearing on the credibility of appellant as a witness; and under the instruction the jury might have been in doubt as to whether his acts and improbable statements could be so considered in weighing his evidence on the other counts. In our opinion there was no error in refusing to give such instruction.

[12] The other instruction refused related to circumstantial evidence, and we see no error in refusing it as the evidence presented directly involved appellant.

Nor is there any variance between the charges contained in the information and the proof. Appellant was charged and convicted under section 476 of the Penal Code.

[13] We agree with appellant's contention that, in view of the fact that expert witnesses were used by the prosecution, both to prove that defendant wrote the checks passed and to identify the finger prints on the New York prison record as being those of appellant, an instruction should have been given under section 1127b of the Penal Code. This same question was before us recently

in the case of People v. Williamson (Cal. App.) 26 P.(2d) 681, and we there held that such section was mandatory, and that, in a case where expert witnesses are used, an instruction should be given substantially as required by the section, whether requested or not. A petition for a hearing of such cause in the Supreme Court after such decision was denied December 2, 1933. We are of the opinion, however, that such failure had no effect on the jury's verdict in the instant case, and that the same result would have obtained if such an instruction, as well as those refused, had in fact been given, and that no prejudice resulted from the failure to give them.

Judgments and orders affirmed.

We concur: STEPHENS, J.; CRAIG, J.

LOZIER et ux. v. JANSS INV. CO. et al.*

Civ. 5045.

District Court of Appeal, Third District, California.

Feb. 5, 1934.

Rehearing Denied March 7, 1934.

Hearing Granted by Supreme Court April 5, 1934.

1. Evidence 🔑434(8).

Generally, purchaser may show fraud of vendor's agent in inducement of written contract sought to be rescinded, though contract supersedes all prior negotiations and stipulations between parties.

2. Principal and agent 🔑148(4).

Vendor is bound only by representations embodied in written contract which notified purchaser that authority of vendor's agent went no further (Civ. Code, § 1668).

3. Vendor and purchaser 🔑334(2).

Fraud of vendor's agents inducing written contract, though contract contained cautionary clause that purchasers read its terms and that no representation not contained therein was binding on vendor, *held* to justify rescission of contract and recovery of money paid thereunder by purchasers (Civ. Code, § 1668).

4. Vendor and purchaser 🔑123.

Purchasers of part of property could rescind joint contract for fraud of vendor's agents without joining purchaser of remainder of property as party plaintiff.

5. Equity 🔑67.

Question of laches is primarily one for trial court, to be determined in light of circumstances of each case.

6. Contracts 🔑270(2).

Delay occasioned by wrongdoer's assurances of honesty to one who was induced into contract by fraud does not bar rescission.

7. Vendor and purchaser 🔑123.

Evidence *held* not to show that purchasers were guilty of laches barring rescission of contract more than a year after expiration of date when resale was to be made as fraudulently promised by vendor's agents, who, during period of delay, constantly assured purchasers that resale would be effected as promised.

8. Vendor and purchaser 🔑118.

Purchasers, who had right to rescind contract for fraud of vendor's agents, need not thereafter have kept up payments under contract.

9. Appeal and error 🔑931(1).

Presumption exists that findings as a whole reconcile conflict in findings on certain issue where record does not contain all findings.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by Howard W. Lozier and Ruth L. Lozier, husband and wife, against the Janss Investment Company, Dell Ellis, John Germann, and another. From a judgment in favor of plaintiffs, named defendants appeal.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (H. F. Prince and Robert F. Schwarz, both of Los Angeles, of counsel), for appellants.

Bernard Potter, of Los Angeles, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

By this action plaintiffs sought to rescind a written contract alleged to have been procured through fraud and misrepresentation, and to recover moneys paid thereunder. The judgment and decree in the court below went in favor of plaintiffs and against defendants. Defendants appeal.

The appeal is presented under the alternative method, and but little of the record is presented in the briefs of appellants, and but scant reference to the testimony is made.

In answer to a motion of respondent, herein made, to dismiss or affirm, by reason of this

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 36 P.2d 620.

allegedly meagre showing, appellants urge that the questions presented are mainly questions of law, and that general statements of admitted facts and findings will suffice the needs of a complete review. Accepting, then, appellants' view of the case, we may dispense with any factual detail other than may be necessary to illustrate each contention as it is discussed.

The first claim of the appellants is that the evidence does not support the judgment for the reason that the claimed and found fraud is predicated upon representations made by an agent, where it was made clear to the plaintiffs that such agents had no power to bind the principal by any representation of fact other than contained in the written agreement.

Putting the point in a different way, it is urged that the trial court erred, to the prejudice of appellants, in overruling objection to the admission in evidence against appellants of representations made by its salesmen to plaintiffs. For the purposes of review, it is admitted that the representations found to be false and fraudulent and the inducing feature of the contract were made by the salesmen, and that all of the elements were present to support a decree of rescission.

The argument of appellants is that in cases in which the fraud inducing a buyer to enter a contract was practiced, not by the seller himself, but by his agent, and where the contract contains a provision that no representations or agreements not contained therein are binding on the seller, then any representations made by the agent and not contained in the contract are not binding on the seller, and cannot be admitted in evidence in an action against the seller for fraud or rescission.

Respondent, though disputing the rule as claimed by appellants, does, however, for the purpose of argument, concede such to be the law; but even with this concession, contends respondent, the contract in the instant case contains no such provision. The provision in the contract sought to be rescinded reads as follows: "The buyer is urged to read the terms of this contract before signing it, as no statement, settlement, agreement, understanding or representation orally made, or written and not contained herein, will be binding on the seller." It is argued that this provision puts the buyer on notice of the agent's restricted authority and absolves the seller from any claim of fraud resting upon the representations of the agent.

[1, 2] The rule is announced in the case of Gridley v. Tilson, in 202 Cal. page 751, 262 P. 322. It is said in this case that, while the Civil Code provides that a written instrument supersedes all negotiations and stipulations concerning the matter between the parties, it has always been the law that fraud in the inducement of a contract may be shown. It is then expressly noted that a well-settled exception is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make such representations. The rule then announced is that a principal is bound only by the representations embodied in the written contract where a provision in the contract notified the prospective purchaser that the agent's authority went no further. As will be readily apparent, the rule thus announced is declared to be, and is, an exception to the general rule. Like all other exceptions, it serves to strengthen the rule, and, to bring any case without the general rule, such case must come clearly within the class embraced within the exception. An intendment or presumption would be in support of the rule rather than the exception. At the outset it will be conceded, as indeed it is, that the quoted provision would not have the effect of absolving the seller from any fraud or fraudulent representations proved against it. No citation of authority is necessary to support this statement. As the principal is bound, under the general rule, by representations made by his agent, it follows that there is nothing in the provision of the contract that will excuse the principal from liability on account of any representations the agent might make.

Here, then, comes into action the exception, and we scan the quoted provision to glean therefrom anything that would advise the buyer of the agent's limited authority. Paraphrasing the provision, it may be construed as saying: "Read carefully the contract; any representations that may have been made to you and not contained herein are not binding."

[3] Without question, the principal has power in himself to make any representations he may choose, whether true or false, and, as far as this cautionary provision goes, the agent has the same power conferred on him. We agree with the court below that there is nothing in the claimed provision that gives notice to the buyer of the agents' restricted authority. Many of the most salutary rules of law have yielded, little by little, to the claimed exigencies of modern business. We do not feel, however, that rules such as we have cited, and designed to prevent fraud and

unfair dealing, should be completely wiped out through a process of making the exception swallow the rule. We have no notion of unduly criticizing the real estate business as a whole. However, through practices apparently sanctioned by those engaged therein, it did become necessary that the state classify the business as one demanding careful supervision and regulation. It is generally known that in hardly any branch of business is there required more skill, diplomacy, and finesse. Salesmen are employed who, for the most part, work on a commission basis where the slogan necessarily must be "no sale, no pay." In many instances huge and attractive commissions dangle before the eyes of the salesman, and temptation is great. And, incidentally, adopting the old figures of Barnum on the birthrate, the field is fertile. The courts have not been too hard upon the business. Many principles of law have been announced that give the work of the salesman wide territory in which to expand and flourish. For instance, more or less extravagant claims have been softened down to mere "puffing"; pseudo-fraud has been given a clean bill of health under the guise of matters of opinion. And finally, to a greater extent, the intending purchaser has been charged with some degree of independent knowledge. But, notwithstanding the leniency thus shown, the law still clings to the old theory that, once actionable fraud is shown, the whole transaction is vitiated. Realty dealers know the law regarding their own business, and it would appear that the efforts of many are directed, not to any strict adherence thereto, but to a studied effort of evasion. The principle of law announced is that the seller is not liable for the representations of an agent where the authority of the latter is restricted and such restriction made known to the buyer. This seems simple enough. If the seller desires to make known to the purchaser this restricted authority, it is readily apparent that this can be done by a few simple words or phrases. By way of illustration, a simple statement in a contract that no agent or representative has authority to make any representations other than those expressly contained in the contract could be placed in conspicuous type on the contract, and would be less expansive than the paragraph or provision now before us, and would serve to give to the buyer notice of the agent's limitation. Instead of doing this, it seems preferable to adopt a position of equivocation; one which is intended to shield the seller, but yet conceal from the buyer the real dangers.

In Berning v. Colodny & Colodny, 103 Cal. App. at page 194, 284 P. 496, 499, we find a contract containing almost exactly the same provision as the one herein discussed; if anything, a little more specific. The appellate court gave little heed to the claim of appellants there, saying: "The contract in the case at bar had its inception in fraud, and no doubt the clause quoted was placed there by the perpetrators of the fraud for the very purpose of preventing inquiry." And so here, even conceding the honesty and good purpose of the seller, it is obvious that the clause was inserted to prevent any future claim of fraud, rather than for the purpose of fully advising any buyer of the agents' restricted authority.

We have given consideration to the cases cited by appellants, the three most strongly relied on being Gridley v. Tillson, supra; Warner v. Taft Land & Dev. Co., 113 Cal. App. 71, 297 P. 969; Campbell v. Title G. & T. Co., 121 Cal. App. 374, 9 P.(2d) 264. The contracts discussed in the several cited cases were much different than the contract before us, with respect to the cautionary clause. It will suffice to say that, aside from announcing the rule and the exception, the cases are of little aid to the appellants. Further, it is to be noted, strange as it may seem, that the decision in each of the cited cases was amply supported without reference to the rule. In other words, reference to the rule of law in each case was gratuitous and not necessary to the conclusion reached.

Concluding this branch of the appeal, we cite section 1668, Civil Code, which reads: "All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud * * * are against the policy of the law." The policy of the law being thus declared, as a matter of substantive law, we repeat that it should be the attitude of the courts to preserve and maintain that policy rather than to hold it at naught by too refined construction.

[4] The next ground of appeal requires some little detail of fact. It seems that, after the plaintiffs had been convinced of the benefits to be derived from an investment, there was still one small obstacle in the way. They were short of funds sufficient to meet the obligations required in the purchase of so much property. It was then explained to them that this need not stand in the way, inasmuch as the seller had another party who was mindful of the great chance presented, and who would put up a sum of money sufficient to carry the investment along until the end of the rainbow was reached. As was to be ex-

pected, this other party would demand, and would be given, an interest in the property. It turned out that this party was named Miss Saidee Benson. The plaintiffs did not know Miss Benson and had never seen her, nor had they had previous business relations with her. As a matter of fact, Miss Benson's connection with the deal was simply to advance a sum of money, which she thought was more in the nature of a loan to the enterprise. Miss Benson herself knew little of the transaction, she being represented throughout by a friend. However, when the contract was drawn, the plaintiffs were the buyers of 68.5 per cent. of the property, and Miss Benson the purchaser of the remaining 31.5 per cent. Miss Benson refused or declined to join as a party plaintiff, and for that reason was made a party defendant in the present suit. Appellants claim that plaintiffs cannot rescind without the joinder of Miss Benson as a party plaintiff. The claim is that a contract cannot be rescinded in part and affirmed in part, and that therefore, before the joint contract of plaintiffs and Miss Benson can be rescinded, all parties thereto as buyers must join. Much authority is cited in support of this claim, but we regard it as beside the point. The principle underlying the contention of appellants and supported by the cited authorities goes to the point of a restoration of the status quo.

Much argument is presented as to the possibilities that might follow from plaintiffs' rescission and the fact of Miss Benson still affirming the contract. However, we fail to see how appellants will be greatly injured, if at all. We are not going to follow through all the reasoning advanced by appellants. It seems sufficient to say that, in whatever predicament appellants might find themselves, there will be no difficulty in finding the one to blame.

In Ruling Case Law, vol. 6, at page 942, we find this apt language: "If the defrauding party has so entangled himself in the meshes of his own plot, that the party defrauded cannot unloose him, the fault is his own. The law only requires the injured party to restore what he has received, and, so far as he can, undo what had been done in the execution of the contract. This is all that the party defrauded can do, and all that honesty and fair dealing require of him. If these fail to extricate the wrongdoer from the position he has assumed in the execution of the contract, it is in no sense the fault of his intended victim, and whatever consequences may follow should rest on the head of the offender alone."

If appellants considered it a better business deal to join strangers with no privity of interest, and to deal with each separately, it cannot create an indivisible unity of contract between them in order that it may profit through the fraud perpetrated upon either. We have referred throughout to the fraud perpetrated for the one reason that appellants do not seriously question the sufficiency of the evidence to support the findings that fraud was perpetrated upon the plaintiffs. We mention this so that it may be clear that we are not making independent characterization of the conduct of appellants.

It is next urged in support of the appeal that plaintiffs were and are guilty of such laches in rescinding as to deprive them of the right. The found fraud was a promise of resale at the expiration of 18 months. The evidence discloses that some 5 months after the date of the contract plaintiffs were informed by some person that the value of the lots was about 50 per cent. of the purchase price; at the end of the 18 months the resale had not been effected. The rescission was made a little more than a year after the expiration of the 18 months. Upon these facts appellants contend that, the delay and laches being so apparent, the remedy of rescission is lost. On the other hand, the evidence discloses that, from rumors of uncertain worth, plaintiffs, from time to time, sought out the salesmen with whom they had done business, and were reassured of the truth of the earlier representations, and the fulfillment of the promises made to them as an inducement to their entering into the contract.

[5, 6] The question of laches is primarily one for the trial court, and is always to be determined in the light of the circumstances of each case. One of the things to be considered in determining the question is whether or not, through the charged delay, the rights of the parties have been in anywise affected, or if there has been any substantial change in the position of the parties to the contract. It needs no citation of authority to support the proposition that, when one has been induced into a contract by fraud, the delay occasioned by the wrongdoer's assurances of honesty will not operate as a bar to the right of rescission. To hold otherwise would be, in effect, to say that the fraud became virtue as it progressed. A well-hooked fish is easily led, and, where a buyer is induced to lay out some $6,000 through fraudulent representations, it is not so difficult to keep him in an unsuspecting frame of mind. In the instant case appellant has parted with

nothing; it still has plaintiffs' money; and likewise it has the property. True, the so-called depression and other things may have combined to lessen the value of the property, but all values are relative, and it may well be that little difficulty will be found in convincing the next series of investors that the economic gyrations of the intervening period enhanced the value of all realty.

[7] The finding of the trial court was that plaintiffs were not guilty of laches, and we conclude that there is no showing sufficient to overcome this finding. There is sufficient evidence to show that the delay in rescission was caused by the constant assurance of appellants that everything was as represented, and that the resale would be effected as promised. Plaintiffs were requested to be patient and for the sake of their original investment to await the further developments promised. The delay was occasioned through the indulgence of plaintiffs, after being lulled into a sense of security through the continuing fraud. That this situation warranted the trial court's finding may be supported by numerous decisions of the Supreme and appellate courts of this state. Barron Estate Co. v. Woodruff Co., 163 Cal. 561, 126 P. 351, 42 L. R. A. (N. S.) 125; Garstang v. Skinner, 165 Cal. 721, 134 P. 329; Noll v. Baida, 202 Cal. 98, 259 P. 433; Hunt v. L. M. Field, Inc., 202 Cal. 701, 262 P. 730; Eade v. Reich, 120 Cal. App. 32, 7 P.(2d) 1043.

The final attack upon the judgment is based upon the ground that at the time of the attempted rescission the plaintiffs were in default, and therefore had no right to rescind. The question of default, in the instant case, presents one of mixed law and fact. It was a part of the fraudulent representation inducing the contract, that plaintiffs would be required to pay no more than the amounts originally provided for and paid. True, the contract itself did provide for continuing payments after the promised date of resale, but the real agreement between the parties was that nothing would be due.

Again, on the matter of payments, plaintiffs were induced to rely upon the original promises, which avoided necessity of further payments, and at no time was payment demanded or suggested. Under the representations made they were to make no more payments, and, upon reassurance of the continuing contract, no default occurred.

[8] But, passing this, the rule is announced in Lubarsky v. Chavis, 99 Cal. App. page 616, 279 P. 205, that, if plaintiff had the right to rescind upon the ground of fraud, he was not obliged to keep up his payments under the contract. The same rule is declared in Eade v. Reich, supra.

[9] Complaint is made as to a conflict in the findings on the issue of default in payments. Under the rule announced, the finding would be somewhat immaterial. However, as we are presented with but a few of the findings, we assume that the findings as a whole did completely reconcile the apparent conflict, and therefore no error would result. It is not the purpose of a reviewing court to make hypercritical analysis of the trial court's findings in the attempt to find some technical or apparent inconsistency. The main purpose of findings (assuming that findings have a purpose other than to form a foundation for appeal) is to apprise the parties of the court's decision.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

220 Cal. 111

REIDY et al. v. SUPERIOR COURT, IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14403.

Supreme Court of California.

Feb. 16, 1933.

Judgment ⚷958(1).

Although former judgment may be pleaded in bar of subsequent action, court has jurisdiction therein to determine whether plea is well taken.

In Bank.

Petition by Marion Reidy and another for a writ of prohibition to prevent the Superior Court, in and for the county of Los Angeles, Leroy Dawson, judge, from proceeding to the trial of an action brought against petitioners by the Bank of America National Trust & Savings Association.

Petition denied and alternative writ discharged.

William Ellis Lady and H. C. Millsap, both of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, of Los Angeles, and Hugo A. Steinmeyer, of San Francisco, for respondents.

CURTIS, Justice.

By this proceeding petitioners seek to prohibit the respondent court from proceeding to the trial of an action pending therein entitled Bank of America National Trust & Savings Association v. Reidy et al. Petitioners contend that the issues involved in said action already have been tried and determined in a prior action between the same persons who are parties to the second action. In other words, petitioners contend that, as the judgment in the prior action is a bar to the second action, the trial court has no jurisdiction to proceed with the trial of the second action. In this contention the petitioners are in error. While the plea of a former judgment may be a complete defense and a bar to a pending action, the court in which the second action is pending has jurisdiction to pass upon the merits of said plea and determine whether or not it is well taken. This question has been frequently before the appellate courts of this state and has been determined adversely to the contention of the petitioners. Baird v. Superior Court, 204 Cal. 408, 412, 268 P. 640, 641; Granger v. Superior Court, 159 Cal. 1, 112 P. 854; United States F. & G. Co. v. Superior Court, 113 Cal. App. 436, 298 P. 63; Spitzer v. Superior Court, 74 Cal. App. 494, 498, 499, 241 P. 270.

We need only refer to language found in the first of the above-cited cases for a correct statement of the doctrine determinative of this question. There the court said, "Res judicata must be affirmatively relied upon and shown in evidence, and in some cases must be pleaded, but in no case is the plea in and of itself sufficient to oust the court of jurisdiction. In its strongest form it is nothing more than conclusive evidence upon all or some of the issues involved. When a former judgment is pleaded either in bar or as an estoppel on some issue, there immediately arise questions as to identity of the parties, the validity of the judgment as shown by the judgment roll, the legal effect to be given it, and perhaps many other questions. Such matters are for the determination of the trial court, and, whether correctly or incorrectly determined, it is nevertheless the exercise of jurisdiction over the subject-matter and the parties."

Petitioners cite and rely upon the following cases in support of their contention that a court is without jurisdiction to try issues which have become finally determined by a former judgment: Oldfield v. Superior Court, 217 Cal. 581, 20 P.(2d) 671; Robson v. Superior Court, 171 Cal. 588, 154 P. 8; Granger

v. Superior Court, 159 Cal. 1, 112 P. 854, 856. These authorities, in so far as they affect the question now under consideration, can be readily distinguished from the instant case and from those cases cited above which hold that the court is not ousted of jurisdiction by a plea of res adjudicata.

In the first two cases cited by petitioners the question at issue arose upon the second trial of the action after a new trial had been granted as to certain issues only. At the second trial the court undertook to try the issues which had already been decided and determined by the judgment rendered at the first trial, and which judgment as to those issues had not been set aside, and accordingly had not been affected in any way by the granting of a new trial as to other issues. In the Granger Case the court was asked to prohibit the trial of two actions pending in the superior court of Nevada county. One action was entitled Bennalack v. Richards and the other Granger v. Richards. Each case had been appealed to the Supreme Court and reversed. Bennalack v. Richards, 116 Cal. 405, 48 P. 622; Granger v. Richards, 154 Cal. 478, 98 P. 528. In the case of Bennalack v. Richards on the second trial therein the trial court was proceeding to try issues that had already been settled and determined at the first trial of said action. In holding that the trial court was without jurisdiction to try these issues, the court said, "So far as Granger and the estate of Richards is concerned, the litigation in Bennalack v. Richards appears to be at an end, and the court is without jurisdiction to proceed further. Treating this application as separable, a writ of prohibition can issue to prevent further proceedings against Granger on behalf of the estate or the executors thereof in that action." But in the case of Granger v. Richards on the second trial, Granger relied upon the judgment in Bennalack v. Richards and contended that it settled all issues then before the court in the case of Granger v. Richards and asked, for that reason, that the trial court be restrained from proceeding to again try these issues. In denying this contention, the court held that, while the judgment in Bennalack v. Richards might be pleaded as a complete adjudication of the issues then before the court, it did not affect the jurisdiction of the court to proceed in the action. The language of the court upon this point is clear and decisive, and is as follows: "It may be conceded that with respect to everything except the taking of a supplemental account and making of a decree requiring Granger to reconvey the property to the estate upon the payment of the money found due him upon the accounting, the whole controversy has been settled by the judgment in the action of Bennalack v. Richards. But this does not affect the jurisdiction of the court to proceed in the action. That judgment can be pleaded as an adjudication of the matters determined by it, but it cannot be given the effect of depriving this court of jurisdiction." It will thus be seen that Granger v. Superior Court, supra, is direct authority against petitioners. The two other cases cited by petitioners are readily distinguished from the instant case. It follows, in our opinion, that petitioners have failed entirely to sustain their contention that the trial court is without jurisdiction to proceed in the trial of the action of Bank of America Trust & Savings Association v. Reidy et al.

The petition is denied and the alternative writ issued herein is discharged.

We concur: WASTE, C. J.; PRESTON, J.; IRA F. THOMPSON, J.; SHENK, J.; SEAWELL, J.

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220 Cal. 97

LACY v. PACIFIC GAS & ELECTRIC CO.

Sac. 4817.

Supreme Court of California.
Feb. 10, 1934.

Rehearing Denied March 15, 1934.

1. Negligence ⚷61(2).

Where original negligence continues and exists up to time of injury, concurrent negligent act of third person causing injury is not independent act of negligence, but two concurring acts of negligence will be held to be proximate cause of injury.

2. Electricity ⚷19(6).

Whether concurring negligence of electric company in leaving transformer pole in farmer's driveway beside pumphouse and that of third party in so operating automobile as to collide with pole proximately caused farmer's injury when pole was struck by automobile, raised into air, and dropped on farmer's legs, *held* for jury.

Facts disclosed that electric company's employees removed transformer pole and left it lying beside the farmer's pumphouse; that a mechanic performing service for the farmer left his automobile standing in reverse, parked beside the pole with the wheels cramped and throttle

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

open; and that as the farmer stepped into the automobile and it was started, the automobile dashed backwards, throwing the farmer to the ground, and struck the pole so as to raise it momentarily, drop it, and break the farmer's legs.

3. **Negligence ⟹136(25).**
Whenever standard of duty is not fixed and substantial evidence on proximate cause is introduced, proximate cause is fact question for jury.

4. **Negligence ⟹126(1).**
Where injury was caused by continuing negligence of defendant and independent concurring negligence of third person, proof of proximate cause includes all attending circumstances.

5. **Appeal and error ⟹930(1).**
Where verdict is for plaintiff, reviewing court must assume jury believed plaintiff's evidence.

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by G. L. Lacy against the Pacific Gas & Electric Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

For prior opinion, see 20 P.(2d) 779.

Thomas J. Straub, W. H. Spaulding and Clinton F. Stanley, all of San Francisco, and W. H. Hatfield, of Sacramento, for appellant.

Butler, Van Dyke & Harris and Butler, Van Dyke, Desmond & Harris, all of Sacramento, for respondent.

CURTIS, Justice.

[1] After a re-examination of the authorities applicable to the legal issues involved in this cause, we find ourselves in accord with the opinion of the District Court of Appeal handed down by said court when this action was pending therein. The question concerning which we were in doubt when we granted a hearing herein was whether the appellate court had properly applied the doctrine of proximate cause to the facts in this case, where the defendant was held liable for injuries sustained by plaintiff by reason of the negligence of Gage in driving his automobile over the power line pole which the defendant's employees had negligently left in plaintiff's driveway. The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury. Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 308, 240 P. 53; Id., 96 Cal. App. 161, 167, 273 P. 875, 274 P. 594, in addition to Pastene v. Adams, 49 Cal. 87, and other cases cited in the opinion of the District Court of Appeal.

[2] Applying this well-established doctrine to the facts in this case, there can be no question but that the proximate cause of plaintiff's injury was the concurring negligence of defendant in leaving said pole in the driveway and the negligence of Gage in so operating his automobile as to collide with said pole. In such a case either of the negligent persons would be liable to the plaintiff for his injuries.

Defendant has cited for the first time in its petition for hearing a number of authorities from jurisdictions other than our own Assuming that these authorities are all that the defendant claims them to be, they would be in direct conflict with the decisions of the courts of this state upon the question now before us. This court would therefore not be justified in accepting them as either controlling or decisive of said question.

The opinion of the District Court of Appeal, written by Mr. Justice Sturtevant, we therefore adopt as the decision of this court. It is as follows:

This is an action to recover for personal injuries. The jury returned a verdict in favor of the plaintiff and from the judgment entered thereon the defendant has appealed.

On March 17, 1930, and for many years prior thereto, the plaintiff was engaged in farming on his ranch near Elk Grove. His farm is located on the south side of Sheldon road, a public highway running east and west. On the eastern boundary is a wire fence. In the extreme northeast corner is a gate leading from the highway into the farm. From that gate there is a piece of open ground about 50 feet by 500 feet which is not planted. On the western side of the opening the ground is planted to vineyard. In the extreme southern end of the open ground there is a pumphouse. The pump is operated by an electric motor. Near the pumphouse is a vat for dipping prunes. Along the eastern side of the open ground are wagon tracks showing travel, but it was the claim of the plaintiff that the entire strip of open ground was laid out for and used as a roadway for farming purposes. For the purpose of furnishing the plaintiff current the defendant had installed a branch line leading from Sheldon road along the border of the vineyard south to the pumphouse. For that purpose three poles were erected. On the 17th of March, 1930, the transformer pole near the pumphouse was 35 feet long. Being dissatisfied with it the defendant entered the premises, installed a pole 40 feet in length, and having done so its employees took out the other pole and toppled it over with the top end extending toward the east. Notwithstanding requests by the plaintiff, the defendant's agents did not remove the pole, but it was left lying on the ground. It continued to remain there until after the accident complained of. On May 1, 1930, the plaintiff commenced to prepare to irrigate. When he attempted to start his pump, he encountered such difficulties that he sent to the Beach Garage at Elk Grove for mechanical assistance. Thereafter Mr. Gage drove out to the plaintiff's farm in his garage service car. He entered the gate on the Sheldon road and drove along the western side of the open ground above mentioned southerly toward the pumphouse. On approaching the pole lying on the ground Mr. Gage swerved toward the east, passed around the eastern end of the pole, and turned directly west in front of the pumphouse. There he stopped his car, leaving the throttle open, threw the shift into reverse, and at the same time cramped the wheels distinctly to the right, then he got out of his automobile and he and the plaintiff made an examination of the condition of the pump. It transpired that when the defendant's employees installed the new pole the wires were so connected that the pump was operating backwards. To make the changes Mr. Gage needed a particular kind of a screwdriver. The plaintiff informed him that he had one at his house. Thereupon Mr. Gage directed him to get in the automobile and that they would go for the screwdriver. The plaintiff attempted to enter the automobile on the right-hand side. At the same time Mr. Gage stepped to the front and cranked the automobile. By that time the plaintiff had stepped upon the running board and at the same instant the automobile dashed back. Mr. Gage asked the plaintiff to shut off the ignition. Before he could do so the car hit the pole and the plaintiff was thrown off the automobile onto the ground. When the automobile hit the defendant's pole the pole was raised into the air momentarily and then fell across the plaintiff, breaking both of his legs. For the injuries so suffered the plaintiff sued to recover.

As we view the case we find no material conflict in any of the evidence. The defendant contends that the leaving of the 35-foot pole as it was left by defendant's line crew was not an effective and contributing cause of the injury to plaintiff unless in accordance with the usual experience of mankind the result ought to have been foreseen and apprehended. The plaintiff replies that the defendant negligently placed the pole and negligently left it in that place from March until May after being notified to remove it and that Mr. Gage so negligently operated his automobile as to cause it to collide with the pole and as a proximate result of the concurrent negligence of the employees of the defendant and Mr. Gage the pole was heaved into the air and caused to fall upon the plaintiff, thus causing the injury complained of. Continuing, the plaintiff claims that the question before the court is solely a question of fact which the jury on sufficient evidence has found against the defendant and that under well-settled rules a court of review may not disturb the finding.

[3-5] The first part of the plaintiff's reply is entirely sound and is supported by a long line of decisions in this state. Pastene v. Adams, 49 Cal. 87; Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A. L. R. 825; Royal Indemnity Co. v. Public Ser. Corp., 42 Cal. App. 628, 183 P. 960, 962; Polloni v. Ryland, 28 Cal. App. 51, 151 P. 296. The second part of his reply is also sound. Whenever the standard of duty is not fixed and there is introduced substantial evidence on the subject of proximate cause it is a question of fact for the jury. 45 C. J. 1280; 1 Shearman & Redfield on Negligence, 112; Andreen v. Escondido Citrus Union, 93 Cal. App. 182, 187, 269 P. 556. When, as here, it is claimed that an injury was caused both by the continuing negligent act of one defendant and the independent concurring negligent act of a third person, many facts are to be considered in determining the proximate cause. 45 C. J. 897–925. The proof on that element includes all "the attending circumstances." 45 C. J. 914; Indemnity Co. v. Public Ser. Corp., supra; Marton v. Jones, 44 Cal. App. 299, 186 P. 410. In the instant case much evidence regarding attending circumstances was introduced. The question was submitted under full and specific instructions. If the jury

believed the evidence so introduced by the plaintiff, and from its verdict we must assume it did, this court may not say as a matter of law that the issue of proximate cause was not proved.

The defendant quotes from Indemnity Co. v. Public Ser. Corp., supra, as follows: "It also appears from the record that the pole is located in a field planted with barley, and that the barley was planted right up to the line of the pole. The barley was being cut and horses were being used in connection with the cutting—all of which is a usual and necessary use of the land on which the pole is situated. We think that the jury was justified in concluding that the defendant should have anticipated that the guy wire might be subjected to sufficient strain by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire and a consequent sagging of the wire, and should have insulated its guy wires so as to avoid injury to others in the event of such an occurrence." The defendant then argues: "The foregoing quotation is the very meat and gist of the Indemnity Company Case. But what earthly application can it have to the case at bar? Surely the leaving of an automobile in reverse gear 'because the brakes were not in very good order' and the front wheels 'cramped towards the right,' and with the throttle of the engine 'wide open, very wide,' and then starting to crank it as Mr. Lacy was getting into it, is a situation that has nothing to do with Mr. Lacy's usual ranching or farming operations and could not have been anticipated by defendant. The bare statement of the facts in the instant case and the Indemnity Company Case shows the distinction between them." These arguments are not convincing. As a matter of law this court may not say that there is any more reason to assume that a farmer will or will not mow his barley than there is to say that he or his agents will or will not drive a motor car over his pump and prune road. See, also, Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53; Id., 96 Cal. App. 161, 273 P. 875, 274 P. 594; Rauch v. Southern Cal. Gas Co., 96 Cal. App. 250, 273 P. 1111; Marton v. Jones, supra.

The defendant cites and earnestly relies on Klarquist et al. v. Chamberlain & Proctor et al. (Cal. App.) 12 P.(2d) 664. However, we think that the case is not at all in point. As we read the case the owners were constructing a building. Bavin & Burch were the contractors. Pursuant to permits issued to them the contractors laid down a new sidewalk. In everything they did they acted legally. The work had so far advanced that the sidewalk was not usable. Plaintiff's decedent while traversing the sidewalk adjacent to the building was therefore compelled to step out into the street. As he did so the truck of one of the defendants approached in a negligent manner, knocked him down, and from the injury he died. The plaintiff sued the owner of the building, the owner of the truck, and Bavin & Burch. Judgment went against the defendants. The contractors appealed. The District Court of Appeal held that the contractors were not negligent, and as to them the judgment was reversed. But in the instant case it is not even suggested that the defendant was not negligent in leaving the transformer pole lying on the plaintiff's driveway.

The defendant also cites South-Side Passenger Ry. Co. v. Trich, 117 Pa. 390, 11 A. 627, 2 Am. St. Rep. 672; Teis v. Smuggler Mining Co. (C. C. A.) 158 F. 260, 15 L. R. A. (N. S.) 893; and Falk v. Finkelman, 268 Mass. 524, 168 N. E. 89, 90. Each case contains instructive phrases, otherwise the first two are not helpful. The case last cited is more nearly in point and requires further comment. Three cases were tried together. One of the defendants had left his automobile parked at the curb. Fire apparatus approached from two directions and in the collision that followed the first automobile was driven up onto the sidewalk and injured the plaintiff. The parking of an automobile at the particular place for more than twenty minutes was prohibited by the terms of an ordinance recently passed, but the passage of which was never called to the attention of the defendant. In passing on the case the Supreme Court of Massachusetts said: "The defendant violated no legal duty owed the plaintiff," and thereupon it ordered judgment for the defendant. In the case of Milbury v. Turner Centre System, 274 Mass. 358, 174 N. E. 471, 473, 73 A. L. R. 1070, the Supreme Court of Massachusetts cited the Falk Case, and commenting thereon, said: "The case differs from Falk v. Finkelman, supra. There the parking of the defendant's automobile at the curb was an innocent act, bare of negligence. Allowing it to remain there beyond twenty minutes, in ignorance of the ordinance forbidding parking for a longer time, although it subjected the owner to punishment, had nothing to do with the collision of fire apparatus or with causing the injury for which recovery was sought. In Rea v. Checker Taxi Co. [272 Mass. 510, 172 N. E. 612], supra, on the other hand, knowing violation of the one-way street ordinance placed the automobile where a collision could occur, one of the very things which the ordinance sought to prevent, it could be found to be negligence directly contributing to the accident. A collision might well be found to be not something unusual and unlikely to happen as a result of such blocking of a corner as here took place—something only remotely and slightly probable—but, rather, a consequence naturally to be expected." It is clear, we think, that the Falk Case is not controlling in this case. On the other hand, the case last cited and Felix v. Soderberg, 207 Wis. 76, 240 N. W. 836, clearly support the views hereinabove expressed.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.

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136 Cal.App. 653

HIRSCHBERG v. ROSE et al.

Civ. 8554.

District Court of Appeal, First District, Division 1, California.

Feb. 13. 1934.

Rehearing Denied March 15, 1934.

Hearing Denied by Supreme Court April 13, 1934.

1. Brokers 🔑37.

In action to recover money advanced to broker for negotiating lease on property which plaintiff sought to purchase, evidence *held* to support finding of agreement to repay commission in event plaintiff did not acquire title before stipulated date.

2. Brokers 🔑39.

General rule that broker is entitled to commission upon procuring acceptable tenant and negotiated satisfactory lease *held* inapplicable, where rights of parties are controlled by special contract and payment of commission is made dependent upon happening of condition which does not materialize.

3. Pleading 🔑53(1).

Plaintiff may state cause of action in as many common counts as he chooses to meet any possible phase of evidence.

4. Appeal and error 🔑1039(2).

Where evidence was sufficient to support findings for plaintiff on one common count in complaint and findings sustained judgment, alleged contradiction between common counts becomes immaterial.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by A. Hirschberg against M. L. Rose and another. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

George D. Collins, Jr., of San Francisco, for appellants.

Young, Hudson & Rabinowitz, of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff obtained judgment against defendants for $1,200, and defendants appeal. The complaint contained two common counts, stated separately, the first for money had and received, and the second for money loaned. The answer consisted of denials of the allegations of the complaint; and on the issues of fact raised thereby the trial court found in plaintiff's favor and entered judgment accordingly.

It appears that the controversy arose over the advancement by plaintiff to defendants of the sum of $1,200 in connection with defendants' services in procuring a tenant for certain premises plaintiff was about to acquire. Insufficiency of the evidence to support the findings is urged as the main ground of appeal. The record discloses, however, that there is a sharp conflict of testimony on the controlling issues of fact in the case, and, after having reviewed all of the evidence, we are satisfied that the trial court's findings and judgment are supported thereby.

[1] In this regard the evidence shows that in April, 1925, plaintiff was negotiating for the purchase of certain premises on the corner of Post and Fillmore streets, in San Francisco, and in contemplation of such purchase authorized the defendant Rose of the defendant firm of M. L. Rose & Co., to procure a prospective lessee for said premises. It was understood that defendants should receive therefor the commission fixed for such services by the rules of the real estate board, which amounted to $1,400. Pursuant to such authorization Rose procured a prospective tenant, who on April 16, 1925, signed a lease acceptable to plaintiff, and as a guaranty for the faithful performance of the terms of the lease deposited $5,000, which plaintiff placed to his credit in a special account in the bank. At the time he opened such account plaintiff introduced Rose to a Mr. Panario, one of the bank's execu-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tives, stating, among other things, that he desired to deposit also the sum of $1,400 to be paid to Rose as a commission for procuring the lease when plaintiff acquired the property. Acting under these instructions, Panario drafted a letter to the bank, which plaintiff signed, directing the bank to pay the $1,400 to defendants "upon our acquiring title to this property"; and, continuing, the letter stated: "We expect to acquire title to the same on or before June 21, and will notify you at that time. In the event that we do not acquire title by July 1, we will reserve the right to withdraw this deposit." Rose read the letter and claims he stated at the time that it did not express his understanding of the agreement; nevertheless the wording of the letter was not altered; and a copy of it was delivered to Rose, which he took away with him. Owing to a defect in the title to the property, consisting of an overlapping of boundaries, the purchase thereof by plaintiff was not consummated as contemplated in said letter. Meanwhile Rose became much in need of money to meet certain payments on a business transaction in which he was interested, and finally, on May 19, 1925, plaintiff consented to advance to him $1,200 with the understanding, so plaintiff claimed, that, if he were unable to acquire the property as contemplated in said letter of April 16th, Rose would repay to him the sum thus advanced. Thereupon they proceeded to the bank, and, after explaining the situation to Panario, plaintiff withdrew $1,200 from the $1,400 deposit and paid the same to Rose, who acknowledged receipt thereof at the end of the escrow letter of April 16th. Rose denied that any such understanding or agreement was had as a condition to the payment of the $1,200. Plaintiff's testimony in this regard was strongly corroborated, however, by two other witnesses, a Mr. Loupe, who was plaintiff's business associate at the time this transaction took place and who protested against making such advancement to Rose at all, and Mr. Panario, who testified that at the time the $1,200 was delivered to Rose plaintiff stated: "You know, Mr. Rose, I have not yet acquired title to this property, and if the deal does not go through you are to return my money"; and that Rose responded "yes." On account of the defective title, plaintiff did not acquire the property by July 1st, and before that date arrived he was obliged to cancel the lease Rose had negotiated and return to the prospective lessee the $5,000 theretofore deposited, together with interest thereon; but Rose did not repay the $1,200. Following the levy of an attachment on his property, Rose agreed to give plaintiff his note for the amount, which plaintiff declined to accept. It is apparent that the foregoing testimony is legally sufficient to sustain the trial court's conclusion that, as claimed by plaintiff, the $1,200 was advanced to Rose and accepted by him with the understanding that he would repay the same in the event plaintiff did not acquire title to the property before July 1st.

It further appears, however, that some time subsequent to July 1st, how much later not being disclosed by the evidence, plaintiff did acquire the property, and, because of such fact, defendants contend that their right to a commission became absolute; and that therefore they were entitled to retain the $1,200 theretofore advanced to them. But, in order to so hold, it would be necessary to ignore entirely the contents of the escrow letter of April 16th, and the express understanding under which the trial court found on conflicting evidence the $1,200 was advanced to defendants; and, of course, we have no right to disregard either.

[2] Defendants cite numerous authorities in support of the general rule that a broker is entitled to his commission when he has procured a tenant who is acceptable, and negotiated with him a lease which is satisfactory, regardless of whether the lease ever becomes effective or whether title has yet vested. But obviously such rule has no application to a case such as we have here, where the rights of parties are controlled by a special contract and the payment of the commission is made dependent upon the happening of a condition which does not materialize.

[3, 4] Defendants further contend that the findings are self-contradictory because the trial court found in the affirmative on both counts. It is well settled, however, that a plaintiff may, as was done here, state his cause of action in as many common counts as he chooses to meet any possible phase of the evidence. 3 Cal. Jur. 394. Therefore, since the evidence in the present case is legally sufficient in our opinion to support the findings on the first count, for money had and received, and those findings sustain the judgment, the point made by defendant against the consistency of the findings becomes unimportant in the determination of the appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

137 Cal.App. 22

PEOPLE v. HARVEY.

Cr. 1319.

District Court of Appeal, Third District, California.

Feb. 20, 1934.

1. Criminal law ⟹1202(6).

Judgment on plea of guilty to lewd and lascivious conduct, with prior conviction, attempting to fix maximum term as sentence, *held* irregular; fixing of term of imprisonment being within exclusive province of state board of prison directors (Pen. Code, § 1168).

2. Criminal law ⟹1184.

Where judgment erroneously fixed maximum term of imprisonment, appellate court was authorized to strike erroneous portion of sentence from judgment (Pen. Code, § 1168).

3. Indictment and information ⟹110(3).

Charge of prior conviction in language of statute is sufficient without allegation that defendant actually served time in penal institution under prior conviction, where defendant admitted prior conviction and that he actually served time in penal institution (Pen. Code, § 969).

4. Criminal law ⟹1202(6).

Suspension of pronouncement of sentence from time to time until information could be obtained regarding prior conviction, not having been made under law providing for probation, was nullity, and subsequent imposition of sentence was not erroneous (Pen. Code, § 1203).

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Corwin S. Harvey entered a plea of guilty to lewd and lascivious conduct, with a prior conviction, and he appeals from the judgment.

Judgment modified, and, as modified, affirmed.

A. J. Harder, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

In 1928 an information was filed against the defendant herein charging him with lewd and lascivious conduct and by a supplemental information filed shortly thereafter it was alleged that defendant had theretofore, in the state of Oregon, been convicted of a felony. On this information defendant in due time entered a plea of guilty and also admitted having suffered the prior conviction. At the time of the sentence, it was made to appear by questions addressed to defendant by the court that he had, under said conviction in Oregon, served time therefor in the state prison. Subsequent to the plea and before the pronouncement of sentence, the court communicated with the prison authorities in Oregon, and "suspended" the pronouncing of sentence from time to time until certain information could be obtained from that source, but later proceeded to impose sentence upon defendant and committed him to state prison for the term of his natural life.

Thereafter in 1933, defendant petitioned the superior court for a modification of this judgment upon the following grounds:

First. Failure of the trial court to pronounce judgment and sentence in accordance with the provisions of section 1168 of the Penal Code.

Second. That the judgment and plea was obtained by promise of deportation.

Third. That the court had no authority to disturb the suspended sentence.

[1, 2] It is apparent that the trial judge failed to follow the provisions of section 1168 of the Penal Code in that an attempt was made to fix the maximum term as the sentence of the court. This was an irregularity, as the fixing of the term of imprisonment was within the exclusive province, at that time, of the state board of prison directors. However, under the authority of People v. Mendosa, 178 Cal. 509, 173 P. 998, and People v. Rossi, 37 Cal. App. 778, 174 P. 916, this court has the authority and it will be the order herein to strike from the judgment that portion of the sentence which attempted and purported to fix the term of imprisonment.

[3] Defendant also claims that not only must the fact of the prior conviction be pleaded and proved, but also the fact that time was served in a penal institution must likewise be alleged and proved. This is not necessary. In re Boatwright, 216 Cal. 677, 15 P.(2d) 755, held that it is sufficient to charge prior offenses in the language of section 969 of the Penal Code, and, if evidence is adduced at the trial or upon arraignment for judgment showing that defendant had actually served time in a penal institution for the felony set forth in the complaint, it is sufficient compliance with the law.

In the instant case the record discloses that defendant not only admitted the previous conviction, but also admitted he had served time in the state prison of Oregon therefor.

Defendant also claims that he entered his plea of guilty under the promise or understanding of deportation. There is nothing before us that would indicate the plea was not entirely voluntary and there is no support for defendant's claim of duress or coercion. People v. Perez, 9 Cal. App. 265, 98 P. 870.

[4] Defendant further claims that the sentence based upon the judgment and conviction was suspended. In this we cannot agree; Judge Deirup, the trial judge who passed upon this motion, preliminarily well said:

> "There was no legal suspension of the sentence. The court rendered judgment of conviction and purported to suspend the sentence. The suspension of the sentence was clearly not made under the law providing for probation (section 1203, Pen. Code). It could not have legally been made under any other law. It was therefore a nullity. The subsequent order setting aside the suspension of the sentence was proper; the second judgment of conviction was a nullity. People v. Mendosa, 178 Cal. 509, 173 P. 998; People v. Patrich, 118 Cal. 332, 50 P. 425."

We therefore find no merit in the various points urged by appellant. However, that portion of the judgment and sentence herein which attempts and purports to fix the maximum penalty at life is stricken from said judgment, and, as so modified, the judgment appealed from, as well as the order likewise here attacked, are affirmed.

We concur: **R. L. THOMPSON, J.; PLUMMER, J.**

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136 Cal.App. 743

PEOPLE v. YOUNG.

Cr. 162.

District Court of Appeal, Fourth District, California.

Feb. 17, 1934.

Criminal law ⇐1071.

Where defendant appealed in open court from order denying new trial and from judgment and timely filed so-called "notice of appeal" wherein grounds of appeal were informally stated, appeal would not be dismissed where substantial rights of respondent were not affected (Pen. Code, § 1239; Rules of the Supreme Court and District Courts of Appeal, rule 2, § 7).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Proceeding by the People of the State of California against Art G. Young. From an adverse judgment, the defendant appeals. On motion of the People to dismiss appeal.

Motion denied.

James M. Thuesen, of Fowler, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

MARKS, Justice.

The Attorney General has moved to dismiss this appeal upon the ground that appellant has not filed any statement of his ground of appeal or any points upon which he will rely.

Section 7 of rule II, Rules of the Supreme Court and District Courts of Appeal, provides in part as follows: "The appellant must, within five days after giving notice of the appeal, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal shall be dismissed; provided, that the appeal shall not be dismissed for any defect in the statement of such grounds or points which does not affect the substantial rights of the respondent."

The record before us discloses that a motion for new trial was denied and judgment pronounced upon appellant on the second day of December, 1933. Thereupon in open court appellant announced his appeal to this court from the order denying his motion for new trial and from the judgment of the court.

Section 1239 of the Penal Code provides that a defendant may take an appeal from a judgment, or order made after judgment, by announcing in open court at the time the judgment or order is made that he appeals from the same.

On December 6, 1933, and within five days from the oral notice of appeal, appellant by his attorney filed what is denominated "a notice of appeal" both from the order denying his motion for new trial, and from the judgment. As his grounds for appeal from the order, he there specified error of the trial court in denying his application to continue the date of the trial, and misconduct on the part of the district attorney. As grounds of appeal from the judgment, he specified that the verdict is contrary to the evidence, and misconduct of the district attorney in his address to the jury. On the same day he filed written request for a clerk's and reporter's transcript which the trial judge ordered prepared.

While the grounds upon which appellant relies on the appeal are informally stated and are incorporated in a document which is called by him a notice of appeal, this document was filed within the time prescribed by the court rule for filing his statement of grounds of appeal. This sufficiently conforms to the requirements of the rule in question and cannot "affect the substantial rights of the respondent."

Motion denied.

We concur: **BARNARD, P. J.; JENNINGS, J.**

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136 Cal.App. 761

TROUNCE et al. v. WHITTIER SAV. BANK et al.

Civ. 9317.

District Court of Appeal, First District, Division 2, California.

Feb. 20, 1934.

1. Execution ⚷402.

In proceedings supplemental to execution where record did not show that parties held property of judgment debtor, they could not be ordered to make delivery of property to sheriff to apply on judgment (Code Civ. Proc. § 719).

2. Execution ⚷364.

In proceedings supplemental to execution, that corporation which was judgment debtor had merged illegally with another corporation did not give judgment creditor right to stock issued by merged corporation to stockholders of debtor corporation.

3. Execution ⚷402.

In proceedings supplemental to execution where plaintiffs moved for order for delivery of property to sheriff to apply on judgment after service of affidavit on defendants instead of applying to court on affidavit or other proof to order parties to appear for examination concerning property of defendants held by them, order *held* properly denied (Code Civ. Proc. § 717).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Harry D. Trounce and another against the Whittier Savings Bank, a corporation, and another, in which A. C. Maple and H. L. Perry were brought in proceedings supplemental to execution. From an adverse order, plaintiffs appeal.

Affirmed.

Edward T. Lannon, of San Diego, for appellants.

Harold Richardson and Harry F. Sewell, both of Whittier, for respondents.

STURTEVANT, Justice.

This is an appeal from an order made in proceedings purporting to be supplemental to execution. Assuming merely for the purpose of this opinion that the record is sufficient, the facts material to this appeal, which are recited in the transcript, include the following: In the above-entitled action a judgment was rendered by default in favor of the plaintiffs and against the defendant corporation on July 16, 1928, for $2,700 and costs. Two different writs of execution were issued, but both were returned unsatisfied. The trial court was not asked for, and it did not, so far as the record shows, make, any order that any person appear and answer regarding any property held by him. Code Civ. Proc. § 717. In some manner a purported deposition of A. C. Maple was taken before a notary on January 20, 1931. Thereafter, on March 14, 1931, the plaintiffs served on said A. C. Maple and H. L. Perry a notice and an affidavit. The notice recited that on March 26, 1931, the plaintiffs would apply to the court for an order directing A. C. Maple to deliver to the sheriff twenty-nine and a half shares of stock in the First National Trust & Savings Bank of Whittier, or $14,012.50 in cash, and directing H. L. Perry in like manner to deliver five shares or $2,375. In the affidavit there are statements of these additional facts. Heretofore the Whittier Savings Bank was merged into the First National Trust & Savings Bank, and the stockholders of the former received shares in the latter. A. C. Maple so received twenty-nine and a half shares, and H. L. Perry received five shares. The corporation commissioner of California did not authorize said transfer. The said individuals sold their stock to Merchants National Bank of Los Angeles for $475 per share. Another affidavit was filed from which it appears that the Whittier Savings Bank has never been dissolved and no agreement of merger between the Whittier Savings Bank and First National Bank of Whittier is on file in the office of the county clerk. On June 19, 1931, the court made an order denying the motion for an order requiring the delivery of the stock or money to the sheriff to apply on the judgment.

[1] In the purported deposition of A. C. Maple it is recited that the Whittier Savings Bank was merged into the First National Trust & Savings Bank, and that the latter received the assets of the former. It is also recited that by the merger the shareholders of the former received for their shares an equal number of shares in the latter. The record shows that A. C. Maple and H. L. Perry so received the said shares of stock as the owners thereof, and it does not show that either of said persons holds any property of the Whittier Savings Bank. Assuming that the order appealed from was made under section 719, Code of Civil Procedure, it was clearly correct.

[2] We have noted in the plaintiffs' briefs that it is their contention that the merger of the Whittier Savings Bank into the first National Trust & Savings Bank was illegal. It was or it was not. If it was legal, the plaintiffs showed no interest in or claim to the stock, or the proceeds thereof, issued to A. C. Maple and H. L. Perry. Assuming that the merger was illegal, then it follows that the plaintiffs have proved themselves out of court. Whatever may be their rights to pursue the assets of the Whittier Savings Bank, their rights do not, in the absence of additional facts, extend to shares of stock in the First National Trust & Savings Bank.

[3] In what we have said we have considered the appeal on its merits. However, the respondents, A. C. Maple and H. L. Perry, contend that the trial court by its order merely declined to exceed its jurisdiction. The plaintiffs reply that it was presenting proceedings supplemental to execution. To that reply the respondents answer that proceedings supplemental to execution are entirely statutory (11 Cal. Jur. 148), and that the plaintiffs did not in any respect comply with the statute. We think that the record before us sustains the answer of the respondents. Having obtained their judgment, the plaintiffs were entitled to maintain proceedings supplemental to execution. Code Civ. Proc. § 717 et seq. To do so they were bound to present an affidavit or other proof to the judge of the trial court showing that respondents had property of the defendant corporation and apply for an order requiring respondents to appear before the judge of the court or a referee appointed by him and answer concerning such property. Code Civ. Proc. § 717. The record does not show that such affidavit or proof was made nor that the order was made. The plaintiffs did serve the affidavit of Mr. Lannon and ask for an order requiring the respondents to turn over the shares of stock. The statute does not provide for such a motion. If the application for an examination had been directed to a referee, and the referee had made a delivery order and the respondents had refused to obey it, the remedy was as for contempt. Code Civ. Proc. § 721. If the plaintiffs had made their application for an order of examination and the same had been conducted before the judge, he would have made an order either dismissing the proceeding or directing the delivery. In neither event would there be any necessity for the motion which was made by these plaintiffs. When the motion came on for hearing according to the record before us, the deposition above mentioned was offered in evidence. As the motion was denied, in support of the order we must assume that the judge declined to consider the deposition. If so, his ruling was entirely correct. On its face the deposition appears to be purely ex parte; in other words, a document not authorized by any statute. Again, the record before us shows that the affidavit of Mr. Lannon was used in support of the motion. For the reason that the deposition was not admissible, it follows that the affidavit was not admissible. The statute provides for an examination before the judge or a referee and not for affidavits.

The order is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

136 Cal.App. 772

MAGBY v. NEW YORK LIFE INS. CO.

Civ. 8173.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1934.

Rehearing Denied March 20, 1934.

Hearing Denied by Supreme Court April 20, 1934.

1. Insurance ⚷669(12).

In action on policy for double indemnity for death by accidental cause, instruction *held* not erroneous as failing to distinguish between accidental death and death resulting from accidental cause.

Instruction failed to define accidental cause of death, but explained term and applied meaning to situation that might arise from evidence in the case and stated that plaintiff must show, not only that death was accidental, but that cause of death was accidental, before she would be entitled to recover.

2. Insurance ⚷669(12).

In action upon policy for double indemnity for death by accidental cause, instruction that exception in policy relating to death by self-destruction was to be construed strictly against insurer *held* not misleading, where instruction stated that reasonable interpretation of exception was that benefit would not apply if insured committed suicide.

3. Trial ⚷205.

In action on policy for double indemnity for death by accidental cause, where deceased was afflicted with recurrent spells of insanity that left him normal, refusal to instruct that presumption that facts shown to exist continued applied to insanity *held* not error.

Appeal from Superior Court, Los Angeles County; W. A. Anderson, Judge.

Action by Amelia H. Magby against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for appellant.

Sheridan, Orr, Drapeau & Gardner, of Ventura, for respondent.

ARCHBALD, Justice pro tem.

Action by plaintiff, as surviving wife of William L. Magby, on the double indemnity provisions contained in three policies of insurance on the life of decedent, issued by defendant, the single indemnity provided for therein having been theretofore paid by the defendant company. The case was tried before a jury, which returned a verdict in favor of plaintiff. From the judgment entered upon such verdict, defendant has appealed.

It was stipulated that the insured died on December 8, 1927, and that the cause of his death was the inhalation of carbon monoxide gas which resulted in asphyxiation. Each policy of insurance contained a clause providing for double indemnity "upon receipt of proof that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental cause * * * subject to all the terms and conditions contained in section 2 hereof." Section 2 of the policy provided: "The provision for double indemnity benefit on the first page hereof will not apply if the insured's death resulted from self destruction, whether sane or insane. * * *" No contention is made that the double indemnity provisions of such policies do not apply if the insured's death did not result from self-destruction. Without quoting the evidence, it is sufficient to say that in our opinion it would amply support either an affirmative or negative finding of death by self-destruction, under the rule binding appellate courts in case of conflicting evidence.

Appellant urges that the court erred (1) in failing to distinguish between "accidental death" and "death resulting from accidental cause or means" in certain instructions given; (2) in so instructing the jury as to lead it to apply the rule of law to the facts of the case that ambiguities in a contract of insurance are to be resolved against the insurer and in favor of the insured; and (3) in refusing certain instructions requested by defendant.

[1] 1. Appellant complains because the court did not in any of its instructions define "accidental cause." In our opinion, a definition of the two words would not be clearer in its meaning than the idea conveyed by the words themselves. The court did in several instructions explain very clearly to the jury what an accidental cause or means was and what it was not, and, we think, brought home to it the meaning as applied to situations that might result from the evidence in a much more satisfactory manner than could possibly have been done by an attempted definition. Taking the instructions as a whole, we fail to see how the jury could possibly have been confused as to the necessity of plaintiff's proving that the insured's death was the result of an "accidental cause" before any recovery could be had, nor that the jury could

possibly have understood that a recovery could be had under the policy if the facts showed merely "accidental death." The distinction between accidental death and accidental cause of death under the policies here was clearly pointed out to the jury in an instruction given by the court at appellant's request, reading as follows: "You are instructed that to recover on an accident policy insuring against death resulting from injuries caused solely by external, violent and accidental means, it must be shown not only that death was an accidental result, but that the cause itself was external, violent and accidental, the word accident in such policy meaning an event which takes place without one's foresight or expectation."

Under the policies here the double indemnity clause became effective only upon death resulting from accidental cause and not merely upon an accidental death, and in our opinion the jury could not have been confused under the instructions given.

[2] 2. Appellant complains that the following instruction led the jury to apply the rule of strict construction to the facts of the case: "It is a rule that insurance contracts are to be most strongly construed against the insurer and in favor of the insured, especially where a forfeiture is involved, so that indemnity will be granted rather than denied, and these provisions of law are particularly applicable to an insurance policy containing the exception that a benefit will not apply if the insured's death resulted from self-destruction. Such an exception applies only to suicide, and accidental self-destruction is not within the operation of the exception. The reasonable interpretation of this clause in the policy is that it means that the double indemnity benefit will not apply if the insured's death resulted from suicide, whether sane or insane."

We agree with appellant that the clauses involved here are not ambiguous, and that, even if they had been, the rule of construction was for the court and not the jury. The instruction in question does not expressly leave the interpretation of any supposed ambiguity to the jury under the rule laid down, and the court itself in the last paragraph tells the jury what the exception means, although in our opinion it is not made any clearer than the language of the exception. The use of the word "accidental" to qualify "self destruction," which of itself implies purpose, design, or intent, would seem to be entirely out of place. If death is "accidental," there could be no purpose, design, or intent back of the act causing it. The two words seem to be used together quite commonly, though. We agree, however, with the following from the case of Lawrence v. Mut. Life Ins. Co. of N. Y., 5 Ill. App. 280, 285: "We are clearly of the opinion that a purely accidental death can in no proper sense be termed an act of self-destruction." Regardless of that, we see nothing in the instruction that the jury could possibly take as an invitation to apply the rule intended only for construction of writings to the facts of the case.

In the case of Poncino v. Sierra Nevada L. & C. Co., 104 Cal. App. 671, 286 P. 729, the interpretation of the contract was expressly left to the jury under a similar instruction, but it was held that, the jury being elsewhere instructed as to the meaning of the material terms of the policy and apparently having followed such instructions, any error was cured. In the case of Postler v. Travelers' Insurance Co., 173 Cal. 1, 158 P. 1022, 1024, the court, after reversing the case on other grounds, considered an instruction similar to the one here, not expressly leaving the matter of interpretation to the jury, observing: "It stated the rule correctly, but the construction of the contract was a matter of law for the court, and the jury could not have been aided by this instruction in deciding the questions of fact submitted to them." While, as we say, the instruction so far as it relates to the interpretation of the contracts should not have been given, we fail to see how the jury could possibly have understood that they were intended to apply it to the facts before them. We must assume that the jurors were intelligent; and, if so, they must have concluded that it had nothing to do with them, inasmuch as the court itself applied the rule in the same instruction and left nothing for them.

[3] 3. The court refused to instruct the jury that "the presumption that facts shown to exist continued applies to insanity." The mental experts who examined the decedent at the time he was taken to the psychopathic ward testified that the particular type of insanity afflicting him might last for weeks, months, or years; that the individual might have a long interval in which he is free from all symptoms and mentally normal, and that "the same thing may occur over again and have the same thing repeated a number of times during life"; that the individual does not deteriorate as the disease goes on, as in case of some insanities, and so end in a state of dementia; and that, when the individual is through with an attack, he is essentially himself—as he was before. In view of the fact that it was not general insanity which

appellant's evidence showed existed, we see no error in the refusal of the court to give the requested instruction relative to the continuance of insanity once shown to exist, particularly in view of the fact that the record does not disclose any adjudication of insanity.

In our opinion, the other instructions refused were substantially covered by those given.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 58

KING v. STUBBS CO., Limited.

Civ. 4942.

District Court of Appeal, Third District, California.

Feb. 21, 1934.

Vendor and purchaser ⚷334(1).

Purchaser *held* entitled to recover sum paid on purchase price of lots which were part of subdivision and were sold by reference to unrecorded map, since contract of sale was void (St. 1929, p. 1792, § 3).

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Assumpsit by Edward King against the Stubbs Company, Limited, and others. From an adverse judgment, named defendant appeals.

Affirmed.

Marshall Rutherford, of Oakland, for appellant.

John Parks Davis, of San Francisco, and Lovett K. Fraser, of Lakeport, for respondent.

Mr. R. L. THOMPSON delivered the opinion of the court.

The plaintiff recovered judgment in this suit in assumpsit for the return of $500 paid to the defendant under the terms of a written contract as part purchase price for three lots. The contract referred to the subdivision of the tract in which the lots are situated by reference to an unrecorded map. From this judgment, the defendant Stubbs Company, Limited, has appealed.

In consideration of the payment of $500, the defendant Stubbs Company, Limited, successor to the Stubbs Songey Company, by its agent Martha Salkeld, executed a written contract with the plaintiff July 6, 1931, agreeing to sell plaintiff lots Nos. 27, 28, and 29 in subdivision 7 of Clear Lake Oaks, in Lake county, Cal., "as shown upon official map thereof." The balance of the purchase price was to be paid in monthly installments of $30, with a provision for 7 per cent. interest on all deferred payments. Notice of rescission of the contract was served upon the defendant during the week following the execution thereof. This suit in assumpsit was brought January 2, 1932, on the ground that the contract is void under the provisions of section 3 of the act of the Legislature with relation to the recording of maps of subdivisions of land, which act was adopted June 17, 1929. St. 1929, p. 1790; Act 4578, vol. 2, Deering's Gen. Laws. The cause was tried by the court sitting without a jury. The court adopted findings favorable to the plaintiff upon every material issue in the case, including the fact that the contract for sale of the lots which was executed by the defendant, described the lots by reference to an unrecorded map. Judgment was rendered accordingly to the effect that the contract is void and for a return to plaintiff of the purchase price paid thereunder. From that judgment, the defendant Stubbs Company, Limited, has appealed.

It is settled law in California that a contract to sell lots belonging to a subdivision by reference to an unrecorded map, contrary to the provisions of the statute, is void. St. 1929, p. 1790; Act 4578, vol. 2, Deering's Gen. Laws; Smith v. Bach, 183 Cal. 259, 191 P. 14; White v. Jacobs, 204 Cal. 334, 267 P. 1087; Hartzell v. Doolittle, 205 Cal. 17, 269 P. 527; Krause v. Marine Trust & S. Bank, 93 Cal. App. 681, 270 P. 246; Letteau v. Dumas, 99 Cal. App. 230, 278 P. 459.

The appellant insists that in the present case the lots were not sold by means of a contract only which referred to an unrecorded map, but that the lots were sold through the agent by actually pointing out the lots in the position which they occupied on the ground. The evidence is conflicting in that regard, but in support of the findings of the court and the judgment, it appears that the plaintiff testified that the agent identified the lots which he agreed to purchase as they appeared "on a map, that is all I know. I

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

don't know where the lots are, I have never been on them, and I have never been shown where the lots are." It therefore satisfactorily appears that the lots were not sold by pointing them out "on the ground," as contended, but upon the contrary they were sold by reference solely to an unrecorded map.

It follows that since the contract for sale of lots was void under the provisions of the statute above referred to, the money paid on the purchase price thereof was without consideration, and the vendee is entitled to recover the money paid thereon, in an action in assumpsit. Pollak v. Staunton, 210 Cal. 656, 662, 293 P. 26; Harwell v. Reiniger, 123 Cal. App. 485, 11 P.(2d) 421.

For the reason that the plaintiff promptly rescinded the alleged contract on the ground that it is void, the defendant did not execute and deliver to him the final formal contract of sale according to agreement. It does appear contrary to the requirement to furnish the purchaser a good and merchantable title, that this formal contract which it was accustomed to execute upon similar sales, contains the following restriction: "That no person shall rent, use, or occupy said property or any part thereof except one who is exclusively of the Caucasian race." It has been held that such restrictions, contrary to an agreement to furnish good title free of incumbrance, constitute a cloud upon the title warranting the vendee in maintaining a suit to recover the money paid upon the purchase price thereof. Tandy v. Waesch, 154 Cal. 108, 97 P. 69, 70; Bertola v. Allred, 46 Cal. App. 593, 189 P. 489; Whelan v. Rossiter, 1 Cal. App. 701, 82 P. 1082. In the Tandy Case, supra, it is said in that regard: "The restrictions, reservations, and covenants constituted incumbrances upon the title of defendant, which, not being removed, justified plaintiff in seeking a recovery of his partial payment under defendant's contract to convey to him a title 'free and clear of all incumbrances.' Indeed, this proposition is not seriously disputed; but, if it were, it finds abundant support."

Since the formal contract of sale in the present case, which contains the foregoing restriction, was not actually executed and delivered to the plaintiff, it may not necessarily be assumed the defendant would have attempted to enforce upon the plaintiff that particular restriction. It is therefore unnecessary to determine in this case the effect of such restriction.

It is also unnecessary to determine the effect of the subsequent filing of another map of said tract of land, in which the lots in question appear to be four feet narrower than those which appeared upon the unrecorded map pursuant to which the contract was actually executed.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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136 Cal.App. 741

FLETCHER et ux. v. STARKER et al.

FLETCHER v. SAME.

Civ. 8134.

District Court of Appeal, Second District, Division 2, California.

Feb. 17, 1934.

Automobiles ⚷246(58).

Evidence that motorist, knowing that pedestrians were confused and attempting to cross intersection first, had ample opportunity to avoid accident by turning to left instead of right, warranted instruction on last clear chance.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Separate actions by John E. Fletcher and wife, and by John E. Fletcher, against Morris Starker and another, were consolidated for trial. From judgments for plaintiffs, defendants appeal.

Affirmed.

Fredericks, Hanna & Morton, and Byron F. Story, all of Los Angeles, for appellants.

Thomas T. Robinson, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

John E. Fletcher and Christina Fletcher, his wife, were injured by an automobile owned by defendant Roseman and driven by his agent, Morris Starker, in the course of his employment. John E. Fletcher brought an action to recover the damages sustained by him, and joined with his wife in another action to recover for the damages alleged to have been sustained by her injuries. The cases were consolidated for trial, and judgments were awarded in both cases in favor of the respective plaintiffs and against defendants. From such judgments defendants have appealed.

Appellants admit that the evidence "is probably sufficient as a matter of law to sustain the finding of negligence," but urge that the judgments must be reversed because the court gave an instruction to the jury involving the last clear chance doctrine, which it is contended there is no evidence to support.

Both plaintiffs testified that, after alighting from a Pacific Electric car, they crossed Huntington drive on a line with the sidewalk along Sunset near Arcadia, where it ends in Huntington drive; that, when they were within about four feet of the opposite curb, they were struck "like a shot out of a gun"; that defendants' car had no lights; and that the horn was not blown. Appellant Starker admitted that he did not blow the horn, but testified that the headlights were burning. He also testified that, when plaintiffs were at one end of the intersection, he was at the other; that when he first saw them he put on his brakes and swerved to the right; that "the brakes made a noise and these people got excited in the road when they heard the brakes squeak, and they stopped and hesitated a moment * * * and they ran across"; and that he was traveling at a speed of about thirty-five miles per hour just before the accident. The evidence shows that the car went up over the south curb of Huntington drive, crashed through a fire hydrant and broke off a tree before it came to rest approximately thirty feet beyond the east line of Sunset. Starker places the distance between his car and plaintiffs at the time the brakes were applied as the width of Sunset, viz., forty feet. There is other evidence to the effect that skid marks traced to the car were in evidence for a distance of sixty-seven feet, beginning within ten feet of the east line of Sunset and extending westerly. The jury might well have concluded that the car was approximately thirty-seven feet west of Sunset when the brakes were applied, that the driver then knew that plaintiffs were confused and attempting to cross in front of him, and that he had ample opportunity to avoid them if he had turned to the left instead of to the right, as he did.

In our opinion, there is ample evidence from which the jury might have found that all of the elements necessary to support the doctrine of last clear chance existed, and we see no error in the giving of such instruction.

Judgments affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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136 Cal.App. 782

LANGER v. WOOD et al.

Civ. 8206.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1934.

Rehearing Denied March 22, 1934.

Hearing Denied by Supreme Court April 20, 1934.

Corporations ⚷243(2).

Subscribers to stock prior to but in contemplation of incorporation, and named in articles of incorporation, *held* "stockholders" subject to stockholders' double liability between date of incorporation and date of permit to issue stock subscribed (Civ. Code, § 322; Const. art. 12, § 3).

[Ed. Note.—For other definitions of "Stockholder," see Words & Phrases.]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by John Langer, as receiver of the Automatic Radio Company, a copartnership, against Harry L. Wood and others. From a judgment in favor of the plaintiff, the defendants Charles B. Hamilton, Charles G. Walter, E. M. Heller, and Eugene Battles appeal.

Judgment affirmed.

Hoye & Boehler, of Los Angeles, for appellants.

Guy T. Graves, of Los Angeles, and Treadwell, Laughlin & Treadwell, of San Francisco, for respondent.

STEPHENS, Presiding Justice.

This action is based on section 3 of article 12 of the Constitution and section 322 of the Civil Code (as of April, 1929) for the recovery of stockholders' liability. Judgment went for plaintiff.

The one point raised on appeal may be simply stated and its solution needs no detail as to facts. That point is: Are those who subscribed for stock prior to but in contemplation of incorporation, and who are named in the articles of incorporation as such subscribers, stockholders of the corporation under the Stockholders' Liability Law between the date of incorporation and the date of issuance of the corporation commissioner's permit to issue the stock subscribed?

The trial court answered this question in the affirmative, and we think correctly. The point is not new and has been passed on more or less directly in the following California cases: Mitchell v. Beckman, 64 Cal. 117, 28 P. 110; U. S. National Bank v. Stiller, 216 Cal. 324, 14 P.(2d) 78; Coast Amusements, Inc., v. Stineman, 115 Cal. App. 746, 2 P.(2d) 447; Western Pac. Paper Co., Inc., v. Hollywood Topics, 113 Cal. App. 305, 298 P. 35, and Stewart v. Engelberg, 207 Cal. 595, 279 P. 661.

Judgment affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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137 Cal.App. 26

PEOPLE v. ABILA.

Cr. 94.

District Court of Appeal, Fourth District, California.

Feb. 20, 1934.

1. Automobiles ⚷355(8).

Evidence sustained conviction, for failing to stop and render aid after being involved in automobile accident (St. 1929, p. 544, § 141).

2. Criminal law ⚷1030(1).

Generally, courts of review pass only on questions presented at trial.

3. Indictment and information ⚷199.

In prosecution for failing to stop and render aid when involved in automobile accident, defendant waived variance between information and proof as to identity of person injured in accident by failure to object at trial (St. 1929, p. 544, § 141).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Carmen Abila was convicted of failing to stop and render aid when involved in accident, and he appeals.

Affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was charged with violation of section 141 of the California Vehicle Act (St. 1923, p. 562, § 141, as amended by St. 1929, p. 544). This section provides that the driver of any vehicle involved in an accident resulting in injury or death, who fails to stop and render aid, is guilty of a felony. He was tried before the court without a jury and has appealed from the judgment of conviction.

The court minutes contained in the clerk's transcript show that a trial by jury was waived by defendant. The trial court, by a nunc pro tunc order, corrected the minutes to show the true fact that the trial by jury was waived in open court by defendant and his counsel. The Attorney General has presented a certified copy of this order and moved for a diminution of the record by its inclusion therein. As it is the inherent right and power of a court to cause its records to correctly state the proceedings had (People v. Ward, 141 Cal. 628, 75 P. 306), the motion for diminution of the record is granted and the certified copy of the nunc pro tunc order of the trial court correcting its minutes is ordered filed.

Defendant urges three grounds for a reversal of the judgment. First, that the evidence is not sufficient to sustain the judgment; second, that defendant was denied a trial by jury; and, third, that there was a material variance between the allegations of the information and the proof as to the identity of the person struck by defendant's automobile. The second contention has been disposed of by our order of diminution of the record.

[1] Defendant urges that as no witness testified that he drove the automobile at the time of the collision the evidence is insufficient to support the judgment. We have examined the record and find ample evidence to support the judgment. At about 7:30 o'clock on the evening of October 1, 1933, Sophia Sanchez and her husband were walking on highway No. 101 near the town of San Juan Capistrano when Mrs. Sanchez was struck by a "model A" Ford coupé, the driver of which did not stop, but continued on his way. No witness identified the driver of this car, but the following evidence is ample to support the conclusion that the au-

tomobile was being driven by defendant at the time of the accident.

Defendant owned a "model A" Ford coupé. On the day in question he drove his coupé, with Joe Briziana as a passenger, to a dance south of San Juan Capistrano a short time before the accident. Briziana remained at the dance and defendant drove toward highway No. 101. No other person was in the car. Shortly after the accident, defendant was found intoxicated in a house in San Juan Capistrano, his car was parked on the premises, and there was a dent in its right front fender. He admitted his car had been in a collision at about the time of the accident here in question, but claimed it was being driven by Joe Briziana and that the collision had occurred in a part of the town of San Juan Capistrano other than the place of the accident in question here. Defendant on two occasions offered to pay all of the expenses of Sophia Sanchez resulting from the accident if nothing be said about it.

[2, 3] The information charged that defendant drove his automobile on a public highway and struck Sophia Parra. The evidence showed that the person struck was Sophia Sanchez with the exception that two witnesses answered questions in which she was named Sophia Sanchez or Sophia Parra. No objection was made in the trial court that there was any variance between the allegations and the proof. In People v. Gonzales, 69 Cal. App. 609, 231 P. 1014, 1015, it is said: "It is insisted that the judgment should be reversed for the reason that the charge was that the defendants attempted to rob T. Tschanz, while the evidence shows that the name of their victim was Simon Tschanz. This variance appears from the record, it is true, and if we concede without deciding that it was a material variance, we at once observe that no objection was made at the trial to any of the evidence on the ground of variance, nor in fact was the point in any manner presented at the trial, or on motion for a new trial. It has been determined, under a statute to the effect that only questions presented at the trial can be reviewed on appeal, that the claim made in a criminal case that there was a variance between charge and proof cannot first be presented to the appellate court (State v. Padilla, 18 N. M. 573, 139 P. 143), and in this state it has been held many times that the point that there is a variance between pleading and proof in civil cases cannot first be made on appeal. Stockton, C. H. & A. Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 P. 565; Robson v. O'Toole, 60 Cal. App. 710, 214 P. 278. In the opinions in the two cases cited, and in the many others referred to in them, the reason given for the rule in civil cases is that an amendment of pleadings may be allowed, and justice thus be done, if the point be made in the trial court. There appears to be an equally cogent reason for the application of the principle in criminal cases. If the question be raised in the trial court, the pending charge may be dismissed and a new indictment be found, or a new information be filed, thus aiding the administration of substantial justice, and wiping out what are sometimes exceedingly technical defenses. It is to be remembered, too, that the general rule is that courts of review pass only upon questions presented at the trial. This rule has often been applied in criminal as well as in civil cases. People v. Taminago, 35 Cal. App. 238, 169 P. 696; People v. Walton, 53 Cal. App. 35, 199 P. 824. We therefore decide that the point that there was a variance between charge and proof was waived."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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136 Cal.App. 732

SHARPE v. CITY OF LOS ANGELES et al.

Civ. 5031.

District Court of Appeal, Third District, California.

Feb. 16, 1934.

1. Injunction 🔑136(2).

Equity ordinarily lacks jurisdiction to enjoin appointment or removal of public officer, and will not usually enjoin individual from exercising duties of public office pending determination of his legal right thereto.

2. Officers 🔑83.

Technical definition of term "public officer" is not necessarily determinative of equity court's jurisdiction in suit involving individual's title to position as agent of any branch of government.

3. Injunction 🔑81.

Equity court cannot determine right of one employed in city public works depart-

ment's bureau of engineering under ordinance to hold such position, and hence cannot enjoin his dismissal therefrom, though his tenure is determined by civil service law.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Suit by Charles T. Sharpe against the City of Los Angeles and others. From an order granting plaintiff an injunction pendente lite, defendants appeal.

Reversed.

Erwin P. Werner, City Atty., Frederick Von Schrader, Asst. City Atty., and Joseph T. Watson, Deputy City Atty., all of Los Angeles, for appellants.

Lewis E. Whitehead and Earl Glen Whitehead, both of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from an order for an injunction pendente lite which was made in a suit in equity restraining the city of Los Angeles from discharging the plaintiff as an employee in the bureau of engineering in the department of public works of that city. It is claimed he had attained permanent tenure under civil service. The issue on appeal is whether a court of equity has jurisdiction to determine by injunction the tenure of an employee of a city as distinguished from an officer.

In the complaint for injunction it is alleged that the plaintiff was employed in the bureau of engineering of the department of public works in the city of Los Angeles pursuant to an ordinance designating the number of persons to be employed in that department, and that he had secured permanent tenure therein under civil service and was entitled to retain his position by virtue of seniority; that the city of Los Angeles subsequently passed an ordinance dispensing with the service of several employees in that department, including petitioner, and had reclassified those who remained; that this last-mentioned ordinance is in conflict with the rules of civil service which are in force in said city; and that the petitioner has been notified by the city of Los Angeles of his discharge, and, unless it is restrained therefrom, the plaintiff will be wrongfully dismissed. The defendants demurred to the complaint on the ground that it fails to state facts sufficient to constitute a cause of action in equity authorizing the issuing of a writ of injunction. The demurrer was overruled. An injunction pendente lite was thereupon issued restraining the city of Los Angeles and its officers and agents from discharging the plaintiff from the engineer's office in the department of public works. From the order directing the issuing of an injunction pendente lite the defendants have appealed.

[1] It is well established that equity ordinarily lacks jurisdiction to enjoin the appointment or removal of a public officer, and that injunction will not usually be granted to restrain an individual from exercising the duties of such office pending the determination of his legal right thereto. In other words, title to a public office may not be tried in a suit for injunction. Barendt v. McCarthy, 160 Cal. 680, 118 P. 228; Purviance v. Compton, 94 Cal. App. 277, 271 P. 120; In re Sawyer, 124 U. S. 200, 8 S. Ct. 482, 31 L. Ed. 402; White v. Berry, 171 U. S. 366, 18 S. Ct. 917, 921, 43 L. Ed. 199; High on Injunctions (4th Ed.) p. 1325, § 1312; 32 C. J. p. 258, § 406; 46 C. J. p. 1007, § 215; 14 R. C. L. p. 374, § 76. In the authority last cited, the general rule regarding a controversy over the title to a public office is stated as follows: "It is a general rule that a court of equity has no jurisdiction in matters of a political nature, and that no injunction to protect a person in the enjoyment of a political right or to assist him in acquiring such a right will be granted. No such jurisdiction has ever been conceded to a chancery court, either by the English or American judiciary. * * * To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government, or of the courts of common law. In line with this principle courts of equity have uniformly refused to interfere by injunction in controversies relating to public office. Thus, such right as a person may have to hold a public office is not a property right which equity will enforce, although he may have a right in the emoluments of his office which he may enforce in an action at law to recover the same, nor, on the other hand, will it interfere by injunction to prevent a person from entering on the duties of a public office."

Likewise, the late Mr. Justice Harlan, speaking for the United States Supreme Court, said in rendering the opinion in the case of White v. Berry, supra: "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is intrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute."

Quoting approvingly from the case of Morgan v. Nunn (C. C.) 84 F. 551, that court further says: "A court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another."

[2] The respondent, however, contends that the foregoing rule with respect to the jurisdiction of a court of equity has no application to the present case, for the reason that the petitioner is an employee of the city of Los Angeles and not an officer. Several authorities are cited which attempt to define an officer as distinguished from a mere employee. Frequently this distinction becomes vital to the determination of the particular issues which are involved in litigation. We are, however, of the opinion that the technical definition of the term "public officer" is not necessarily determinative of the jurisdiction of equity in a suit involving the title of an individual to his position as an agent of any branch of government, federal, state, or municipal.

The real issue in the present case is whether the petitioner is acting as an agent of the city of Los Angeles in his employment under the authorization of an ordinance of that city, or whether he is an independent employee who is serving the city in a contractual relation. It is not a question as to whether the plaintiff holds a public office in the technical sense in which that term is frequently used, but rather, Does the controversy over the plaintiff's alleged right to hold the position which he occupies necessarily involve the performance of prescribed duties within the functions of the municipal government of the city of Los Angeles? It has been determined that the duties and powers which are to be exercised by an individual determine his relationship to the municipality or other governmental agency, rather than the mere name which is assigned to his position, 21 Cal. Jur. 824, § 8; Coulter v. Pool, 187 Cal. 181, 186, 201 P. 120, 123; Logan v. Shields, 190 Cal. 661, 214 P. 45; Rand v. Collins, 214 Cal. 168, 172, 4 P.(2d) 529; Staheli v. City of Redondo Beach, 131 Cal. App. 71, 79, 21 P.(2d) 133. In the Coulter Case, supra, regarding the status of a public officer, it is said:

"Its definition and application depend, not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. Knox v. Board of Sup'rs of Los Angeles County, 58 Cal. 59; Mechem on Public Offices, § 4; Hartigan v. Board, 49 W. Va. 14, 38 S. E. 698. A public office is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. State v. Jennings, 57 Ohio St. 415, 63 Am. St. Rep. 723, 49 N. E. 404.

"A public officer is a public agent, and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting."

[3] Applying the facts in the present case, as they are related in the complaint, to the foregoing definition of a public officer, as that term is there used, for the purpose of determining whether equity will assume jurisdiction in a controversy involving the right of an employee to hold his position, it clearly appears the plaintiff was employed in the bureau of engineering of the public works department of Los Angeles as an agent of that city for the performance of specific duties incident to the government of the city. His status in that capacity divests equity of jurisdiction to determine his right to hold the position, and precludes the issuing of an injunction to prevent his dismissal. His position in that office was created by ordinance, with a fixed tenure prescribed by the terms of civil service. His duties as such agent of the city are classified and prescribed by ordinance. Neither the term of his employment nor his duties are "transient, occasional, incidental," contractual, or uncertain. Upon the contrary,

they are fixed by law. In effect he is an assistant in the engineer's office to perform designated duties for the city which are strictly within the political functions of the municipality. For that reason, equity will not interfere with the affairs of the city, and an injunction will not issue to restrain the dismissal of such an officer.

Nor is equity vested with jurisdiction under the circumstances of this case merely because the tenure of the plaintiff's position is determined by resort to the civil service law, instead of having been definitely fixed by ordinance or statute. In the case of White v. Berry, supra, it was held that the removal of a gauger who was appointed in the federal service, and whose tenure was determined by the rules of civil service, could not be enjoined by equity, even though his removal was in violation of law. In support of his contention that equity has jurisdiction in the present case for the reason that the plaintiff is a mere employee of the city of Los Angeles, as distinguished from an officer thereof, the respondent cites 6 McQuillin's Mun. Corp. (2d Ed.) p. 545, § 2666, which reads as follows: "Equity has jurisdiction to restrain municipal officers from removing employees until the validity of such action may be determined by virtue of charters and ordinance provisions."

The case of State v. Lucas, 236 Mo. 18, 139 S. W. 348, 351, is the only authority cited in support of that declaration of law. In the Lucas Case it was held that injunction will lie to restrain the unlawful dismissal of certain clerks employed in the waterworks department of Kansas City, notwithstanding the fact that their tenure was fixed by civil service. The court said: "These plaintiffs are not [public] officers; they are mere clerks, mere employees." In a proper case, under circumstances showing that an employee is engaged in performing work for a municipality of a contractual nature, and that he is not an agent for the city in the performance of its governmental affairs, it seems clear that equity will assume jurisdiction to determine his property rights by means of injunction. Apparently the Lucas Case extends the jurisdiction of equity far beyond that limitation. That case was decided on the theory that a mere employee, as distinguished from an officer, possessed property rights in the tenure of his position which entitle him to resort to equity. If that is the purport of the decision, it is in conflict with the great weight of authority in nearly every other state in the Union, as well as in the federal courts. In applying the principle which declares that equity will not interfere to determine the title to a position which involves the governmental affairs of a city, state, or nation, we are unable to distinguish any essential difference between an officer and an employee whose position is created by ordinance or statute with his duties classified and prescribed and his tenure fixed by civil service rules. Both classes appear to be agents for the performance of specific governmental functions.

In California it has been definitely held that a controversy over the right to hold office involves none of the characteristics of property rights. In Matter of Carter, 141 Cal. 316, 74 P. 997, it is said in that regard: "Here we have a controversy between the office holder and that functionary of sovereignty who is invested with the power of removal, and the question is whether or not the officer (fire commissioner) has a right to the office which the sovereign power which conferred it must respect as private property. The authorities are uniform that in such a controversy the office has not the characteristics of property. Throop on Officers, §§ 345, 346, subds. 17–19; Conner v. Mayor, etc., of City of New York, 5 N. Y. 296; Id., 2 Sandf. [4 N. Y. Super. Ct.] 369; Nichols v. MacLean, 101 N. Y. 533, 5 N. E. 347, 54 Am. Rep. 730; Hoboken v. Gear, 27 N. J. Law, 273; Kenny v. Hudspeth, 59 N. J. Law, 322, 36 A. 662; State v. Council, 53 Minn. 242, 55 N. W. 118, 39 Am. St. Rep. 595; Donahue v. County of Will, 100 Ill. 94."

Among the authorities there appears to be some confusion in the application of the general rule that injunction will not lie to determine title to a public office. Missouri, Kentucky, and Texas have held that injunction would lie under certain circumstances. The great weight of authority in most of the states and in the federal courts adheres strictly to the rule that equity has no jurisdiction in cases affecting the tenure of public officers. In the case of City of Electra v. Taylor (Tex. Civ. App.) 297 S. W. 496, 499, the court held that: "Inasmuch as plaintiff (Chief of Police) alleged merely that the defendants were threatening to relieve him of his official positions, and inasmuch as plaintiff was still occupying said positions at the time of the filing of the suit, we hold that injunction rather than mandamus was the proper remedy."

So also in the case of Bonner v. Belsterling (Tex. Civ. App.) 137 S. W. 1154, it was held that injunction was a proper remedy on the part of a duly elected member of a city board of education to prevent another claimant from wrongfully ousting him from office. These last-mentioned cases appear to be in conflict with the well-established rule in regard to trying title to a public office by means of injunction. Indeed, Texas appears to have later reached a different conclusion in the case of Miles v. Logan (Tex. Civ. App.) 265 S. W. 421, 424. In that case, Miles, who was the city clerk of Port Arthur, sought to restrain the city commissioners from removing him from office. The court said: "If appellant is not out of office, he cannot have his injunction to restrain the city commission from removing him. On the allegations of his petition, the power to remove a civil service employee of the city of Port Arthur is vested in the city commission, and the form and manner of removal is fully prescribed by duly enacted city ordinances. It is the law of this state that—'Courts of equity will not interfere to protect a person from removal from office by a man or body of men to whom the power to remove is given by law.'"

In support of the injunction pendente lite, the respondent relies chiefly on the foregoing Missouri, Kentucky, and Texas cases above cited. But he also cites the case of Priddie v. Thompson, 82 F. 186, 190, wherein the United States Circuit Court, quoting with approval from the dissenting opinion which was rendered in the case of In re Sawyer, 124 U. S. 223, 8 S. Ct. 482, 31 L. Ed. 402, says "equity will intervene in a proper case to protect a de facto officer against interference on the part of adverse claimants." The Sawyer Case did not so hold. The Priddie Case, however, has been disapproved and is not in accord with numerous other federal cases which hold exactly the contrary. In the later case of Morgan v. Nunn, 84 F. 551, 554, the United States Circuit Court said: "The same questions arose before Judge Jenkins in Carr v. Gordon [C. C.] 82 F. 373, and Taylor v. Kercheval (before Judge Baker [C. C.]) 82 F. 497, and was by each of those learned judges elaborately considered; and both came to the conclusion that the rules regulating removals in the classified service were mere executive orders, not having the force or effect of law, and that, aside from this, a court of equity will not, by injunction, prevent a removal from office, or restrain an appointment. A contrary view was taken by Judge Jackson * * * in Priddie v. Thompson [C. C.] 82 F. 186, but I find myself unable to concur with the reasoning of that learned judge."

For the foregoing reasons we are persuaded that equity is without jurisdiction to restrain the city of Los Angeles or its agents from discharging the plaintiff. Equity has no jurisdiction to determine the title of the plaintiff to the position which he occupies.

The order granting the injunction pendente lite is therefore reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

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136 Cal.App. 754

EVERTS v. WILL S. FAWCETT CO.

Civ. 1108.

District Court of Appeal, Fourth District, California.

Feb. 19, 1934.

Appeal and error ⟹786.

Appeal would not be dismissed as taken for delay and as involving unsubstantial questions, where appeal was from $200,000 judgment and appellant was forced to abandon counterclaim in larger amount because trial court refused continuance based on alleged inability of principal witness and real party in interest to attend trial.

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by H. W. Everts against the Will S. Fawcett Company, a corporation. Judgment for plaintiff, and defendant appeals, and plaintiff moves to dismiss the appeal or affirm the judgment.

Motion denied.

Oscar Lawler and Jud R. Rush, both of Los Angeles, for appellant.

Clarke & Bowker and A. S. Goldflam, all of Los Angeles, Hickcox & Trude, of Brawley, and Louis Ferrari, of San Francisco, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal or affirm the judgment on the grounds that the appeal was taken for delay only and that the questions involved are so unsubstantial as not to need further argument.

It appears from the opening brief that the judgment entered amounted to more than $200,000; that the respondent was forced to abandon a counterclaim in a much larger

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes amount because it was unable to secure the evidence of certain witnesses at the time set for trial; and that this appeal is based upon the contention that the court abused its discretion in denying a motion for a continuance. Reasons and grounds for a continuance are set forth which, on their face, appear to possess considerable merit. In fact, the trial court, after setting the trial for May 22, 1933, vacated this order on motion of the appellant and reset the case for trial on October 9, 1933, although it later vacated that order and again set the case for May 22, 1933. Subsequently, the court denied two motions for a continuance based, in part, upon the alleged illness and inability of the principal witness and real party in interest to attend the trial. This refusal of a continuance is the basis for this appeal.

It not only appears that an examination of the whole record will be necessary, but the question presented appears to be sufficiently substantial to deserve consideration and one in the decision of which the court should have the benefit of the respondent's assistance.

The motion is denied.

We concur: MARKS, J.; JENNINGS, J.

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137 Cal.App. 53

LESPERANCE v. LEISTIKOW.

Civ. 8143.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1934.

Hearing Denied by Supreme Court April 20, 1934.

Vendor and purchaser ⟹330.

Purchaser's tender of land other than that which contract provided should be conveyed to vendor as part payment of purchase price of vendor's land and failure to consummate contract as agreed gave vendor right of action for value of property purchaser failed to convey.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Leo B. Lesperance against Frederick W. Leistikow. From an order granting a new trial after verdict and judgment rendered in favor of plaintiff, plaintiff appeals.

Reversed.

Harry M. Irwin and Andrew H. Rose, both of Los Angeles, for appellant.

F. A. Stephenson, of Los Angeles, for respondent.

CRAIG, Justice.

From an order granting a new trial after verdict and judgment rendered in favor of the plaintiff, he appealed.

Certain real property described in escrow instructions upon which the parties relied as their agreement having been conveyed by the plaintiff to the defendant, a controversy arose over an asserted discrepancy in the consideration received therefor. After a trial before a jury, a verdict was returned in favor of the plaintiff under directions of the court. The defendant thereupon moved for a new trial upon alleged errors of law, which motion was granted.

Under the terms of their agreement, the appellant as "seller" conveyed to the respondent as "buyer" lands situated in the county of Los Angeles for an alleged total consideration of $160,000 composed of $60,000 in cash and two tracts of land in the Dominion of Canada subject to contracts for their sale to other parties and upon which there remained due and payable approximately $111,477. The respondent also agreed to procure for the appellant a loan in the sum of $20,000 upon said Canadian properties or to furnish such amount in lieu of a loan. There were other agreements which need not here be mentioned. Following said conveyance and after protracted correspondence and delay, there had been paid by the respondent certain amounts of money aggregating about $79,000, and he had caused to be registered in Canada and forwarded to the appellant conveyances and contracts containing descriptions of other and different properties than those specified in their agreement, which latter were promptly returned with a demand for the remainder of the stipulated consideration. No further effort appears to have been made toward consummation of the transaction by the respondent. By uncontradicted evidence it appeared that the vendor should receive $2,000 per acre for eighty acres of land in California, and the verdict and judgment awarded him $91,237.50, consisting of the balance of said consideration and interest thereon.

In support of the order granting a new trial, it is contended upon numerous authorities, which are not questioned and need not be cited, that an action for damages arising from fraud where one party is misled through misrepresentations of the other in an exchange of real properties is governed by elementary rules which preclude a recovery in the instant case. But neither the complaint nor the evidence can be said to present issues subject to such rules, since the contract did not call for property other than that demanded, nor was it represented that the properties conveyed by the respondent were the same as or even equivalent to those constituting the consideration specified. A retention of the subject-matter of the transaction and refusal to pay therefor amounts to deprivation of valuable consideration for which an action may be maintained. In such a case as here presented, the measure of the right to relief is determined by the value of the property which the purchaser failed to convey in consideration of his purchase. Cummings v. Dudley, 60 Cal. 383, 44 Am. Rep. 58; 3 Parsons on Contracts, 215. Cases cited by the respondent are not in conflict with this rule.

The order granting a new trial is reversed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

TOM v. EDDY.*

Civ. 7872.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1934.

1. Eminent domain 🔑153.

Remote grantee of property, where original conveyance was made during pendency of proceeding to condemn property for street purposes, *held* entitled to recover proceeds of condemnation award from assignee of original grantor (St. 1903, p. 376, as amended).

2. Eminent domain 🔑152(1).

Provision of Street Opening Act providing that right to compensation accrues at date of order appointing referee or of order setting suit for trial *held* procedural only, and does not govern substantive right to proceeds of condemnation award (St. 1903, p. 379, § 10, as amended).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Alfred P. Tom against F. J. Eddy. From a judgment of nonsuit, the plaintiff appeals.

Judgment reversed.

Fred N. Arnoldy, of Los Angeles, for appellant.

CONREY, Presiding Justice.

The question presented by this appeal is the following question of law: When during the pendency of an action to condemn real property under the Street Opening Act of 1903 (St. 1903, p. 376, as amended), title to the property is transferred by grant from the defendant A to another person B, but the condemnation action proceeds to judgment in the name of A as defendant; and after the entry of the interlocutory judgment, but before the compensation has been paid by the condemnor and before any final decree, the property is granted by B to C; and in the several deeds of transfer no provision is made concerning the ownership of the money to be paid by the condemnor, and no contract is made relating thereto; and thereafter defendant A assigns to D his claim of right to receive the said money—as between the grantee C and the assignee D, which of these two is entitled to receive the award?

In this action the facts are in substance those assumed in the above-stated question. In addition, it appears that the plaintiff, Alfred P. Tom, to whom the property was conveyed, gave notice to the condemnor, of his claim to the award, before the claims of the defendants in the condemnation action, to said award, had been assigned to defendant Eddy, and before the money had been paid to him. The plaintiff had no knowledge that said money was being paid to Eddy, until that payment had been made. Upon proof of these facts, in this action of the plaintiff Tom to recover said money from Eddy, the defendant Eddy moved for a nonsuit upon the ground that plaintiff was not the owner of the parcels condemned at the time the right to compensation for the taking thereof accrued, and particularly upon the ground that under the provisions of section 10 of the Street Opening Act of 1903 (St. 1903, p. 379, as amended), the right to such compensation accrues at the date of the order appointing referees or of the order setting the condemnation suit for trial. The motion was granted, and judgment of nonsuit entered. From this judgment the plaintiff appeals.

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*PER CURIAM.
Good cause appearing, now on the court's own motion the decision of this appeal, filed herein February 21, 1934, is vacated and set aside, and the cause resubmitted for decision.
For subsequent opinion see 31 P.2d 443.

[1, 2] By a recent decision, Security Co. v. Rice, 215 Cal. 263, 9 P.(2d) 817, 82 A. L. R. 1059, the Supreme Court decided the question at issue here, and that decision upholds the contention of appellant that the money belongs to him. Further, we are of the opinion that the provisions of section 10 of the said Street Opening Act of 1903 (St. 1925, p. 242) were intended only to regulate matters of procedure, including a rule which fixes the time with reference to which the question of value shall be determined, in an action of condemnation under the authority of that law. As was said in City of Los Angeles v. Oliver, 102 Cal. App. 299, 311, 283 P. 298, 303: "That the fixing of some particular date as of which values shall be ascertained is a matter of procedure would seem self-evident." It is wholly independent and apart from the merits of a controversy concerning the substantive right of ownership of the fund created by the award.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

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136 Cal.App. 728

PEOPLE v. O'TOOLE.

Cr. 1318.

District Court of Appeal, Third District, California.

Feb. 16, 1934.

Larceny 🔑65.

Evidence sustained conviction of grand theft.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Harry W. O'Toole was convicted of grand theft, and he appeals.

Affirmed.

J. C. Stoller and O. C. Parkinson, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted by a jury of the crime of grand theft, accomplished by stealing from E. C. Clarenbach the sum of $375. It is claimed the judgment is not supported by the evidence for the reason that no one testified to have actually seen the defendant take the money, and because the identical currency was not identified.

There is no merit in the appeal. Reading the record leaves no doubt of the guilt of the defendant. There is ample evidence to support the verdict and judgment.

Mr. Clarenbach was a tractor mechanic who lived in Stockton. September 27, 1933, he sold a tractor, receiving as part payment therefor the sum of $250 in greenbacks. With this money on his person he spent the afternoon and night drinking and gambling. He won $125 at gambling. He then had $383, consisting chiefly of $20 bills, together with some change in silver coins.

About 5 o'clock on the morning of September 28th, in company with a friend by the name of Walker, he entered the North Hunter Street Saloon in Stockton, where they were well known. Walker persuaded Clarenbach to deposit his roll of greenbacks with Fiscus, the bartender. He left with him $375 in currency, taking a signed receipt therefor. Walker soon went away. After remaining about the saloon for a couple of hours, Clarenbach went out in search of his automobile, which he had parked nearby. At the corner of Market and Center streets he met the defendant in company with two itinerant friends. One of them was named Williams, with whom he had slept the preceding night at the Salvation Army barracks. The defendant had no money. He had known Williams only three days. He borrowed 50 cents from Williams on the assertion that "he was broke." During the time he was in Stockton he lived on charity and displayed no evidence of having any money.

It was about 7:30 on the morning of September 28th when Clarenbach met the defendant and his companion. The defendant begged for money with which to buy his breakfast. Clarenbach invited him to go with him and offered to buy him a meal. They went together to a restaurant and Clarenbach paid for the meal. They then returned to the place where the defendant's companions sat, and Clarenbach and the defendant soon left together, going toward the North Hunter Street Saloon. Half an hour later the defendant returned to the place where his associates still sat upon the running board of an automobile, and boasted of having robbed Clarenbach. Williams testified in that regard: "O'Toole came back and flashed the money under our nose. He said he took it—took it as easy as taking sugar from a baby." The defendant then started out on a profligate spending of money, carefully avoiding the North Hunter Street Saloon. He flourished money about, buying drinks for many and offering a $20 bill from which to pay for a package of cigarettes. He carelessly thrust currency in nearly every pocket of his clothing.

Fiscus, the bartender, testified that Clarenbach and Walker came into his place of business about 5 o'clock on the morning of September 28th, and that a roll of $375 in greenbacks was deposited with him, for which he gave a signed receipt. The receipt was offered in evidence. He said that Walker soon left the place, but that Clarenbach remained for a couple of hours and then went away; that he returned about 8 or 8:30 that morning in company with the defendant, who stood by his side at the bar when the roll of bills was returned to Clarenbach, who placed it in his left-hand shirt pocket. He then treated the defendant and several other bystanders, paying for the drinks with some silver which he had retained. The defendant bought no drinks and offered to treat no one. Within a few minutes after the return of his money, Clarenbach sat down and, resting his head on a card table, he went to sleep. The defendant soon went away.

Between 8:30 and 9 o'clock Clarenbach's friend Walker returned to persuade him to go to work. He found him asleep at the table and discovered that his money was gone. Having been present when the money was deposited with the bartender, he asked Fiscus where it was. Fiscus told him he had returned the money and that so far as he knew it was in Clarenbach's pocket. After a thorough search for the money it was assumed that he had been robbed. Clarenbach testified that the bartender then said: "You been robbed. * * * That fellow, * * * Mr. O'Toole had taken it and left."

At 2 o'clock that afternoon, the defendant was arrested in the Webber Saloon. He was drinking and spending money lavishly. He then had $217 in currency which was distributed among nearly all the pockets in his clothing. The money which he still retained included seven $20 bills. In attempting to account for his sudden acquisition and liberal distribution of currency, he told a very improbable and conflicting story. He said he had worked in the woods and cared for a sick man in Oregon and that he brought with him to Stockton $125 and that he had won $300 at gambling the night of September 27th. He did not remember what sort of a gambling game he had played. He denied that he was at the North Hunter Street Saloon the previous night. He inferred that he had never met Clarenbach. He said that he slept the night before either at a Jap's or in the park. In the transcribed statement which he made to the officers immediately after his arrest, he said:

"When you were arrested you had considerable money? A. I have.

"Q. Where did you get it? A. I earned it. * * *

"Q. Were you at * * * North Hunter Street? * * * A. I don't remember. * * *

"Q. Did you see Mr. Clarenbach here, had you seen him before? A. I can't recall him. * * *

"Q. Where did you stay last night? A. Well, I don't remember. Might have stayed down to the Jap's, or I might have stayed over in the park."

The defendant became a witness at the trial in his own behalf. He then admitted borrowing the half dollar from his friend Williams, and sleeping with him at the Salvation Army barracks the night before his arrest. He also admitted begging for and eating breakfast with Clarenbach, and subsequently going with him to the saloon where he stood by his side and witnessed the return of his roll of greenbacks. He acknowledged seeing Clarenbach place the roll of bills in his left-hand shirt pocket. He also admitted drinking with him repeatedly, but acknowledged that he bought no drinks himself. He said, regarding his visit to the saloon in company with Clarenbach, when he recovered his money: "I drank gin. When I thought I had enough, I excused myself and left."

The foregoing circumstances, including his admission to his companions that he had taken the money from Clarenbach "as easy as taking sugar from a baby"; his sudden acquiring and lavish expenditure of currency, including a large number of $20 bills, immediately after he had been compelled to eat and sleep as an object of charity; the improbable and conflicting story which he told to account for his possession of so large a sum of money; his presence in the saloon and knowledge of the return of the money to Clarenbach, and his opportunity for securing the currency while the owner was asleep, together with the numerous conflicting and improbable statements which he made indicating guilty conscience and warranting an assumption that he had been successfully impeached—furnishes ample evidence to support the verdict and judgment, and leaves no doubt of the defendant's guilt.

The judgment and the orders are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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136 Cal.App. 745

ROGERS v. BURNHAM.

Civ. 1107.

District Court of Appeal, Fourth District, California.

Feb. 17, 1934.

Appeal and error ⇨786.

Where opening brief and moving papers disclosed that serious questions were presented requiring extensive examination of record and careful consideration of authorities, motion to dismiss appeal or affirm judgment was denied.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Margaret Rogers against Donald C. Burnham, as executor of the Estate of Julia Ann Smith, deceased. Judgment for defendant, and plaintiff appeals. On motion to dismiss appeal or affirm judgment.

Motion denied.

Bertrand L. Comparet, of San Diego, for appellant.

Stearns, Luce & Forward, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is a motion to dismiss the appeal or affirm the judgment on the grounds that the court erred in relieving the appellant from her default in the matter of filing a bill of exceptions within the statutory time; that for this reason the court had no jurisdiction to settle a bill of exceptions; and that the points raised in the opening brief are so unsubstantial as to require no further argument.

The case is one involving compensation for services claimed to have been rendered to a deceased person, and the appeal is based upon the contention that the evidence was not sufficient to sustain findings to the effect that such services were not rendered and that there was no account stated between the parties.

The points and authorities in support of this motion are very brief and consist mostly of references to certain portions of the transcript. The nature of the point raised on the appeal and the manner in which this motion is presented, obviously require an examination of the transcript. See The City of Los Angeles v. Los Angeles-Inyo Farms Co., 126 Cal. App. 61, 14 P.(2d) 339; Brown v. Gow, 126 Cal. App. 113, 14 P.(2d) 322; Inga v. Blum (Cal. App.) 22 P.(2d) 34.

It appears from the opening brief and the moving papers that serious questions are presented, as to the sufficiency of the evidence and as to an abuse of discretion on the part of the trial court, which will require an extensive examination of the record as well as a careful consideration of the authorities, in all of which the court is entitled to the assistance of the respondent.

The motion is denied.

We concur: MARKS, J.; JENNINGS, J.

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136 Cal.App. 777

SHORES v. GUNN.

Civ. 8185.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1934.

Appeal and error ⇨1011(1).

Decision of trial judge that plaintiff was real party in interest in suit on note *held* conclusive, where evidence was conflicting.

Appeal from Superior Court, Los Angeles County; James H. Pope, Judge.

Action by Olve J. Shores, also signed Ida Stockton Shores, against F. F. Gunn. Judgment for plaintiff, and defendant appeals.

Affirmed.

F. R. McNamee and Luke J. McNamee, both of Los Angeles, for appellant.

Olve J. Shores, in pro. per.

STEPHENS, Presiding Judge.

This is a suit on a promissory note signed by defendant in favor of Ida Shores. The original complaint alleges an assignment or indorsement of the note to Olve J. Shores. The case was called for trial, and the court permitted the amendment of the title to the complaint so that the plaintiff should be "Olve J. Shores, also signs Ida Stockton Shores." The cause came on for trial, and the plaintiff testified that she was Ida Stockton Shores, and that she also used the name of Olve J. Shores, and in effect that she was the Ida Shores named in the note as payee. She produced and surrendered the note to the court, and testified that she had loaned the sum of money mentioned therein to the signers, one of whom was defendant in the trial court, and that the note had not been paid. The only defense to the note interposed at the trial was an attempt to establish through a deposition theretofore given by plaintiff that the real party in interest was Olve J. Shores and not Ida Stockton Shores, the individual who appeared as the party plaintiff in the case.

The evidence fell far short of establishing this. In fact, it did not cause more than a color of conflict. Of course, even if a conflict of evidence was created by the evidence, its issue was final with the decision of the trial judge. This decision and the judgment went for plaintiff.

Judgment affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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137 Cal.App. 1

PEOPLE v. GRAVES. *

Cr. 2388.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1934.

Hearing Denied by Supreme Court March 22, 1934.

1. Criminal law ⚷338(2).

Circumstantial evidence may be inadmissible because too remote, but every case depends upon its own facts, and circumstance, if extreme remoteness is not apparent, should be admitted and its weight left to jury.

2. Criminal law ⚷338(2).

Determination of admissibility of circumstantial evidence is whether it can afford any rational inference in connection with other evidence as to point under investigation.

3. Bribery ⚷10.

In prosecution against county supervisor for receiving bribe to influence approval of compromise settlement with dam contractors, evidence showing withdrawal of large sum of currency from bank by dam contractors immediately after contractors received payment under settlement *held* admissible.

4. Criminal law ⚷696(3).

In prosecution against county supervisor for receiving bribe, refusal to strike out, at close of people's case, evidence showing withdrawal of currency from bank by dam contractors, immediately after contractors received payment under settlement with county supervisors, on ground evidence was not connected with defendant, *held* not error, in view of other circumstantial evidence.

5. Criminal law ⚷563.

Proof of corpus delicti need not be sufficiently strong to uphold conviction of itself, prima facie proof of corpus delicti being sufficient.

6. Criminal law ⚷535(2).

In prosecution against county supervisor for receiving bribe to influence approval of compromise settlement with dam contractors, testimony of defendant before grand jury during investigation of compromise settlement *held* admissible as against objection that extrajudicial statements of defendant are inadmissible, where proof of corpus delicti is lacking.

7. Bribery ⚷11.

In prosecution against county supervisor for receiving bribe to influence approval of compromise settlement with dam contractors, evidence *held* to sufficiently establish corpus delicti.

8. Criminal law ⚷564(1).

In prosecution against county supervisor for receiving bribe to influence approval of compromise settlement with dam contractors, evidence showing that money was given for defendant's vote in Los Angeles county, on compromise settlement, *held* to sufficiently establish venue in such county.

9. Criminal law ⚷829(15).

In prosecution against county supervisor for receiving bribe to influence approval of compromise settlement with dam contractors, refusal of defendant's instruction on circumstantial evidence, if error, *held* not prejudicial in view of other instructions covering same subject (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Sidney T. Graves was convicted of receiving a bribe, and he appeals.

Judgment and order denying motion for new trial affirmed.

Hearing denied by Supreme Court; PRESTON and LANGDON, JJ., dissenting.

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*Rehearing denied 30 P.(2d) 508.

Jerry Giesler, Randall & Bartlett, and Kenneth W. Kearney, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Buron Fitts and Frank Stafford, both of Los Angeles, for the People.

STEPHENS, Presiding Justice.

The defendant in the trial court, the appellant here, was tried before a jury upon the accusation contained in the indictment about to be set out. The jury found the accused guilty, and after a motion for a new trial had been made and denied the accused prosecuted this appeal from the judgment and from the denial of the motion for a new trial.

The indictment is as follows: "The said Sidney T. Graves is accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment, of the crime of bribery, a felony, committed as follows, to-wit: that the said Sidney T. Graves on or about the 7th day of February, 1930, at and in the County of Los Angeles, State of California, did wilfully, unlawfully, corruptly and feloniously receive and agree to receive a bribe from Felix Kahn, Allan MacDonald, Charles R. Ross, MacDonald & Kahn, Inc., a corporation, Fisher-Ross-MacDonald & Kahn, Inc., a corporation, John Doe, Richard Roe and Jane Doe, a sum of money, to-wit, Eighty Thousand Dollars ($80,000.00) lawful money of the United States, upon the agreement and the understanding that his official vote, opinion, judgment, and action should be influenced thereby and should be given in a particular manner, to-wit, to vote in favor of the acceptance by the Board of Supervisors of the County of Los Angeles, acting ex officio as the Board of Supervisors of the Los Angeles County Flood Control District, of a certain compromise and claim which was then and there offered to be made and demanded by the said Felix Kahn, Allan MacDonald, Charles R. Ross, MacDonald & Kahn, Inc., a corporation, Fisher-Ross-MacDonald & Kahn, Inc., a corporation, John Doe, Richard Roe and Jane Doe, and the payment of the sum of Eight Hundred Thirty Thousand Seven Hundred Sixty-five and 90/100 Dollars ($830,-765.90) by the said Los Angeles County Flood Control District to the said Fisher-Ross-MacDonald & Kahn, Inc., a corporation, Felix Kahn, Allan MacDonald, Charles R. Ross, MacDonald & Kahn, Inc., a corporation, John Doe, Richard Roe and Jane Doe, which said offer of compromise and claim and payment were then and there pending before and to be considered by the said Board of Supervisors of the County of Los Angeles, then and there ex officio acting as the Board of Supervisors of the Los Angeles County Flood Control District, the said Sidney T. Graves and the other members of the said Board of Supervisors being then and there the duly elected, qualified and acting Board of Supervisors of said County of Los Angeles."

The supervisors of the county of Los Angeles are ex officio supervisors of the Los Angeles county flood control district. The defendant (appellant) held the office of supervisor of Los Angeles county all through the several years in which the flood control district was actively considering the construction of a large dam in the San Gabriel Canyon of the Sierra Madre Mountains. As a practical method of attending to the various kinds of business duties falling upon the board, it created committees or departments, each supervisor being the chairman of a committee. The chairman gave his particular attention to the specific business assigned to his committee or department. One of these committees handled or paid particular attention to the flood control business and policy of the district, and was denominated the flood control and buildings committee. Appellant was the chairman of this committee and the active head of its affairs throughout the happening of the events to which we are about to turn our attention. The construction of this dam alone was a stupendous undertaking, and the "district," as we shall herein refer to the organization, was equipped with offices, employed a chief engineer and assistants, an attorney, and a firm of attorneys as special attorneys. The assistance of the county counsel was also available to the district.

On the 7th of December, 1928, a contract for the construction of the dam was awarded to a group of four individuals, Claude Fisher, Charles P. Ross, Allan MacDonald, and Felix Kahn, upon their bid of $11,250,040. By and with the consent of the board, the contract was assigned to a corporation entitled Fisher, Ross, MacDonald & Kahn, Inc. By the use of the word "contractor" herein it will be understood that we refer to this corporation. In due time actual work began and considerable work had been done when, during the month of September, 1929, an earth slide occurred and revealed a defective rock base. Subsequent to the letting of the contract, a law had been enacted requiring the consent of the state engineer for the construction of a dam of the character contemplated by the contract to which reference has been made. This consent had not been obtained before the slide occurred, but soon thereafter the state engineer was requested by the board to examine and report on the site, and thereafter and after examination said engineer withheld his approval and officially disapproved thereof. Immediately after the slide the board of supervisors, herein generally referred to as the board, notified the contractor not to proceed further, and after the state engineer's report, formally canceled the contract and abandoned the construction of the dam. The contractor protested and threatened suit in court for damages. The county counsel, the flood control attorney, and the firm of attorneys employed as special counsel advised the board in writing that the district would not be liable for prospective damages, since the work was stopped and the dam was abandoned because the state engineer had withheld his approval and also because of the discovery through the slide that the foundation work made the dam unsafe. They also advised the board that a defense could possibly be made that the contractor knew of the fault before they bid on the job and that they withheld such information from the board. During the three months following the abandonment, negotiations for a settlement were carried on in which appellant, representatives of contractor, engineers and attorneys representing both sides, and sometimes, though not to any great extent, other members of the board, participated. These negotiations resulted in a settlement whereby the following sums for the items mentioned were agreed to be paid and were paid to the contractor, and the contract was by mutual consent at an end:

"The Settlement.

"For 83,886 cu. yds. of excavation work not paid for at the contract price of $2.95 per cu. yd.	$247,463.70
Amount held back on excavation work	203,479.20
For work done pending settlement	8,044.00
For interest and necessary expenses during part. shut down at $3000.00 per day	279,000.00
Total on main compromise	$737,986.90
For buildings and equipment at site	92,779.00
"Grand total	$830,765.90"

The date of this settlement was January 30, 1930. After agreement that the compromise payments should be as just recited, and just before the official vote thereon, the contractors filed a claim against the district with the board for the sum of $4,290,459.20. At the session of the board at which the vote to compromise was taken, the attorney for the contractors was asked if a claim had been filed, and he answered: "Yes, but I do not think it is necessary to do it. The claim filed included what profit we would have made, $4,290,459.20." Contractor had already been paid $1,800,000 in progress payments on the contract. Appellant was active in the matter of arriving at a settlement. At one time he said he did not want the matter to drift into litigation. In the matter of receiving an appraisal of the buildings and materials at the site he evidenced a desire for speed by requesting a report as soon as it could be made. Just before the meeting for passage of the compromise appellant requested that the flood control attorney be informed that he need not attend the meeting. It was the usual practice for the chairman of the committee having in charge the matter before the board to move the adoption of any motion relative thereto, and in the case of the motion to adopt the compromise agreement appellant was the actor. All supervisors voted for it and all of the attorneys approved it. This covered everything but the buildings and equipment, and a warrant was duly drawn, delivered, and cashed. On February 6th, after advertisement for bids (to technically cover a legal requirement), the purchase of buildings and equipment was made and a warrant for the sum of the agreement was drawn on the same day.

On the day the compromise was before the board for approval, appellant made the statement to the board that the contractors were not being paid a cent of damages. This, of course, could hardly be the fact and he could not have believed it true, for a large part of the payment was for damages through stoppage of the work at $3,000 and $4,000 per day. It also paid for a large yardage excavated outside of the pay lines and therefore outside of the contract, if we take the district's chief engineer's figures as accurate. This is the state of the case at the conclusion of the compromise.

On February 7th, or the day following the payment for the buildings and material, a man in San Francisco appeared at the Crocker First National Bank and gave his name as C. E. Dutton. He produced $40,000 in currency and purchased a cashier's check payable to Alice T. Richardson; and on the same day a man appeared at the Anglo-California Bank in the same city, gave the same name, and produced $17,000 in currency with which he purchased a cashier's check payable to Pearle Finch. On this same day appellant was absent from a meeting of the board but attempted to have it recorded that he was present. On the next morning he appeared in the safety deposit department of a bank in Los Angeles, where he had a safety deposit box rented. On February 21st appellant again appeared at the safe deposit department of the latter bank and on the same day he presented the $40,000 cashier's check to the American Mortgage Company in payment of a second trust deed on the Ray Manor apartment house in Los Angeles. The note representing the indebtedness was indorsed to the payee of the check, Alice T. Richardson. The evidence further shows that the indorsement upon the check, "Alice T. Richardson," was forged by appellant. Thereafter the title to the Ray Manor apartment house was quieted in superior court against Alice T. Richardson of the $40,000 indebtedness in favor of appellant and his wife. Alice T. Richardson was at all of these times an aged invalid aunt of appellant's, living with him and his wife, and the evidence is clear that she never had any interest in this check nor the funds it represented. The evidence further shows that the $17,000 check drawn to Pearle Finch was deposited on the said 21st day of February to the account of Pearl E. Finch (variation in name intended) at Hermosa Beach, after the signature of the payee had been forged by appellant. Thereafter $13,146 of this money was paid by appellant in discharge of an incumbrance on another apartment house the title to which stood in his and his wife's names, and thereafter $3,853.40 thereof was placed in the bank account of appellant's wife. Pearl E. Finch was also a relative of appellant, and it is clear that she never had any interest in the check nor the money it represented.

On the day the two cashier's checks were purchased in San Francisco for a total sum of $57,000 in currency, the firm of MacDonald & Kahn (interested in the contract) withdrew from their account in the Wells Fargo & Co. Bank in San Francisco the sum of $80,000 in currency. The above was the status of the evidence when the state began the introduction of the testimony given by appellant under oath before the grand jury of Los Angeles county.

Appellant was subpœnaed to appear before the grand jury and there he was informed that the subject of the inquiry related to the San Gabriel dam matter. He was questioned at length about his acquisition of the $57,000 represented by the two cashier's checks. Without attempting to detail the testimony, suffice it to say that appellant related an unbelievable story of a Mr. Dutton who had years ago been loaned as large an amount of the Graves family money as $90,000. Later appellant denied that the loan was that much. Appellant's story about Dutton was vague and general. The latter was sometimes in Vancouver, B. C., but he seems to have rarely stayed any one place long enough to receive mail. Appellant testified that he was not in San Francisco on February 7th, and that Dutton had sent or brought the cashier's checks to him in Los Angeles. The whole story was incredible, inconsistent, contradictory, and upon its face a tissue of untruth so palpable that no part of it could be given any credence. The fact that appellant was in San Francisco masquerading under the name of Dutton, and that he received at least $57,000 in currency and later handled it in a way to demonstrate that he was concealing his possession of it, together with his mythical explanation of its source, constitutes a statement of fact from which no other deduction could be drawn than that the most powerful motive existed for concealing not only the possession but the source of the money. In fact, his own story, analyzed in the light of truth and reason, practically amounts to a confession that the money was ill-gotten. No evidence has been introduced and no argument or claim has been made to the trial or appellate court in contradiction of this conclusion, excepting only appellant's plea of not guilty to the indictment.

The appellant as defendant in the trial court offered no evidence, and the jury returned a verdict of guilty. In the course of the trial Allan MacDonald and Felix Kahn, two of the original bidders on the contract and who continued interested in the assignee corporation as members of the firm of MacDonald & Kahn, were sworn and refused to testify upon the ground that their testimony might tend to incriminate them. They were also subpœnaed to bring the books of their corporation, but they stated from the witness stand that they had not done so because they were not in possession of them. All of the testimony regarding the withdrawal of $80,000 in currency from the bank by MacDonald & Kahn was objected to by appellant upon the ground that it was irrelevant and not in any way connected with him. The objection was overruled. Of course, the case was prosecuted upon the theory that the currency withdrawn from the bank by MacDonald & Kahn, or at least $57,000 thereof, was delivered to appellant in payment of a corrupt agreement between the contractor and appellant as to the settlement hereinbefore detailed. The attitude of appellant as to the objection just referred to is well expressed in his opening brief on appeal, as follows: "The evidence disclosed that the contracting firm of MacDonald & Kahn at that time was apparently accustomed to dealing with large sums of money. They had received but recently this settlement from the county of Los Angeles, amounting to almost a million dollars. Is it unreasonable to assume, while we are discussing guesswork, that an $80,000 withdrawal even in currency might not necessarily be anything unusual for a firm accustomed to doing business in amounts of this magnitude? How could the jury say that this money was not withdrawn for any other reason that might suggest itself to one's mind?"

All of the evidence as to the testimony of appellant before the grand jury was objected to on the ground that it was an extrajudicial statement and could not be admitted as the corpus delicti had not been laid. This objection was also overruled.

Appellant advances five points in his claim for reversal of the conviction. The first one is the point above made as to the withdrawal of the currency from the bank. The second one is the point above made as to the corpus delicti. The third is that the evidence is legally insufficient to establish the corpus delicti. The fourth is that the evidence was and is legally insufficient to establish venue in Los Angeles county. The fifth is that the court erred in refusing certain instructions on circumstantial evidence. We shall discuss these assignments in their order.

I. *Was the testimony as to the $80,000 properly admitted?*

[1-3] In the approach of this question we are mindful of the fact that this case is one of first impression, in a sense. Both the state and the appellant assert in their briefs that they have been unable to discover any case in the books where the issues in a bribery case have depended as largely on circumstantial evidence as does this one. Neither side asserts that a bribery case under such conditions cannot successfully be presented, but both tacitly admit that great difficulty is encountered. As this exceptional quality of the case bears heavily upon the point at hand, we shall enter at once upon its consideration.

A study of cases shows a confusion in the minds of some courts between the admissibility of a circumstance in evidence and its weight when admitted. Of course, a circumstance may be so remote as to be of no practicable use and should therefore be held inadmissible, but every case must be considered in its own light, and if extreme remoteness is not apparent the circumstance should be admitted and its weight left to the jury. Again, a circumstance may, when introduced, seem very remote; but when considered with the other evidence both direct and circumstantial it may bridge a gap in the evidence. Two cases are never exactly alike. They may indeed have great similarity and yet be just different enough for the same fact in evidence to be extremely significant in one and useless in the other. It would appear, therefore, that the examination of analogous cases can help but little in questions of admissibility of circumstantial evidence, and perhaps less in the process of measuring the weight of such evidence.

In the old case of Rex v. Burdett, 4 B. & Ald. 123, we find this quotation: "Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive [circumstantial] proof, or leave the worst crimes unpunished." The theory upon which evidence of circumstances is admitted as evidence in the trial of a case is not that each circumstance stands flawless in its proof of the ultimate fact, but that each certain circumstance has a relation to and points reasonably to the fact sought to be proved. "The question [of admissibility] is not as to the value or strength of the testimony, but whether it can afford any rational inference in connection with the other evidence in the case, as to the point under investigation. Though certain testimony offered may appear to be vague by itself, and altogether inconclusive, and apparently irrelevant, it may be made certain in its character, and plainly relevant, by other facts in proof. If a case turns on a great variety of circumstances, facts seemingly unimportant when separately considered may assume importance when considered in connection with others. And so no evidence relevant to the issues can be rejected on the ground that, unassisted by other testimony, it will not establish the point in issue." Ency. Ev. p. 113, vol. 3.

Burrill, in his treatise on Circumstantial Evidence, at page 193 thereof, treats of the use of circumstantial evidence as follows: "And the intrinsic character of the facts themselves, enables the jury to deal with them as they would with a similar body of facts affecting their own private interests, where the conclusion necessary to be formed would be one upon which some important action of their own was to be founded. It was well remarked, in a late important case (Commonwealth v. Webster, Bemis' Rep. 466, 5 Cush. (59 Mass.) 295, 52 Am. Dec. 711), that 'the common law appeals to the plain dictates of common experience and sound judgment, and the inference to be drawn from all the facts must be a reasonable and natural one.'"

It would seem, then, that in the process of unfolding the evidence in the trial of the instant case, the proof of which by its very nature depends almost wholly upon circumstances, the fact of the withdrawal of the large amount of currency would be admissible evidence and its weight would be affected largely by its relation to other circumstances. This fact would be very important when joined with the fact that immediately following the payment on the compromise, appellant went to the city wherein the contractors maintained their headquarters and there became possessed of a large sum of money in currency, and acting under an assumed name disposed of it as hereinbefore shown. Notwithstanding the argument of counsel that contractors were used to handling large sums of money, the present commercial practice of transferring credit by check from bank to bank in the discharge of obligations seems to mark the withdrawal of such a large sum of currency as an unusual circumstance. We think the evidence was properly admitted as a circumstance in the unfolding of the case. People v. Getty, 49 Cal. 581; People v. McClain, 115 Cal. App. 505, 1 P.(2d) 1085.

[4] We now come to the question as to whether or not the court should have granted appellant's motion to strike, made at the conclusion of the people's case, upon the ground that the evidence or circumstance was not connected with appellant. The question before us is, as we see it: Was the circumstance so remotely related to the other circumstances of the case as to be of no assistance in arriving at the truth? If this circumstance, being but one of all of the circumstances of the case, though a necessary one, and all of the circumstances including this one, point consistently toward the fact of guilt, and are not explainable except upon the hypothesis of guilt, each has borne its burden and was properly admitted and was properly left in the case for the consideration of the jury.

What other hypothesis than guilt in this case can appeal to the plain dictates of common experience and sound judgment, to paraphrase Chief Justice Shaw in the Webster Case hereinbefore cited? What other hypothesis do the circumstances in this case point to? The jury had to determine the momentous question upon the evidence before it. The evidence under objection is entitled to remain in and the court was not in error when it denied the motion to strike it from the evidence if, when fitted together as a mosaic with the other circumstances or facts, pictured guilt beyond reasonable doubt and to a moral certainty. If some of the mosaics were missing they could have been supplied by appellant himself, who, within his rights, remained silent throughout the trial. But it was within his power to supply the whole truth of the matter being inquired into. Under these conditions the law does not permit him to complain if less than absolute certainty or less than demonstration, and only moral certainty beyond reasonable doubt is taken as sufficient to establish guilt. The anxiety of appellant to settle the case out of court possibly could have been explained by upright reasons but it is consistent with guilt. The desire to have the flood control attorney stay away from the meeting may have been based upon good, legitimate reasons, but the attorney had expressed his belief that no liability existed and it may be that he would have been in the way. Appellant's expression that no damages were included in the settlement would seem to have no possible explanation in truth, and it is consistent with guilt. The facts of his trip to San Francisco the next day after payment of the compromise money and his attempt to conceal the trip may have been innocent facts, but they are consistent with guilt. His acquisition of $57,000 in currency, while his known financial condition was bad, and his handling of it through his relatives and under an assumed name may, from a strict standpoint of the possible, have been innocent of crime; but deception is an indication of crime. All of this, together with the forgery of his relatives' names, cannot point to innocence and it is consistent with guilt in this case. The drawing of a large amount of currency by those beneficially interested in the settlement on the very next day after the payment of the compromise and upon the very day appellant had a large amount of currency in hand under the related circumstances may have been for other business purposes, even though the actual handling of so much money in commercial enterprises be the rare exception rather than the rule; but it is consistent with guilt. The incredible story related by appellant before the grand jury is consistent only with some strong reason for the concealment of truth, and this is consistent with and indicative of guilt. We repeat, what reasonable hypothesis, other than guilt, could include all of these circumstances? It is, of course, true that there is no direct testimony of the alleged fact that appellant corruptly agreed to vote and did corruptly vote for the compromise. There is no direct testimony of the alleged fact that the contractors entered into the corrupt agreement or that they performed by the corrupt delivery of money; but there are circumstances present in this case, one of them being the testimony objected to, that baffle any other explanation and establish appellant's guilt to a "moral certainty" and beyond a "reasonable doubt." It is said in Commonwealth v. Webster, supra, in a passage from Chief Justice Shaw's famous charge to the jury as to reasonable doubt: "It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." Later in the same charge the Chief Justice refers to moral certainty as being "a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." "'[T]he guilt of the accused' observes Mr. Best 'must be essentially connected with the facts proved, so as to flow from them by a species of moral necessity.' 'Moral certainty' observes the Marquis Beccaria, 'is only probability; but which is called certainty, because every man of sense (or, in his senses) assents to it necessarily, from a habit produced by the necessity of acting.'" Burrill on Circumstantial Evidence, p. 199. That is, if one is willing to act upon his conclusion such conclusion is to him a "moral certainty." See, also, Wills on Circumstantial Evidence, p. 262.

Courts have sometimes used the expression that an inference cannot be based upon an inference and appellant has sought to apply this principle as a reason for rejecting the evidence under consideration. In the first place, the expression itself is far from an accurate one. Just as the language we speak is said to be made up of dead metaphors, so our ordinary statements as to facts are really made up of dead inferences. These inferences are so intimately associated with known or obvious facts that we habitually accept them as facts. Wigmore, at section 41, volume 1, of his treatise on Evidence says flatly, "There is no such rule, nor can be." But using the term as loosely as you please, how does it apply to the situation here? The fact is the large amount of currency was withdrawn from the bank. We know by inference from other facts that on the same day appellant had a large sum of currency in hand. We know from other facts and inferences all of the other circumstances. It is from the reasonable relation of all of these separate relevant facts each to the other that an inference of the greater fact, to wit, the corrupt agreement and its consummation, is drawn. Wigmore, supra, § 148, vol. 1. It seems to us that the inference that this money was in fact the same money appellant had in San Francisco, and that he got it corruptly as alleged, is just as clear and calls into play no broader inference than does Mr. Justice Storey's famous charge to the jury in Williams' Trial, a murder case, quoted from section 2081, Wigmore on Evidence. The body of the man alleged to have been thrown into the sea was never recovered. Said the court: "The counsel for the prisoner contend to you that there is no evidence of the actual death of Baynard, that it is still possible he may have been saved by some miraculous interposition. * * * But by what spirit of the deep was he protected? To what region has he been conveyed? * * * If you are satisfied with the truth of the evidence presented to you, it is impossible for you to indulge the least doubt on the point of his actual death." The ocean tide *could* have lain Baynard's body upon the silvery strand of a tropical isle where the beneficent sun *could* have successfully awakened a slumbering spark of life, but Justice Storey did not think much of the chances. The jury in the instant case was justified in thinking as little of the chances that some beneficent spirit of finance stuffed $57,000 in bills in Graves' empty pockets. We think the court was not in error when it denied the motion to strike the evidence.

We have examined all of the cases cited by appellant, and as we have indicated, they have not convinced us that the motion to strike should have been granted. We shall here but briefly notice those most relied upon by appellant. Before we do this, however, it will be well to very briefly mention that the two cases, People v. Getty and People v. McClain, heretofore cited, are cases wherein evidence of coins and of a certain number of $100 bills found on defendants and corresponding to the missing property was admitted as proof that the possessors had stolen them. The possession of these coins and of these bills was hardly more remarkable than the withdrawal of this large amount of currency and the finding at practically the same time of a large amount of currency in appellant's hands under all of the circumstances heretofore related. It must also be remembered throughout this discussion that the contractors are not here on trial. Had they been, the evidence might well have been of a different scope. The evidence that appellant sought to have stricken is a circumstance as to appellant's guilt in connection with facts directed against appellant only. The force of this statement will be seen in our analysis of the case of People v. Bissert, 71 App. Div. 118, 75 N. Y. S. 630, hereinafter cited.

People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704, and People v. Davis, 210 Cal. 540, 293 P. 32, are both cases turning on the proper corroboration of accomplices. The point for decision in these cases was not the admissibility of circumstantial evidence. This is plainly seen by a reading of section 1111, Penal Code: "A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it *merely shows the commission of the offense, or the circumstances thereof.*" (Italics ours.)

People v. Mullen, 69 Cal. App. 548, 231 P. 588, 589, and People v. Smith, 55 Cal. App. 324, 203 P. 816. In the Mullen Case a person had been robbed and the victim had given evidence of identification of the defendant as an accomplice of the robber. As the police intercepted the defendant he was riding in an automobile with another man against whom no evidence was given and against whom no charge had been made. This man threw a revolver in the back of the car as the officers intercepted them. This revolver was shown as an exhibit to the jury. It was held error for the reason that no evidence connected the revolver or knowledge of the revolver with the defendant. The court refused to apply section 4½, article 6, of the Constitution, saying: "We have made an examination of the entire cause, including the evidence, and are satisfied that if it cannot be said, as we do not find it necessary to say, that the evidence is totally insufficient, it must be said that it is lamentably weak and unsatisfactory." Had the evidence been convincing that the man who tossed the revolver was the man who did the robbing, the ruling would most probably have been different.

In the case of People v. Smith, 55 Cal. App. 324, 203 P. 816, Smith was being tried for the murder of his wife. It was the theory of the prosecution that the defendant had administered cyanide. A can of cyanide was found in a corner of a saw-filing room on a shelf. Defendant had access to and occasionally went into this room. When seen on the shelf a few days after the death of defendant's wife, the can was covered with one-fourth inch of dust and filings. No evidence was offered that defendant had ever touched it or knew of it. It was held that its introduction into evidence as an exhibit was error. In the consideration of the ruling it must be borne in mind that the trial court had admitted evidence that a stomach of a deceased person had been found to contain enough cyanide to cause death. However, the appellate court found this evidence improper for the reason that the stomach whose contents had been analyzed was not identified as that of defendant's wife. The case does not seem to us to have great, if any, analogous features.

The rulings in both of these cases, too, can be supported upon the theory that the exposition of demonstrable things such as a gun, a can of cyanide, or a slug, not identified as the instrument used, is error, because the presence of these sinister things, though not connected in any way with the case, would be likely to produce passion in the minds of the jurors.

People v. Bissert, 71 App. Div. 118, 75 N. Y. S. page 630, at page 637. In this case a policeman was charged with having accepted a bribe from one Lena Schmidt to permit her to conduct a house of ill fame. The Schmidt woman testified that she gave the policeman $550 for the purpose mentioned. As in California, corroboration of an accomplice in a bribery case is necessary and evidence was admitted that Lena Schmidt had drawn $450 from a bank several days before the alleged delivery of the $550 to the policeman. The reviewing court said: "It is not claimed that the defendant (policeman) induced her (Lena Schmidt) to draw this money from the bank, or that any of it was traced into his possession. Under such circumstances, how can it be said that the fact that she drew this amount of money from the bank tended in the slightest degree to establish that the defendant accepted a bribe, or corroborated the testimony of the witness Schmidt? Had the money drawn from the bank been traced into the defendant's possession, or *had there been established some fact from which that inference could be properly drawn*, then it might be considered by the jury." (Italics ours.) In the instant case the strange coincidence of the defendant's being in San Francisco the day after the payment to the contractors; the appellant's possession of the large sum of *currency* on the very day that the contractors drew a large (commercially, unusually large) sum of *currency* from the bank; appellant's masquerading under the false name and all of the other mentioned acts indicative of crime supplies these facts from which the inference was properly drawn.

In the Bissert Case, the facts or circumstances from which the inference that the policeman had received the money drawn from the bank were attempted to be supplied by evidence that Lena Schmidt had proceeded to furnish her house as though to continue the illegal business confidently. But this was very properly held error, as these acts were acts of the woman and not of the accused policeman. Had the woman been accused of giving the bribe the fact that she proceeded with confidence and furnished her house would undoubtedly have furnished a fact from which an inference could have been drawn, just as the actions of Graves, connected with the other evidence, furnished the facts from which the inference was drawn that the currency withdrawn from the contractor's bank was the currency in Graves' hands in San Francisco.

II. *The introduction of the appellant's statement before the grand jury was error for the reason that extrajudicial statements of a defendant are not admissible where proof of the corpus delicti is lacking, as in this case.*

[5, 6] It seems clear to us that the testimony other than the appellant's grand jury statement clearly establishes the corpus delicti. It must be borne in mind that the proof of the corpus delicti need not be from proof that is sufficiently strong to uphold a conviction of itself. A prima facie proof of corpus delicti is sufficient. The extrajudicial statement here complained of is but corroboratory of the fact that the source of the money or the checks was not legitimate and that in an attempt to conceal such source this public official was driven to the extreme of perjuring himself. It should be borne in mind that in a case of bribery the corpus delicti is inextricably mixed with the consideration of guilt of the accused under the evidence. As expressed in Encyclopedia of Evidence (p. 91, vol. 3): "Proof of the corpus delicti where bribery is charged is the same thing as proof of the defendant's connection with the crime. The one cannot exist without the other."

III. *That (all) the evidence was and is legally insufficient to establish the corpus delicti.*

[7] Our treatment of point 2 covers this point as well.

IV. *The evidence was and is legally insufficient to establish venue.*

[8] If the evidence is sufficient to establish that the money was given for the vote of appellant in Los Angeles county on the compromise, a part of the crime was committed there and this fixes the venue.

V. *The court erred in refusing certain instructions on circumstantial evidence.*

[9] The one relied upon in the briefs of appellant is as follows: "You are instructed that in order to convict the defendant upon the evidence of circumstances it is necessary not only that all the circumstances concur to show beyond a reasonable doubt that the crime was committed as alleged in the indictment, but that the defendant was the one who committed such crime and that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances prove, coincide with, account for and therefore render probable the theory sought to be established by the prosecution, but they must exclude to a moral certainty every other theory but the single one of guilt or the jury must find the defendant not guilty."

There can be no doubt but that the refused instruction could properly have been given. The refusal was upon the ground that the points covered were sufficiently covered in other instructions. The other instruction (the one given) in addition to the presumption of innocence is as follows: "If, upon consideration of the whole case, you are satisfied to a moral certainty, and beyond a reasonable doubt, of the guilt of the defendant you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence, or by a combination of both. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

It occurs to us, as it did to the trial court in the argument for a new trial, that the jury *could* not have determined, in the face of the presumption of innocence that they were satisfied to a moral certainty, and beyond a reasonable doubt of his guilt as they were instructed they must do to find appellant guilty, and at the same time *could* have considered that the circumstances were consistent with innocence. We have already seen how eminent authority defines "moral certainty" and "reasonable doubt." "Reasonable doubt" is consequent upon, and, in fact, involved in the real meaning of "moral certainty." Quoting again from Burrill on Circumstantial Evidence (p. 200): "The one quality or state of mind implies the absence of the other. * * * So long as moral certainty is not reached a reasonable doubt may be said to remain on the mind. When all reasonable doubt is removed, *moral certainty follows.*" The point was argued fully in the motion for a new trial, and the court, being in a far better position than any appellate court could be, was convinced (and said so) that no prejudice to the defendant (appellant) could have resulted in the premises. We have reviewed all of the court's instructions. They were as simple, plain, direct, and understandable to the lay mind as it would seem possible to make them. No less than four or five times the court told the jury that they must determine the issues to a moral certainty and beyond a reasonable doubt against the defendant in the case or he must be acquitted. In view of our analysis of the meaning of the two expressions, and in view of the evidence adduced, we cannot see the possibility that the jury could have arrived at an entirely different conclusion if somewhere in the instructions the court had said that the circumstances must exclude to a moral certainty every other theory but the single one of guilt. After quoting from the Webster Case, supra, Mr. Wigmore, in section 2497 of his treatise, observes: "Many others (definitions of measures of persuasion or reasonable doubt) in varying forms, convey the same notion in more or less well-chosen words. * * * Nevertheless, when anything more than a simple caution and a brief definition is given (the reason for section 1096a, Penal Code) the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion, or, at the least, a continued incomprehension. * * * 'No man can measure with a rule he does not understand; neither can juries determine by rules obscure in themselves and made yet more obscure by attempted definition.' The effort to perpetuate and develop these unserviceable definitions is a useless one, and serves today chiefly to aid the purposes of the tactician. It should be wholly abandoned."

We have reviewed the whole transcript, not merely the condensed statement in the briefs, and we are convinced beyond any possible doubt that no prejudice to appellant or injustice to him has resulted through any ruling of the trial court. We are firmly convinced that he has had a fair and legal trial and that no reasonable man can acquaint himself with the evidence adduced without being convinced beyond a reasonable doubt and to a moral certainty that the only possible verdict consistent with the evidence was the verdict arrived at by the jury. If any of the points raised, excluding of course that of the statute of limitations and venue, may be determined as error, then we think this case is just such an one as was contemplated by the framers of section 4½ of article 6 of the Constitution, in this admirable attempt to prevent the reversals of criminal verdicts on harmless technicalities.

The court's ruling denying the defendant's motion for a new trial is sustained, and the judgment is affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

220 Cal. 129

CARPENTER v. SMALLPAGE et al.

Sac. 4813.

Supreme Court of California.
Feb. 23, 1934.

As Amended March 24, 1934.

1. Vendor and purchaser 🔑231(17).

Title of foreclosure purchaser *held* to relate back to recorded trust deed, and foreclosure was superior to original owner's deed to third person executed over five years after trust deed but recorded before foreclosure deed.

2. Lis pendens 🔑3(4).

Where trust deed is foreclosed by nonjudicial sale by trustee after notice as provided in deed, no lis pendens need be filed.

3. Mortgages 🔑378.

Interest of one taking conveyance of realty with notice of recorded trust deed *held* extinguished when trust deed was foreclosed.

4. Evidence 🔑353(3).

In quiet title action, steps taken to foreclose trust deed under which defendant claimed *held* properly proved by recitals in trustee's foreclosure deed, where trust deed expressly made such recitals conclusive proof of facts recited.

5. Quieting title 🔑43.

In quiet title action, evidence in support of contention that trust deed and foreclosure proceeding under which defendant claimed were tainted with fraud *held* properly excluded, where no fraud was charged in plaintiff's pleadings.

6. Fraud 🔑49.

Where fraud constitutes element of cause of action or defense which is of affirmative nature, facts showing fraud must be alleged.

In Bank.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by A. H. Carpenter against Lafayette J. Smallpage, M. M. McFarland, and others. From an adverse judgment, plaintiff appeals, and, on his death pending the appeal, M. B. Carpenter, executor of plaintiff's last will and testament, is substituted as plaintiff.

Affirmed.

A. H. Carpenter and B. M. Bainbridge, both of Stockton, and Frederick L. Felton, of Los Angeles, for appellant.

Lafayette J. Smallpage and Chas. H. Epperson, both of Stockton, for respondents.

CURTIS, Justice.

The original plaintiff died during the pendency of this appeal. His executor has been substituted in his place. All references herein to the plaintiff or appellant are intended to relate to the original plaintiff.

Plaintiff brought this action to quiet his title to certain real property situated in the city of Stockton. Defendants answered, and the defendant M. M. McFarland set forth in his answer that he was the owner of said real property and claimed to have acquired the same under and through a trust deed executed by Charles A. Menne and Alzada M. Menne, his wife. Each of the parties hereto derive whatever rights they have in said real property from a common source; that is, from the said Charles A. Menne, who acquired the property from George O. Rimington on June 9, 1923. In October, 1925, Menne married Mary Alzada Welton. (In all documents hereinafter mentioned her name appears as Alzada M. Menne.) In April, 1926, he filed and recorded a declaration claiming said real property as a homestead. On May 29, 1926, Charles A. Menne deeded the property to his wife, Alzada M. Menne. On June 14, 1926, Alzada M. Menne was declared a bankrupt. As the real property here involved was a homestead at the date said Alzada M. Menne was declared a bankrupt, it is conceded that said bankruptcy proceedings did not in any way affect the title to said real property, although it stood on said date in the name of said bankrupt. On July 7, 1926, Charles A. Menne and his wife, Alzada M. Menne, executed a trust deed to said real property to secure certain obligations due to the Stockton Morris Plan Company. This trust deed was duly recorded in the office of the county recorder of the county of San Joaquin, where the real property therein described was situated, on July 9, 1926. On January 23, 1930, an abandonment of said homestead was executed and filed for record in the office of said county recorder. On March 15, 1930, Charles A. Menne was adjudicated a bankrupt. On February 6, 1932, Charles A. Menne and Alzada M. Menne executed a deed to said real property to the plaintiff herein, A. H. Carpenter, which deed was duly filed for record on February 8, 1932. In the meantime, the trust deed executed by Menne and wife to secure said obligations due the Stockton Morris Plan Company had been foreclosed by a sale of said real property by the trustees named therein and in accordance with the provisions of said deed of trust. At said sale, the defendant M. M. McFarland became the purchaser of said real property, and the deed from said trustees to said McFarland was recorded on February 9, 1932. Upon this state of the evidence, the trial court found that the defendant M. M. McFarland was the owner of said real property and that the plaintiff had no title or interest therein. Judgment was rendered in accordance with these findings, and the plaintiff has appealed.

[1, 2] There is no merit in the point made by appellant that he was entitled to judgment on the pleadings. While the plaintiff in his amended complaint set forth his claim of title in regular form, the defendant M. M. McFarland by his answer also set forth the chain of title under which he claimed to be the owner of said real property. In this chain of title was shown the trust deed executed by Menne and wife to secure the obligations due the Stockton Morris Plan Company, and all the proceedings taken to foreclose said trust deed, down to and including the deed of the trustees to McFarland by which they conveyed to McFarland said real property in said foreclosure proceedings. Appellant contends that as McFarland did not place his deed of record until after the appellant "had secured his record title to said real property," and, as there was no lis pendens filed in the foreclosure proceedings, the appellant's deed took precedence over, and was superior to, the trustee's deed to McFarland. A mere statement of this contention shows its lack of merit. McFarland's title related back to the deed of trust executed by Menne and wife to secure the obligations of the Stockton Morris Plan Company which was recorded on July 9, 1926, over five years before appellant received his deed. Appellant, when he accepted delivery of his deed from Menne and wife, had constructive, and the evidence shows also actual, notice of the trust deed executed by Menne and wife some five or six years before such acceptance. As to the absence of any lis pendens in the foreclosure proceedings, the evidence shows that the trust deed was foreclosed by a nonjudicial sale of the property by the trustees after notice given as provided in said trust deed. There is no place for a lis pendens in foreclosure proceedings of this character.

[3, 4] It is next contended that there is no evidence in the record in support of findings III and IV of the court. In finding III, the court found that plaintiff was not the owner of said real property or of any interest therein. The evidence conclusively shows that fact. Plaintiff's title to the property was subject to the trust deed, and, when this trust deed was foreclosed, it extinguished whatever interest plaintiff acquired under his deed from Menne and wife. Finding IV relates to the title of McFarland. In this finding the court detailed the various conveyances through which McFarland claimed title to the property beginning with the deed from Rimington to Menne down to the trustees' deed to McFarland. Through these conveyances, McFarland acquired a perfect title to the property, at least as against the plaintiff. In this finding the court set forth the various steps taken to foreclose the trust deed, all of which were proven by the recitals in the trustees' deed. These recitals under the terms of the trust deed were made conclusive proof of all facts therein recited against Menne and wife and all persons claiming under them. Roberts v. Colyear, 179 Cal. 669, 672, 180 P. 937. There is no possible question as to the sufficiency of the evidence to support finding IV.

[5, 6] Plaintiff also claims that there was fraud practiced against Menne and wife in the procuring from them of said trust deed and also in the declaration of default thereunder and in the further proceedings which culminated in the foreclosure of said trust deed and the execution thereafter of the deed to McFarland. Plaintiff attempted to introduce evidence in support of these claims of fraud but, upon objection by the defendants, the court refused to admit any such evidence. The ruling of the court was correct, as plaintiff failed to charge fraud in his complaint or in any of his pleadings. Burris v. Adams, 96 Cal. 664, 667, 668, 31 P. 565; Maison v. Puntenney, 212 Cal. 134, 137, 298 P. 33.

The objection to the bill of exceptions is without substance. The proceedings taken by the court in the settlement of the bill of exceptions are fully set forth in the record and show that the bill of exceptions was settled as directed by the court and in accordance with the facts developed before the trial court.

While in the statement of facts we have referred to the two orders by which Menne and wife at separate times were declared bankrupts, we do not see that either of these orders, under the facts shown, had any effect upon the title to said real property in so far as the rights of McFarland are concerned. We simply set forth these orders to show all the facts of the case. We find no error in the record.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

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220 Cal. 196

MERCED IRR. DIST. v. SAN JOAQUIN LIGHT & POWER CORPORATION.

Sac. 4831.

Supreme Court of California.

Feb. 28, 1934.

Rehearing Denied March 30, 1934.

1. Judgment 🔑744.

Former judgment that contract obligated buyer to purchase all electricity produced by seller's plant, and declaring maximum capacity thereof, *held* conclusive in subsequent action between same parties.

2. Judgment 🔑253(1).

Seller's allegation that buyer accepted electricity not exceeding specified amount precluded recovery of price of any excess amount.

In Bank.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Action by the Merced Irrigation District against the San Joaquin Light & Power Corporation. Judgment for plaintiff, and defendant appeals.

Reversed.

Rehearing denied. CURTIS, J., dissenting; PRESTON and LANGDON, JJ., disqualified.

Thos. J. Straub and W. R. Dunn, both of San Francisco, and F. H. Pearson, of Fresno, for appellant.

Hugh K. Landram and C. Ray Robinson, both of Merced, and Stephen W. Downey and Downey, Brand & Seymour, all of Sacramento, for respondent.

PER CURIAM.

This action was commenced by plaintiff for declaratory relief involving its asserted rights under a contract with defendant and, as incidental to that relief, for a money judgment in the sum of $15,664.50. Judgment was rendered in plaintiff's favor and the defendant prosecutes this appeal therefrom.

[1] On February 21, 1924, the parties to this litigation entered into a contract whereby the respondent agreed to erect and construct a hydroelectric generating plant near Exchequer on the Merced river "of about 25,000 kilowatts capacity" and the appellant agreed to purchase the electric output thereof saving and excepting only so much thereof as might be required in and about the operation of the reservoir and generating plant. Some time in June, 1926, the plant was placed in operation. Along in April, 1927, it commenced to produce in excess of 25,000 kilowatts which continued until August 1, 1927. The appellant refused to pay for energy in excess of 25,000 kilowatts output and respondent brought an action to recover $61,396.23 representing the contract price of the output in excess of 25,000 kilowatts. The appellant answered that complaint denying that it had agreed to purchase any electrical energy from respondent in excess of an output of 25,000 kilowatt hours, and alleging that respondent had failed to construct a generating plant of "about 25,000 kilowatts," but had constructed in connection with its reservoir a plant with a capacity far in excess "of 'about 25,000 kilowatts' and of a capacity of at least 32,000 kilowatts." This cause was tried before a jury which returned a verdict in favor of the plaintiff there, the respondent here. The cause was appealed and the judgment affirmed. Merced Irr. Dist. v. San Joaquin L. & P. Corp., 101 Cal. App. 153, 281 P. 415, 417.

Subsequent to the judgment becoming final therein and during the year 1932, the output of the plant was increased so that for seventy-seven consecutive days it generated in excess of 31,250 kilowatts, and in fact for fifty-two consecutive days produced 33,900 kilowatt hours. The appellant has paid for all energy up to 31,250 kilowatts, but has refused to pay for any in excess thereof. It is respondent's contention that in the former action it was determined that the plant was one "of about 25,000 kilowatts capacity" and that appellant is bound to take and pay for the entire output. On the other hand appellant asserts that by the former decision it was obliged to receive and make payment for all of the output "within the maximum figure of 31,250 kilowatts."

In order to understand more clearly the respondent's position it must be borne in mind that upon the issue in the former action of whether the respondent here had failed to erect a plant of about 25,000 kilowatt capacity evidence was introduced showing it consisted of two generators bearing the notation on the manufacturer's label plate "'15,625 K. V. A. (kilovolt amperes) at 8-10 power factor,'" which the expert witnesses produced by respondent testified meant that these units were designed to be ordinarily operated at 80 per cent. power factor allowing the difference as a safety margin and that, if so operated, they would produce 25,000 kilowatts, but that if operated at full capacity, they would produce 31,250 kilowatts. They also testified in effect that, taken together, the two units made up a plant known to the trade as one of 25,000 kilowatt capacity.

The District Court of Appeal in its opinion said: "The vital questions to be determined in the present case are: What is the maximum capacity of a hydroelectric generating plant commonly termed a 25,000 kilowatt plant? Was the reference to a plant of this character a limitation of agreement to purchase only 25,000 kilowatts, or was it merely descriptive of the general character of a plant, the entire output of which was bargained for?"

Again it is said: "The chief controversy centers around the application of the words 'about' and 'capacity' as they are employed in the contract." Eliminating some language which does not seem essential here, the court answered the questions as follows: "The appellant, which is a public utility corporation engaged in supplying its customers with electric power and light, and which knew of respondent's plans for the construction of the reservoir with a maximum head of 300 feet, must be presumed to have known and contracted with relation to a variable and not a static head, and that the output of such a plant would necessarily fluctuate, in a measure which would be dependent upon the season, the quantity of water in the storage reservoir, and surrounding conditions. It must also have been deemed to have contracted for the entire output of the plant of '25,000 kilowatts capacity,' with knowledge that the trade commonly referred to such a plant at 80 per cent. only of its possible output, and that it might be capable of producing 31,250 kilowatts. The appellant therefore should be required to accept and pay for the entire actual output of the plant within the maximum figure of 31,250 kilowatts. It is not disputed that the entire output for which the judgment in this case was rendered was within this amount except that for a period of a few days 32,400 kilowatts were produced. This slight excess of 1,150 kilowatts over the maximum estimated output of the plant for a few days only comes within the rule of de minimis non curat lex and may be included within the definition of the word 'about' as it was used in the contract. 35 Cyc. 206; 23 R. C. L. 1352, § 176. This slight excess is not sufficient variance to defeat the respondent's claim.

"The foregoing conclusion is based upon the technical meaning of the phrase which is used in the contract, to wit, 'a plant of about 25,000 kilowatt capacity,' as it was construed by respondents' expert witnesses. The word 'capacity' does ordinarily mean the maximum ability to retain contents or perform work. But we think this is too narrow a definition for the purpose of construing the contract in the present case. It is not unreasonable to assume that the electrical trade may designate a generating plant by reference to the approximate load which it is ordinarily designed to produce with a 20 per cent. margin of safety and a thorough understanding that under favorable conditions its maximum capacity may be increased to that extent. In the same sense a vessel is described as one of 5,000 tons burden, or a truck as one of 10 tons capacity. A contract to purchase the entire cargo of the first or load of the latter would not necessarily limit the obligation to the mere figures employed in the description of the conveyance.

"While it is ordinarily the province of the court to construe the language of a contract, there are so many scientific factors involved in determining the kilowatt capacity of an electric generating plant that it becomes a proper subject for expert testimony. United States Heater Co. v. Jenss, 128 Wis. 162, 107 N. W. 293. It became a question for the determination of the jury as to whether the term 'capacity' was used in its ordinary sense or in a technical trade sense. * * *

"The appellant contends that, even though the plant which was installed by the respondent was originally one of 25,000 kilowatts operated at 80 per cent. power factor, changes were subsequently made by the respondent, including the substitution of mica for cotton insulation to permit the increase of temperature without burning out the coils, a two-inch increase of diameter of the water wheel shafts to enable them to carry a heavier load, and a cooling system to lower the temperature of the water in the reservoir, each of which was designed to increase the maximum capacity of the plant. The appellant introduced expert testimony to show that these changes did actually increase the capacity of the plant to a maximum output of from 36,000 to 39,000 kilowatts. This testimony was disputed by the respondent, in proof of which contradiction it was pointed out that the highest output of the plant under most favorable conditions was but 32,400 kilowatts for a period of only a few days. It seems immaterial, however, whether changes were made which actually resulted in the possibility of increasing the capacity to an amount of energy in excess of the maximum output of a 25,000 kilowatt plant, so long as that result was not accomplished, and the appellant is not asked to accept or pay for electric energy beyond the maximum product of a 25,000 kilowatt plant. The appellant did not contract for the output of a specific machine. The quality or character of the electric energy is not questioned. The quantity is the only element in dispute. The appellant merely bargained for a quantity of electric energy equivalent to the maximum output of a plant of about 25,000 kilowatts. The appellant is not harmed, nor may it complain if a quantity of electricity less than the maximum amount contracted for was actually generated in a 39,000 kilowatt plant instead of a 25,000 kilowatt plant.

"The appellant charges error in the giving and refusing of certain instructions. Instruction No. 7, which is challenged, was given as follows: 'You are instructed, therefore, that it is your duty to determine whether or not the power house constructed by the Merced Irrigation District is of a capacity of about 25,000 kilowatts, and if you so find, then you must further find that under the provisions of the contract in evidence, defendant is and was bound to accept the entire electrical output therefrom.' This was a correct declaration of the law. It was a question of fact as to whether a plant which was capable of producing 31,250 kilowatts per hour operated at unity power factor was in truth such a 25,000 kilowatt plant as was referred to in the contract. Upon this point the evidence was conflicting. Expert witnesses disagreed as to this issue. It therefore became a question of fact for the jury to determine. There is no dispute over the fact that, if it was a 25,000 kilowatt plant according to the contract, the appellant would be required to accept and pay for the entire output. Incidentally, it was also the province of the jury to determine whether the changes which were made in the machinery had the effect of increasing the kilowatt capacity of the plant, although the state of the record would seem to make it immaterial whether the modifications did in fact change the capacity of the plant, as heretofore suggested."

It cannot be successfully disputed, as is evident from the foregoing recitals, that the capacity of the respondent's generating plant was one of the chief issues in the trial court as well as one of the principal questions before the appellate tribunal. The implied finding of the jury based upon a conflict in the evidence was to the effect that it was a 25,000 kilowatt capacity plant with a maximum capacity of 31,250 kilowatts. The appellate court concluded that appellant did not contract for 25,000 kilowatt hours, but contracted for the output of a plant with a maximum capacity of 31,250 kilowatts. Further, the jury determined (and upon conflicting testimony) that the alterations did not increase its capacity, and the appellate court upheld its conclusion in this particular. So far, therefore, as the prayer for declaratory relief is concerned, it would seem that the issues had heretofore been completely litigated and determined. Construing the contract of the parties and the action of the respondent thereunder, it was found that the respondent had complied by constructing a plant contemplated by the parties and that appellant was compelled to accept the output thereof to a defined maximum. This case illustrates the reason for the rule invoked by the appellant that respondent's contentions are concluded by the former judgment. Parties should not be permitted to litigate and relitigate the same cause of action. The cases are legion and unanimous to the effect that facts once litigated and the law once pronounced upon those facts are conclusive in all subsequent proceedings involving the same subject-matter.

[2] We should have some doubts upon that phase of the case which seeks a money judgment against appellant for electrical energy already developed in excess of 31,250 kilowatts were it not for the language of the complaint. It reads: "That defendant accepted delivery of all power generated and delivered as aforesaid in 1932, up to, but not exceeding a maximum of Thirty One Thousand Two Hundred Fifty (31,250) kilowatts." This allegation puts it beyond the power of the court to order payment on the theory that appellant accepted delivery of the excess electrical energy.

Judgment reversed.

220 Cal. 142

MacARTHUR v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 14262.

Supreme Court of California.

Feb. 27, 1934.

1. Master and servant ⚷388.

To entitle claimant, not legally married wife, to compensation as dependent of deceased employee, essential element is good faith of parties, which must be evidenced by reasonable basis for belief that parties complied with laws of country in which they assumed marriage relation (St. 1919, p. 917, § 14(b, c).

2. Master and servant ⚷417(7).

Findings of Industrial Accident Commission, if there is any evidence in record to support inferences drawn by commission and upon which findings may be based, cannot be disturbed.

3. Master and servant ⚷405(5).

Decision of Industrial Accident Commission denying compensation to claimant, not legally married wife, as dependent of deceased employee, based on absence of belief in good faith that parties could contract legal marriage, *held* supported by evidence (St. 1919, p. 917, § 14(b, c).

4. Master and servant ⚷403.

Burden of proving that claimant was entitled to compensation as wife of deceased employee is upon claimant (St. 1917, p. 849, § 19(d); St. 1919, p. 917, § 14(a)(1).

5. Master and servant ⚷388.

Common-law marriage between compensation claimant and deceased employee, entered into in Canada, *held* invalid under Canadian law, precluding compensation to claimant as surviving wife (St. 1917, p. 849, § 19(d); St. 1919, p. 917, § 14(a)(1).

In Bank.

Certiorari to review an order of the Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Rae MacArthur, claimant, against the Raymond Concrete Pile Company, employer, and the Employers' Liability Assurance Corporation, Limited, of London, England, insurer, for compensation for the death of Glenn MacArthur, deceased employee. On certiorari by the claimant to review an order of the Industrial Accident Commission denying compensation.

Order affirmed.

Prior opinion in 20 P.(2d) 70.

J. D. Bauer, of Los Angeles, for petitioner.

Arthur I. Townsend and Everett A. Corten, both of San Francisco, for respondents.

J. J. Haydon, of Los Angeles, and Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for respondent Employers' Liability Assur. Corporation, Limited.

SHENK, Justice.

Petition for review and annulment of the order of the respondent commission which denied any compensation to the petitioner.

The petitioner claims compensation as a dependent widow of Glenn MacArthur, who met his death on April 1, 1932, at Wilmington, Cal., from injuries sustained while he was employed as a loftman by the respondent Raymond Concrete Pile Company. The respondent Employers' Liability Assurance Corporation, Limited, was the employer's insurance carrier. The only issue in the case was whether the applicant was the widow of the deceased employee and entitled to compensation as a dependent.

The respondent commission made its finding that the deceased employee left no person dependent upon him for support, and denied any award to the applicant. The question for review is whether the commission has exceeded its powers in so finding on the record presented.

The applicant testified on the hearing before the commission that she was the wife of the decedent by a marriage which took place in Vancouver, B. C., on October 4, 1921, pursuant to an unwitnessed oral agreement between them. No marriage license was obtained nor any ceremony performed. The parties lived as husband and wife for about a year in British Columbia and then came to the United States. They lived at Seattle, San Francisco, and Oakland, where they mingled with friends and relatives and held themselves out as husband and wife. They finally went to live in Wilmington, where the decedent's mother resided and where they were received, and continued to live, as husband and wife up to the time of the employee's death. During this time, a period of about eleven years, the decedent supported himself and the applicant from his earnings. The record shows without dispute that the applicant was maintained as a member of the decedent's household and was dependent upon him for support. The question is whether she was such a dependent as is entitled to receive compensation pursuant to the provisions of the Workmen's Compensation Act (St. 1917, p. 831, as amended).

[1-3] The answer must be found in section 14 of the act (St. 1917, c. 586, p. 844, as amended St. 1919, c. 471, p. 917). Section 14 (a) (1) provides that a wife living with her husband at the time of the injury or for whose support he was legally liable at that time shall be conclusively presumed to be wholly dependent upon him for support. Sections 14 (b) and (c) provide: "(b) In all other cases, questions of entire or partial dependency and questions as to who constitute dependents and the extent of their dependency shall be determined in accordance with the fact, as the fact may be at the time of the injury of the employee. (6) No person shall be considered a dependent of any deceased employee unless in good faith a member of the family or household of such employee, or unless such person bears to such employee the relation of husband or wife. * * *"

In Temescal Rock Co. v. Industrial Acc. Comm., 180 Cal. 637, 182 P. 447, 13 A. L. R. 683, where an award to the applicant was upheld, it was decided that a woman who in good faith believed that she was the lawfully wedded wife of the decedent was entitled to compensation as a dependent pursuant to subsection (b) as qualified by subsection (c). But the requirement of good faith to achieve this result depends upon some basis in fact upon which the woman was entitled to found her belief. In that case the contracting parties were ignorant Mexicans who obtained a license to marry and thereafter cohabited as husband and wife under the belief that they had been legally married.

Prior to the events in the present case hereinbefore related, the petitioner, in June, 1914, in British Columbia, was married by a minister to a man by the name of Meehan, after a license had been obtained. Subsequently she obtained a divorce in Tombstone, Ariz., from Meehan on grounds other than adultery. She returned to Canada, where presumably she met the decedent. At the time the petitioner and MacArthur were contemplating marriage, they were informed by friends that they probably could not obtain a license because the law of Canada would not recognize a divorce on any ground except adultery and that such a marriage would therefore be bigamous. The petitioner and MacArthur were acquainted with another couple who had consummated their intention by living together as husband and wife without solemnization of the marriage ceremony. The petitioner and MacArthur then made the oral agreement referred to and from that time, October, 1921, lived together as husband and wife. The petitioner stated upon the hearing that at all times she honestly believed that she was lawfully living with the decedent as his wife and that they had contracted a valid common-law marriage.

As pointed out in the case of Temescal Rock Co. v. Industrial Accident Commission, supra, in not every case wherein the applicant has entered into the marital relationship with the decedent without complying with the requirements of the law (section 68 et seq. Civ. Code) will the test as to whether she is a dependent pursuant to the act apply in her favor. The essential element in each case is the good faith of the parties, which must be evidenced by a reasonable basis for the belief that they had complied with the laws of the country in which they assumed the relationship. In two cases since that decision, where the facts showed that the parties believed that they had solemnized a legal and binding marriage, the test necessary to determine the good faith of the parties was held to have been met. Louden v. Ind. Acc. Comm., 105 Cal. App. 65, 286 P. 1045; Landsrath v. Ind. Acc. Comm., 77 Cal. App. 509, 247 P. 227.

In Taylor v. Ind. Acc. Comm., 131 Cal. App. 468, 21 P.(2d) 619, the court refused to annul an order of the commission denying compensation to the applicant based on a finding that she was not in good faith a member of the decedent's household. The court refused to extend the case of Temescal Rock Co. v. Ind. Acc. Comm., supra, to facts which established that in California the applicant and decedent commenced living together; that when marriage was discussed, the decedent said they were just as good as married, "it is a state law"; and that she believed him and lived with him as his wife and they were considered as married by their friends and acquaintances. The showing on the present record is ruled by the statement in that case that if there is any evidence in the record to support the inferences drawn by the commission and upon which it has based its findings, those findings cannot be disturbed. The commission, on the evidence presented here, could reasonably find that the applicant did not believe that she could contract a legal and binding marriage in Canada at the time she agreed to live with the decedent as his wife. The conclusion that the petitioner is not entitled to an award pursuant to the provisions of subsections (b) and (c) of section 14 of the act is therefore supported by the record.

[4, 5] The commission, however, concedes that if the law of Canada at that time permitted marriage per verba de præsenti, followed by cohabitation, the applicant would be entitled to compensation under subdivision (a) (1) of section 14. Civ. Code, § 63. The evidence in the record as to what was the law of Canada at the time in question was submitted in a supplemental return to the writ of review. Evidence on this issue was not before the commission at the time it made its order herein, but was submitted upon a petition for rehearing before the commission, which was denied. The respondent commission requests that the supplemental record be reviewed on the present proceeding in this court in order to expedite a final disposition of the matter. Inasmuch as all parties appear to have acquiesced in the request by submitting a showing as to the law of Canada on the point involved, the question will be considered.

The evidence before us on this issue shows the following with reference to the state of the law of British Columbia in 1921: The Marriage Act in force at that time was R. S. B. C. 1911, chapter 151. Section 25 of that act provided: "In all matters relating to the mode of celebrating marriages or the validity thereof, and the qualifications of parties about to marry, and the consent of guardians and parents or any person whose consent is necessary to the validity of such marriage, the law of England shall prevail, subject always to the provisions of this act." The act extended the authority to perform the marriage ceremony to Protestant clergymen and other denominational and to civil authorities, in addition to clergymen of the established church of England. The act does not specifically invalidate a marriage per verba de præsenti. By the operation of section 25, therefore, it would appear that whether such a marriage was valid in British Columbia will depend on the answer to the question whether under the law of England a marriage per verba de præsenti followed by cohabitation was recognized as valid.

In volume 19, American and English Encyclopedia of Law, at page 1192, it is stated: "It is now settled that there could be no valid marriage at common law in *England* without the presence of a person in holy orders, that is, a clergyman of the established church." To support this statement are cited Regina v. Millis, 10 Cl. & F. 534; Beamish v. Beamish, 9 H. L. Cas. 274; Catherwood v. Caslon, 13 M. & W. 261; Culling v. Culling, (1896) Prob. 116. Informal marriages were considered valid under the common law of England prior to 1753. 19 Am. & Eng. Encyc. of Law, pp. 1193, 1194. In that year Lord Hardwicke's Act (26 Geo. II, c. 33) regulated the license and solemnization of marriage in England. The case of Regina v. Millis, supra (1843), reflects the spirited controversy which arose on the question whether under that act an informal marriage was valid. The question was determined adversely to its validity by the lower court and the result was left undisturbed on appeal by reason of an equally divided House of Lords. In a note discussing the case the same authority (19 Am. & Eng. Encyc. of Law, p. 1194) states: "The decision in this case has not been universally acquiesced in, and there has been a reluctance to follow it except on the principle stare decisis. (Catterall v. Catterall, 1 Rob. Ecc. 580, 11 Jur. 914, per Dr. Lushington; Atty.-Gen. v. Windsor, 6 Jur. N. S. 834, per Lord Campbell.) See also remark of Willes, J., in Reg. v. Mainwaring, 7 Cox. C. C. 196, and the opinion of the same judge in Beamish v. Beamish, 9 H. L. Cas. 274. * * * The courts of Canada have disapproved or refused to be bound by Reg. v. Millis. (Doe v. Breakey, 2 U. C. Q. B. 349; Connolly v. Woolrich, 11 L. C. Jur. 197.)"

The Marriage Act of 1823 (4 Geo. IV, c. 76) repealed and superseded Lord Hardwicke's Act. This act and the Marriage Act of 1836 (6 and 7 Will. 4, c. 85) rendered void a marriage not solemnized in accordance with their requirements. 16 Halsbury's Laws of England, p. 280, par. 516. The record before us shows no change in the condition of the law of England at the time of the enactment of R. S. B. C. 1911, supra.

The petitioner is forced to concede that despite the criticisms of the decision in Regina v. Millis, that case established the law of England from the date of its decision, that is, that there must be a compliance with the marriage act in force. The petitioner contends, however, that the principle of that case was not adopted or recognized as part of the common law of Canada. Counsel for the petitioner states: "When Canada was colonized, long prior to the decision of the Millis Case, Canada took the common law as then recognized in England, and at that time the doctrine of the Dalrymple Case (Dalrymple v. Dalrymple, 1811, 2 Hagg. Conn. Rep. 54), was fully established as the common law of England, and of necessity became the common law of Canada, and the Dalrymple Case establishes the rule of the validity of common law marriages." Counsel relies on Breakey v. Breakey, 2 U. C. Q. B. 349; Connolly v. Woolrich, 11 L. C. Jurist 197; and 5 Law Quarterly Review, 57. He presents no case interpreting the statute of 1911 or determining what was the law applicable under section 25 of that act, whether the law of England as herein noted, or the common law adopted by other Canadian provinces. On the contrary, he states that no case involving an attack upon such a marriage or deciding the validity thereof under the act of 1911 appears to have arisen. Nor is it shown what was the statutory law of other provinces alleged to have rejected the law of England following the case of Regina v. Millis.

The case of Breakey v. Breakey, supra, relied upon, involved the validity of a marriage which was solemnized publicly in Ireland about 1815 before a Presbyterian minister, who had either been removed or had resigned from his congregation, although he still continued to perform marriage ceremonies. The parties lived together in Ireland and England, and afterwards emigrated to Canada. The decision in that case that the marriage was valid rested upon the conclusion that such marriages were legalized by the Imperial Statute 5 and 6 Vict. c. 113. Although the cases of Regina v. Millis and Dalrymple v. Dalrymple, supra, were discussed, no conclusion as to the applicability of those cases was reached, inasmuch as it was thought that the Imperial Statute was determinative of the issue. We may assume that had a case involving similar facts arisen for decision in British Columbia the marriage would likewise have been held valid.

The case of Connolly v. Woolrich, supra, decided in 1867 by the superior court, District of Montreal, involved a marriage solemnized in 1803 in the Athabaska district of Canada in accordance with Indian tribal customs, between William Connolly and a daughter of an Indian chief of the Cree nation. They lived together as husband and wife until 1832 in the Northwest country, in Lower Canada and Montreal, and had numerous children. The woman during that time was known as Mrs. Connolly. In 1832 while the parties with their family were in Montreal, a marriage by Connolly with a second cousin, Julia Woolrich, was solemnized according to law, and two children were born of that union, which lasted until 1849, when Connolly died. In that case it was concluded that the Athabaska region was beyond and without the chartered limits of the Hudson Bay Company. The opinion was also ventured, admitting that the region was within the chartered limits, that the charter applied only to those "who belonged to the company, or were living under them," and that Connolly was not a member of or living under the Hudson Bay Company. It was concluded that there was nothing which changed or abolished the customs of the Indians or the laws of the French settlers, or which introduced the English common law into that region; that the lex loci governed and the marriage was valid. The court indicated that if it were compelled to decide the case under the English common law it would not hold itself bound by the case of Regina v. Millis, but would regard the marriage as valid. In this respect it was noted that the region of Athabaska was barbarous country situated in the remote wilderness of Northwestern America where there were no priests or ministers, and that even the law of England does not compel parties to do the impossible.

The Dalrymple Case relied upon by the petitioner affirmed a marriage per verba de præsenti made in Scotland, where at that time so-called common-law marriages were valid. The cases submitted and herein cited recognize that the laws of England had no force beyond its boundaries. They were in force in America in the states and in the provinces when especially adopted as the law thereof, or when it could be said that they were brought there by the settlers. The court in the case of Connolly v. Woolrich, supra, noted that several of the states had recognized that a marriage without the intervention of a clergyman was a good marriage pursuant to the common law of England which the settlers there carried with them. What was decided later on in Regina v. Millis never became the law except by legislative enactment.

The citation by the petitioner of 5 Law Quarterly Review, p. 57, adds nothing helpful to the foregoing discussion.

The burden of proving the affirmative of the issue is upon the petitioner. Section 19 (d), Workmen's Compensation Act, supra. (St. 1917, p. 849). We may assume that under the statute of 1911 in force in British Columbia in 1921, without for the moment considering the effect of section 25 thereof, the courts of that province would adopt the common law claimed by the petitioner to be in force elsewhere in Canada. The petitioner also, however, shows that no case interpreting the statute as affected by section 25 thereof, or any similar statute, has been decided. The record before us cannot be said to support an interpretation of the statute contrary to its express provisions, viz., that with respect to the mode of celebrating marriages or the validity thereof the law of England shall prevail where not otherwise modified by the act. On the showing made it follows that a marriage which was not celebrated in accordance with the provisions of the act of 1911 and the law of England as shown by the record was invalid. This result is also in conformity with the law of California on the subject. Therefore, in the absence of any law in this state which would recognize the validity of such a marriage, and lacking any facts of remoteness from civilization which would support a showing of impossibility to comply with the statutory requirements enacted for British Columbia, we must conclude that the alleged marriage of the petitioner and MacArthur was invalid.

The foregoing answers all of the contentions required to be determined.

The order is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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220 Cal. 114

WINTHROP v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 14342.

Supreme Court of California.

Feb. 21, 1934.

Hearing Denied by Supreme Court March 22, 1934.

1. Master and servant 🔑405(4).

Evidence sustained Industrial Commission's finding that compensation claimant's disability resulting from strangulated ovarian cyst was not caused or aggravated by employment.

2. Master and servant 🔑417(9).

Where Industrial Commission's order denying compensation on ground claimant's disability did not arise out of employment is annulled by reviewing court as not supported by evidence, commission may receive any further evidence and pursue any inquiry on issue of fact which was before it on prior hearing (St. 1917, p. 871, § 60(a).

3. Master and servant 🔑414.

Industrial Commission is not bound by common-law or statutory rules of evidence and procedure.

4. Master and servant 🔑417(9).

Industrial Commission had authority after reviewing court's annulment of its order denying compensation on ground claimant's disability did not arise out of employment, to retry such issue and hear testimony of claimant's attending physician who refused to testify at former hearing (St. 1917, p. 871, § 60(a).

In Bank.

Proceeding under the Workmen's Compensation Act by Fannette Winthrop, claimant, opposed by the Wetherby-Kayser Shoe Company, employer, and the Associated Indemnity Corporation, insurer. To review an award of the Industrial Accident Commission denying compensation, claimant brings certiorari.

Affirmed.

Prior opinion, 22 P.(2d) 579.

Goldman & Lieberman, of Los Angeles (Aaron B. Rosenthal, of Los Angeles, of counsel), for petitioner.

A. I. Townsend, of San Francisco, for respondents.

H. C. Kelsey, of Oakland, and R. P. Wisecarver, of San Francisco, amici curiæ.

SHENK, Justice.

This is a petition for review of the second order of the respondent Industrial Accident Commission denying the application of the petitioner, Fannette Winthrop, for compensation.

The claim for compensation grew out of an operation by which an ovarian cyst or tumor was removed from the abdominal cavity of the petitioner. The tumor had become strangulated by its pedicle or stem having become twisted. This resulted in a gangrenous condition necessitating the operation. It was the claim of the petitioner that the twisting of the pedicle was caused by a fall from a stool which occurred more than two weeks before the operation and while she was in the employ of the respondent Wetherby-Kayser Shoe Company of Los Angeles. The commission based its first order denying compensation on its finding that no part of the disability suffered by the petitioner arose out of the employment. On the first review the order denying compensation was annulled. Winthrop v. Industrial Accident Com., 213

Cal. 351, 2 P.(2d) 142. The opinion on the former review is referred to for a statement of the facts of the case and the grounds of the order of annulment.

[1] After the decision on the first review the commission proceeded to re-examine the issue. Further testimony was received on the question whether the condition of the tumor necessitating the operation was connected with the fall suffered by the petitioner. On the former hearing the testimony of Dr. Toland, the attending physician who performed the operation, was not before the commission. This omission was due to the doctor's refusal to testify either because he "did not want to get mixed up in it" or because of some mistaken belief that the substance of his testimony constituted a privileged communication. On the second hearing, Dr. Toland testified fully as to the position and condition of the tumor as he found it with relation to the time when the petitioner fell and the time when the operation was performed. His testimony was to the effect that the condition of the tumor was not due to the fall, but was a development from natural causes. The testimony of Dr. Toland indicated that the time element was a conclusive factor, and upon it the commission could reject the contention that the fall effected the twisting of the pedicle. The record as now presented supports the finding of the commission that the petitioner suffered no disability which was caused or aggravated by the employment and its conclusion that no compensable injury was sustained by her. Walter v. Ind. Acc. Com., 209 Cal. 635, 289 P. 627. The only question remaining is whether the commission had jurisdiction to retry that issue of fact after the annulment of its order denying compensation to the petitioner.

The petitioner contends that the jurisdiction of the commission following the annulment upon the former review is restricted to proceedings to determine the proportion of the disability which was traceable to the preexisting disease or condition, the percentage due to aggravation induced by the fall, and the amount of compensation to which the petitioner is entitled.

The position of the respondents is that the annulment of the former order, as in the case of an unqualified reversal of a judgment in a civil action, leaves the matter again "at large" for proceedings in the nature of a retrial of the issues of fact.

The question is: What are the powers and jurisdiction of the commission when the court has annulled its order denying an award on the ground that the finding that no portion of the petitioner's disability was caused by injury arising out of the employment is not supported by the evidence?

[2, 3] An extended discussion will not be required to set forth our views leading to the conclusion that the commission has jurisdiction to receive any further evidence and pursue any inquiry on any issue of fact which was before it on the prior hearing. Broad powers are conferred upon the commission by the act to the end that its objects and purposes may be accomplished. The commission is not bound by common-law or statutory rules of evidence and procedure. The path of the commission toward a free and full inquiry to ascertain the substantial rights of the parties is made clear by the framework of the act. The spirit of this legislation forbids a limitation upon the commission's power to inquire into the facts within narrower confines than those which define the jurisdiction of a trial court in a similar situation. There, upon an unqualified reversal of its judgment, issues of fact may be retried, and the lower court is bound by the law of the case, unless the evidence on the second trial supplies the additional and necessary proof which was lacking in the former record. Central Sav. Bank of Oakland v. Lake, 201 Cal. 438, 443, 257 P. 521. That such a limitation was not intended follows under the liberal construction enjoined upon the courts by the provisions of the act. This becomes more apparent when the situation is reversed and an award granting compensation in a particular case is annulled because the commission has exceeded its jurisdiction in finding, in the absence of competent evidence, that the injury arose out of and in the course of the employment. In our opinion, it would be a violation of the spirit and intent of this legislation were its provisions to be construed as precluding the commission thereafter from allowing the employee to make a different record, if possible, which would support a finding in his favor on that issue. Inasmuch as the substantial rights of all parties are the subject-matter for determination by the commission (section 60 (a), Stats. 1917, p. 871, c. 586), there is no basis for a holding that a different and narrower jurisdiction must be exercised by the commission in one case than in the other.

[4] This court has heretofore indicated that the issues of fact are open to further hearing by the commission upon the annulment of an award by the reviewing court. Englebretson v. Ind. Acc. Com., 170 Cal. 793,

799, 151 P. 421; Carstens v. Pillsbury, 172 Cal. 572, 578, 158 P. 218; California C. I. Exchange v. Ind. Acc. Com., 190 Cal. 433, 438, 213 P. 257; see, also, Clapp's P. Station v. Ind. Acc. Com., 51 Cal. App. 624, 629, 630, 197 P. 369; King v. Alabam's Freight Co., 40 Ariz. 363, 12 P.(2d) 294, 296; McGarry v. Ind. Acc. Com. of Utah, 64 Utah, 592, 232 P. 1090, 1091, 39 A. L. R. 306; Brocco v. May Department Stores (Mo. App. 1932) 55 S.W.(2d) 322, 325, 326.

The order denying compensation is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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220 Cal. 118

NIELSEN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

S. F. 14945.

Supreme Court of California.

Feb. 21, 1934.

As Modified March 22, 1934.

1. **Master and servant 🔑417(9).**

Industrial Commission had authority after reviewing court's annulment of its order denying compensation on ground claimant's disability did not arise out of employment to retry such issue and hear further testimony thereon (St. 1917, p. 871, § 60(a).

2. **Master and servant 🔑417(7).**

Weight of evidence and credibility of witnesses are for Industrial Commission, and, if there is evidence or reasonable inference supporting commission's finding, it cannot be disturbed (St. 1917, p. 875, § 67(c).

3. **Evidence 🔑552.**

Expert's opinion based on hypothetical statements of facts in record is competent evidence in compensation proceeding.

4. **Master and servant 🔑405(4).**

Evidence sustained Industrial Commission's finding that employee's death from heart disease was not from injury arising out of and in course of employment and hence was not compensable (St. 1917, p. 875, § 67(c).

In Bank.

Proceeding under the Workmen's Compensation Act by Camilla Nielsen and others for the death of Anton Nielsen, husband and father, opposed by Carl Bersch, an individual, doing business as the Bay City Cabinet Company, employer, and the State Compensation Insurance Fund, insurer. To review an order of the Industrial Accident Commission denying compensation, claimants bring certiorari.

Affirmed.

Prior opinion, 21 P.(2d) 445.

John C. Scott and H. C. Kelsey, both of Oakland, for petitioners.

Arthur I. Townsend, B. E. Pemberton, Ivan A. Schwab, and Everett A. Corten, all of San Francisco, for respondents.

R. P. Wisecarver, of San Francisco, amicus curiæ.

SHENK, Justice.

This is the second review in this matter. A petition for a review of the respondent commission's first order was granted by the District Court of Appeal. The order of the commission denying any compensation to the widow and dependents of the deceased employee was annulled by that court, and the application was remanded for further proceedings and findings. Nielsen v. Industrial Accident Commission, 125 Cal. App. 210, 13 P.(2d) 517. A petition to have the cause heard in this court was denied on September 22, 1932. Thereafter the commission conducted a hearing and received further evidence. At said hearing the applicants objected to the receipt of any evidence other than for the purpose of determining the amount of compensation to be awarded to them. The commission admitted additional evidence relating to the question whether the disability which caused the employee's death was in any part due to his employment. Thereupon the commission made its finding that "the evidence is insufficient to hold that the employee sustained injury occurring in the course of and arising out of said employment." It accordingly made its order that the applicants take nothing. This order is now before us for review.

[1] The first contention is that, after the decision of the District Court of Appeal on the former review and the annulment of the commission's previous similar order, the commission's jurisdiction was limited to an inquiry into the amount of compensation to be awarded based on the proportion of the disability due to the employment. This question is settled adversely to the contention,

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For modifying opinion, see 30 P.(2d) 995.

and to the effect that the commission, after such an annulment, may investigate further the facts bearing on the issue of the cause of the injury, and if the entire record as then presented supports its finding its order must be affirmed. Winthrop v. Industrial Accident Commission (Cal. Sup.) 29 P.(2d) 850. The effect of the decision just cited is that the commission is bound to follow the holding of the court on review so far as applicable, but is not foreclosed from receiving additional evidence which might have the effect of supplying the necessary proof which was lacking on the former record. If the record is not changed in any substantial respect, the law of the case as established on the review would be held determinative. The expression of the opinion of the reviewing court that on the facts in the record the injury was shown to be compensable or the direction that the application is remanded for further proceedings and findings in accord with the opinion would have no special or greater effect.

It therefore becomes necessary to determine whether the record as now presented contains the additional proof necessary to sustain the commission's finding and order denying compensation.

The facts on the former record are stated in the opinion on the former review. Nielsen v. Ind. Acc. Com., 125 Cal. App. 210, 13 P.(2d) 517. The present order of the commission is based on the testimony given by Dr. Du Bray on the second hearing. Dr. Du Bray submitted evidence on the first hearing. Of that evidence the District Court of Appeal in the former case stated at page 212 of 125 Cal. App., 13 P.(2d) 517: "Dr. Du Bray, without any examination of the deceased and without a full knowledge of the facts found at the autopsy, gave his opinion that death was caused by coronary occlusion and was not caused by the exertion of the employment." Dr. Du Bray's opinion given on the second hearing was based on a written statement of the facts presented to him and on the other reports and the testimony in the record. He was also subjected to a rigid cross-examination. His conclusion was the same as on the first hearing, viz., that death was not due to an acute dilatation of the aorta which is produced by unusual exertion, but was due to coronary occlusion not necessarily due to any physical strain or exertion, but which in the present case was due entirely to the pre-existing heart condition, and that the decedent's labors preceding his death did not contribute to the condition which was the cause of death.

The applicants urge that the record on this review is not substantially different, and that the decision on the former review (Nielsen v. Ind. Acc. Com., supra), and the case of Winthrop v. Industrial Acc. Com., 213 Cal. 351, 2 P.(2d) 142, are controlling in support of their contention that the injury is compensable.

In Nielsen v. Industrial Acc. Com., supra, the case of Winthrop v. Industrial Acc. Com., 213 Cal. 351, 2 P.(2d) 142, was followed to the effect that "there was no true conflict in the evidence where that on one side consisted of opinions based upon a state of facts not shown by the record to exist while that on the other side was based upon facts actually shown to exist or rested upon the testimony of physicians who had actually treated and examined the patient." Nielsen v. Ind. Acc. Com., supra, 125 Cal. App. at page 212, 13 P.(2d) 517. No question arises with respect to the holdings in those cases that aggravation of pre-existing disease is compensable. Section 3 (4), Workmen's Comp. Act, Stats. 1917, p. 833, c. 586, as amended Stats. 1919, p. 910, c. 471, § 1; Knock v. Ind. Acc. Com., 200 Cal. 456, 253 P. 712. The respondents assert that some misapprehension is growing as to the meaning to be attributed to the foregoing statement in the Winthrop Case and in the Nielsen Case. It is stated that those decisions are mistakenly relied upon as holding that experts whose opinion is based on an hypothetical statement of the facts involved does not raise a conflict with the testimony of those experts who have examined the physical condition of the injured employee and have acquired a personal knowledge of the facts. See Reynolds v. Struble, 128 Cal. App. 716, 729, 18 P.(2d) 690; Thoreau v. Ind. Acc. Com., 120 Cal. App. 67, 71, 72, 7 P.(2d) 767.

[2, 3] By section 67 (c) of the act (Stats. 1917, p. 875, supra), the findings and conclusions of the commission on questions of fact are made conclusive and final and are not subject to review. The power vested in the court on review by subdivision 1 of the same section, to determine whether the commission has acted without or in excess of its powers, has not been construed to mean that the court may not determine that the commission has exceeded its powers when it has made a finding contrary to the evidence or in the absence of any evidence to support it.

Pruitt v. Industrial Acc. Com., 189 Cal. 459, 466, 209 P. 31; Market St. Ry. Co. v. Ind. Acc. Com., 193 Cal. 178, 182, 224 P. 95. On the other hand, the questions of the weight of the evidence and the credibility of the witnesses are for the commission, and, if there is any evidence or reasonable inference which will support the commission's finding, the reviewing court has no power to disturb it. There is no language in the Winthrop Case 213 Cal. 351, 2 P.(2d) 142, which should afford any foundation for a statement that the reviewing court had exceeded its powers in that case. There was no intent to hold, and it was not decided, that the opinion of experts who had no personal knowledge of the facts may not raise a conflict with the testimony and opinion of those whose conclusions are drawn from a personal examination of the injured employee. The opinion of experts based on hypothetical statements of the facts in the record is competent evidence. The weight of such evidence is for the commission's determination. Nor was it held in the Winthrop Case that each statement or question upon which an opinion is asked must contain all of the facts appearing in the record. Treadwell v. Nickel, 194 Cal. 243, 267, 228 P. 25. What was held in the Winthrop Case was that the probative value of the witness' opinion is lacking if in the course of its development he has not been made acquainted with all of the essential facts. This was the extent of the holding in that case, and, pursuant to the well-defined power of the court on review, is the utmost that was intended by the holding. It must also be noted here that the manner of presenting the facts to the witness whose opinion is asked, or the form of his answer or report based on such facts, is not a question which greatly concerns us under pertinent provisions of the act. Section 60 (a), Stats. 1917, p. 871, supra.

[4] The record now before us presents conflicting views as to whether or not the exertion of the decedent an hour or so prior to his death contributed to his disability. The views on each side of this question are based on all of the facts relating to the employee's condition at the time of his death and on the history of the facts and circumstances leading up to and attendant upon the last work that was done by him. The record in this state gives the probative value to the witness' testimony which was lacking on the former hearing, and supports the commission's present conclusion. Brandon v. Ind. Acc. Com., 211 Cal. 341, 343, 294 P. 1064; MacDonald v. Ind. Acc. Com., 213 Cal. 156, 1 P. (2d) 979.

The order is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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220 Cal. 139

WOOD v. NELSON et al.

Sac. 4777.

Supreme Court of California.

Feb. 27, 1934.

1. Appeal and error 🔑1008(1).

Whether conversations between general contractor and subcontractor amounted to agreement to furnish extras, or resulted in agreement of modification of written contract entitling subcontractor to additional compensation, *held* for trial court.

2. Mechanics' liens 🔑302.

Subcontractor *held* entitled to personal judgment against building owner in action to foreclose mechanic's lien, to extent of fund which owner owed to general contractor at time of trial, where subcontractor served stop notice upon owner.

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by M. B. Wood against E. K. Nelson and others. From a judgment for plaintiff, George Covell appeals.

Affirmed.

Edwin V. McKenzie, of San Francisco. Arthur J. Carlson, of Modesto, and Frank J. Mahoney and Wm. H. Kiler, both of San Francisco, for appellant.

T. C. Butler, of Watsonville Junction, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff in an action to foreclose a mechanic's lien.

The claim grew out of the construction of the Covell Hotel in Modesto. The plaintiff was employed by the general contractor to furnish the labor and materials to complete the mason work on the structure. The building was completed and accepted. No question is raised as to the due filing of the claim of lien.

The plaintiff based his right to recover upon a written contract between him and the defendant Nelson, the general contractor, calling for a contract price of $7,000, and upon an oral modification of the written contract pursuant to which he alleged sums due aggregating $3,951.25. Payment on the foregoing sums to the extent of $7,964.82 was also alleged. The balance of $2,986.43, together with a filing fee of $1.80, was claimed to be due, owing, and unpaid, and to be a lien on the real property involved.

The trial court found the existence of the written contract. It also found that when the work had progressed to a certain point, the plaintiff and the defendant Nelson entered into an oral agreement for a modification of the written contract; that the modification agreement called for changes in the thickness of the walls and the materials to be used, and for changes in the method of fireproofing and reinforcing, and provided for payment to the plaintiff, in addition to the contract price, of the reasonable value of additional materials used and labor performed, plus 10 per cent. thereof for superintending the work. The plaintiff had judgment for the amount alleged to be due. The judgment provides for a sale of the premises and if the proceeds be insufficient to satisfy the claim for judgment against the defendants, E. K. Nelson, the general contractor, George Covell, the owner, and Southern Surety Company of New York, the surety on the contractor's bond. The defendant George Covell alone appealed from the judgment.

[1] The main contention on the appeal is that the evidence does not warrant the finding that there was a modification of the original agreement providing for a contract price of $7,000. It is the appellant's contention that the changes referred to by the plaintiff were contemplated in the negotiations preceding the execution of the written contract. There was testimony of what were the conversations between the plaintiff and the general contractor prior to the execution of the written contract, and to the effect that certain requirements were to be changed or omitted. The appellant contends that inasmuch as the plaintiff nevertheless entered into the written contract to be bound by the general plans and specifications, such conversations cannot constitute evidence of any modification of the written contract. It is further contended that any materials or labor furnished in addition to what was called for by the written contract were extras furnished without the required written order of the owner and architect. There was also testimony of conversations had between the plaintiff and the general contractor subsequent to the commencement of the work relating to certain necessary changes. On the whole record we cannot say that the finding of the court is without support in the evidence. Whether the conversations between the parties to the contract, taken as a whole, amounted to no more than an agreement to furnish extras, or resulted in an agreement of modification of the written contract, and what that modification agreement was, were primarily questions of fact for the court, and on the record presented the conclusion reached by it cannot be disturbed; nor can it be said that the amount remaining unpaid is not as found and decreed by the court.

[2] The only other question is whether the plaintiff was entitled to a personal judgment against the appellant for any deficiency. The court found that the contract with Nelson, the general contractor, and the contractor's bond were duly filed for record. In the complaint it was alleged that the plaintiff caused a stop notice to be served upon the owner at a time when $10,500 of the contract price was due and payable to the general contractor. The defendant Covell, by his answer, admitted the service of the stop notice, and admitted the retention of $12,500 of the contract price which he offered to deposit in court. The court found the fact of service of the stop notice and that at the time of trial there was due to the defendant Nelson from the owner the sum of $10,500 of the contract price, which the defendant Covell then held and retained. The judgment for any deficiency against the appellant is based upon this finding and is to be construed as being addressed to and limited by the amount of the fund retained by him, and is a proper judgment against the appellant to that extent. Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712; see Roberts v. Security T. & S. Bank, 196 Cal. 557, 573–574, 238 P. 673; 17 Cal. Jur., p. 43 et seq.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.

220 Cal. 181

T. L. REED CO. v. KRUSE.

Sac. 4795.

Supreme Court of California.

Feb. 28, 1934.

1. Mortgages ⚷376.

In trustor's action to compel trustee to account on sale of land under trust deed and for excess of sum required to discharge indebtedness, fixed amount provided in trust deed for attorney's fee was disallowed as item of expense where no fee was actually paid to attorney.

2. Mortgages ⚷376.

In trustor's action to compel trustee to account on sale of land under trust deed, and for excess of sum required to discharge indebtedness, compensation paid supervisor during time trustee operated farm was disallowed as expenses, where supervisor was general agent of beneficiary, superintending all its farming operations and time devoted to superintending of property involved was not shown.

3. Mortgages ⚷376.

In trustor's action to compel trustee to account on sale of land under trust deed, trustor *held* entitled to profit received from sale of wood on premises where trees were severed during trustee's occupancy and subsequently sold by purchaser of premises at profit.

4. Mortgages ⚷376.

In trustor's action to compel trustee to account on sale of land under trust deed, trustee *held* not entitled to credit for taxes on property, delinquent at time of sale and subsequently paid by purchaser, where beneficiary under trust deed purchased property subject to delinquent taxes.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by the T. L. Reed Company against J. R. Kruse. From a judgment for plaintiff, defendant appeals.

Affirmed.

C. E. McLaughlin and Porter McLaughlin, both of Sacramento, for appellant.

Everts, Ewing, Wild & Everts, C. L. Clark, Dan F. Conway, and L. N. Barber, all of Fresno, and Butler, Van Dyke, Desmond & Harris, of Sacramento, for respondent.

PRESTON, Justice.

Action for an accounting upon sale of land by a surviving trustee pursuant to the provisions of a deed of trust. Plaintiff alleged that the money received by defendant trustee at the time of sale was $15,000 in excess of the sum required to discharge the indebtedness under the trust deed, together with advancements and expenses, including costs of sale. Defendant answered, alleging that he sold the property for $61,043.30, the exact sum required to satisfy said items. Upon conflicting evidence the court found that defendant received from the purchase price of said property $5,000 in excess of the amount required to discharge the indebtedness of plaintiff and sums otherwise advanced and secured by said deed of trust. Judgment followed for plaintiff accordingly, and defendant appealed.

The record fails to show the particular items which went to make up the $5,000 award to plaintiff, but it does contain evidence amply sufficient to support the findings and judgment, as hereinafter set forth.

The trust deed was given to secure a $40,000 promissory note and later advancements made in behalf of plaintiff. Plaintiff defaulted and defendant took possession of and conducted farming operations on the premises from January 2 to June 10, 1929. At sale of the property, held on the latter date, it was bid in by the beneficiary named in said deed of trust for the exact amount due according to its records, to wit: $61,043.30. In calculating the sum to be bid, the beneficiary included the principal debt, interest, costs, and expenses, and, in addition, a $2,000 attorney's fee and expenses incurred in farming the land during the aforesaid period of occupation, including $1,500 for services of a supervisor who had possession of and operated the farm. During said occupancy a number of fruit trees were severed and the wood therefrom was cut and partly corded. After sale of the property, this wood, which had remained thereon, was sold by the purchaser at a profit of perhaps $1,500, but plaintiff was not given credit for such sum or any part thereof.

[1] The deed of trust provided that the trustee should pay the expenses of sale, including an attorney's fee in a fixed amount. But here no fee was actually paid to any attorney. Apparently necessary legal duties were performed by general counsel for the beneficiary, an insurance company. These facts justify disallowance of the attorney's fee of $2,000. The purpose of said provision of the trust deed was to place a limit upon the amount of fee which could be charged,

not to bind the trustor to pay such a sum if it was not actually expended or incurred as an expense of the sale.

[2] Disallowance of the compensation paid to the supervisor during the time he occupied and operated the farm on behalf of the beneficiary is also justified. The evidence shows that this supervisor was a general agent employed by said company at a salary of $250 a month to superintend all of its farming operations. There is no showing of the time devoted to superintending operations on the property here involved during the said period of occupancy prior to sale, or of any apportionment of the compensation paid said supervisor as between this property and other ranches or lands which he managed for his employer. While the deed of trust provided that the beneficiary should judge the expense necessary to keep the property in good condition and repair, it was necessary for said company to show the sums actually expended by it before claiming credit. Here, as above stated, there was a failure of proof of the amount paid said supervisor with respect to this particular property.

[3] The allowance to plaintiff of a sum equal to the profit received from sale of wood on the premises is also justified. The trees were removed after plaintiff's surrender of the property, but he was charged with the labor costs incidental to their removal. It was the duty of defendant trustee, during his occupancy and management of the premises, to sell this wood and apply the proceeds of sale to purposes of the trust or to otherwise account to plaintiff therefor. But the trustee allowed the wood to stay on the land and the purchaser thereafter sold it. The court was justified in charging said trustee with its reasonable value, which was placed by one witness as high as $3,600.

From the above discussion it will be seen that if plaintiff were allowed credit for the three items mentioned, $2,000 attorney's fee, $1,500 salary of supervisor, and $1,500 for wood, this would afford a proper basis for the $5,000 judgment in his favor.

[4] But appellant further asserts that the court erred in failing to take into consideration and give him credit for $9,895.34 on account of taxes and assessments on the property, delinquent at the time of sale and subsequently paid by the purchaser. This contention is without merit. The beneficiary purchased the property at public sale, subject to the delinquent taxes, and was thus able to make the purchase for a sum lower by that amount. Had appellant, as trustee, paid said taxes and assessments, the sum realized from the sale would have been greater to the amount of the delinquencies. Had the beneficiary, as such, paid the taxes prior to sale of the property, it would have been entitled, under the deed of trust, to reimbursement therefor, but it certainly may not claim this credit for payments made subsequent to the sale when its relation of beneficiary had terminated and it was acting in its capacity as purchaser of the property.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.

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220 Cal. 279

CALIFORNIA GRAPE CONTROL BOARD, Limited, v. BOOTHE FRUIT CO.

Sac. 4652.

Supreme Court of California.
March 1, 1934.

1. Principal and agent 🔑170(2).
Principal's receipt without protest of balance of purchase price of grapes sold by agent and express approval of sale *held* ratification of sale.

2. Corporations 🔑423.
Corporation president's malicious and oppressive act in converting grapes belonging to another *held* imputable to corporation.

3. Agriculture 🔑6.
Co-operative marketing association, organized to secure benefits under Federal Agricultural Marketing Act, which bought grapes on vine and posted conspicuous notices of purchase in vineyard, *held* entitled to damages from one converting portion of grapes with intention to injure and cripple association's effectiveness (Federal Agricultural Marketing Act [12 USCA §§ 1141–1141j]; Civ. Code, § 3336).

4. Trover and conversion 🔑22.
Buyer's right to damages for conversion of grapes bought on vines *held* not affected by buyer's unlawful intent to allow grapes to waste on vines (Civ. Code, § 3336).

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the California Grape Control Board, Limited, against the Boothe Fruit Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Dennett & Zion, of Modesto, for appellant.

Agnew & Boekel, of San Francisco, and Hawkins & Hawkins, of Modesto (John D. Gallaher, of San Francisco, of counsel), for respondent.

PRESTON, Justice.

[1] The plaintiff, a co-operative marketing corporation, organized under the laws of California for the purpose of securing the benefits of the Federal Agricultural Marketing Act (12 USCA §§ 1141–1141j), caused to be grouped together in the year 1930 a large percentage of the grape acreage of California, by securing the signatures of the owners of such acreage to a uniform marketing agreement constituting it their selling agent. One Swanson, a signatory to such uniform agreement, had a grape yield on his acreage in Stanislaus county, for the year 1930, of about 100 tons. In September, 1930, through his agent, one Paulson, he sold the said grapes on the vines to plaintiff. A down payment on the purchase price was made, and conspicuous notices of purchase were posted throughout the vineyard. Later, payments were completed to Swanson himself. The authority of the agent to sell was put in issue by defendant in this action, but the question of want of authority of said agent, if such defense were sustained, would be immaterial, as the sale was specially ratified by the owner who, as above noted, personally received, without protest, the balance of the purchase price and moreover expressly approved the contract of sale after it was made by the agent.

[2-4] The Boothe Company, a corporation (defendant here), had as its president and manager D. P. Boothe, who resented the policy, purposes, and operations of plaintiff. Admittedly with full knowledge of the claims of ownership of plaintiff to said vineyard, said corporation, through its president, entered upon the lands of said Swanson and picked some 47 tons of said grapes, carried them away, and converted them into raisins, which were marketed for its own benefit. Plaintiff's complaint here against said Boothe Company as defendant was cast in three counts. First, it sought an injunction against further depredations upon said vineyard by defendant; second, it stated a cause of action for claim and delivery; and, third, it contained a plain count for conversion of personal property. It further alleged that the act of defendant was prompted and executed by fraud, malice, and oppression, and prayed for exemplary damages. The answer of defendant was a general and special denial. The case was tried upon the conversion count alone; the other two counts apparently being abandoned by plaintiff. The court made findings for plaintiff upon said count, fixing the value of the property converted at $387 and assessing exemplary damages against defendant in the sum of $100. Defendant appealed. We can find no merit in the grounds urged for reversal.

There is in the record ample evidence of malice and oppression on the part of said D. P. Boothe, who openly defied the rights of respondent as owner of the property and condemned its purposes in its efforts to stabilize the grape industry. In other words, what he did was done willfully with the firm intention of injuring and crippling the effectiveness of respondent. These acts of defendant's president and manager were imputable to the corporation. Lowe v. Yolo County, etc., Water Co., 157 Cal. 503, 108 P. 297.

The claim that respondent suffered no damage because it intended to violate the state law by allowing the grapes to waste on the vines clearly cannot be relied upon by appellant. The property belonged to respondent; appellant converted it. How respondent obtained it or what use it intended to make of it can be no justification for the acts of appellant. Property rights are not administered according to speculation as to the purpose for which the property is intended to be used.

In Marland Refining Co. v. Duffy, 94 Okl. 16, 220 P. 846, 851, 35 A. L. R. 52, it is said: "The weight of authority establishes the rule of law that one, who does an unlawful act, is not thereby placed outside of the protection of the law, but that, to have this effect, the unlawful act must have some causal connection with the injury complained of. * * *" See, also, Matta v. Katsoulas, 192 Wis. 212, 212 N. W. 261, 50 A. L. R. 291, and note page 293.

The court, under section 3336 of the Civil

Code, gave to respondent the value of the property converted, and the market value of said property was properly used as a basis for this award.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J.; IRA F. THOMPSON, J.; CURTIS, J.

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220 Cal. 267

CLARK v. TAVARES et al.

Sac. 4773.

Supreme Court of California.
March 1, 1934.

Rehearing Denied March 30, 1934.

Corporations 🔑**432(12).**

Evidence sustained finding that salesmen who induced plaintiff to exchange certain stock for stock of defendant corporation by fraudulent representations were agents of defendant corporation, as well as of corporation's stock sales manager (Civ. Code § 2338).

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Liston Clark against J. G. Tavares and the Yosemite Portland Cement Corporation. From an adverse judgment, defendant last named appeals.

Affirmed.

F. H. Pearson, of Fresno, for appellant.

J. Oscar Goldstein, of Chico, for respondent.

PRESTON, Justice.

Respondent, plaintiff below, to secure the fruits of a rescission in pais on a contract to purchase shares of stock of the appellant corporation, sued the said corporation and its stock sales manager, J. G. Tavares, for the sum of $6,000, representing the value of securities exchanged by respondent for said stock, which transaction was alleged to have been induced by fraudulent representations.

The complaint is in three counts, and declares upon three separate transactions: First, it alleges that on September 24, 1928, for 113 shares of class A stock of said corporation, respondent gave in exchange 22 shares of the common capital stock of the Pacific Gas & Electric Company. Second, it alleges that on September 27, 1928, for 152 shares of class A stock of said corporation, respondent gave in exchange 10 shares of the common capital stock of the Pacific Telephone & Telegraph Company. Third, it alleges that on October 26, 1928, in part payment for 335 shares of class A stock of said corporation, respondent gave 15 shares of the stock of the Bank of Italy and supplied the balance of the purchase price by giving a check for $293.75.

The purchase price was $10 per share, although the evidence shows that the stock was offered as low as $6 per share at the office of defendant stock sales manager. The parties who directly perpetrated the fraud in the first two instances above named were George F. Kenney and D. A. Schlemmer, working together, and in the third instance, A. Shapiro and B. L. Goldberg, working together. Schlemmer was the leading conversationalist in inducing the first two purchases. He had been a sales manager of appellant, selling its cement products. The four men were working under the immediate supervision and direction of defendant Tavares, who made no defense to this action, but defaulted therein.

The cause was put at issue, and the court made findings of fact and gave judgment in favor of respondent, giving him the full relief prayed for and decreeing that the stock of appellant corporation, having been deposited in court, be held subject to the order of defendants.

The only contention worthy of full discussion is that the four representatives above named, who perpetrated the initial fraud, were agents of the defaulting defendant Tavares only, and were in no sense the agents of appellant. Appellant bases its chief reliance upon the fact that in the letter of authority to Tavares it specified, "All salesmen are to be and to remain your employees without any liability upon the part of this corporation or otherwise," and upon the further fact that the letter stated that commissions on all sales were to be paid only upon receipt of the cash from the selling price of the stock. To this should be added the further contention that appellant did not receive any of the proceeds of the securities converted nor did it part with any of its treasury stock, but that orders of respondent were filled from privately owned stock of others.

At the outset it should also be noted that in said letter of authority above referred to, appellant reserved the right to employ other salesmen, and the court specifically found that the persons making the fraudulent representations were agents, servants, and representatives of both appellant and its codefendant. Enough of the evidence will now be recited to show that this finding is properly supported.

Appellant, in pushing its campaign to sell its treasury stock, after securing the services of Tavares as stock sales manager, printed and circulated extensive literature in which it vouched for Tavares as its stock sales manager. A copy of this literature was specially mailed to respondent, among others in the community in which he resided, of which fact he had knowledge. In this literature appellant specifically named the above agent, Schlemmer, as its sales manager, using the following language: "D. A. Schlemmer, Sales Manager. One of the most successful sales executives in the industry; for 10 years with the Nicolson Syndicate Mills of Kansas; subsequently sales and traffic manager of the California Portland Cement Company of Los Angeles." As already noted, respondent states that this man made the first misrepresentations to him. Also, prior to call upon respondent of any of the agents, he received direct from appellant a communication over the signature of appellant's president, "An invitation to become associated with them in the ownership and earnings of the corporation." This invitation bore a serial number and, among other names appended to it, was that of "D. A. Schlemmer, Director of Sales."

The nature of the fraud practiced upon respondent need not be dwelt upon, as it is conceded that the evidence supports the conclusion of the court below that material misrepresentations of fact were made to respondent, which induced the purchase in each instance. When these agents called upon respondent, they had order blanks of appellant numbered serially. Respondent, in making each purchase, signed one of these applications. They were addressed to the company itself, and also bore the following: "Yosemite Portland Cement Corp., J. C. Tavares, Securities Dept. (Signed) George F. Kenney, Agent" and "Make all checks payable to Yosemite Portland Cement Corporation." The serial number of the first one executed by respondent to appellant was No. 7998. On the very day it was signed, order No. 7997 was signed by one Crippen, and the records of appellant show that the salesmen who conducted the latter sale were Geo. F. Kenney and D. A. Schlemmer. The records of appellant also show that correspondence occurred between said Crippen and the corporation respecting this subscription. Likewise, in the stock sales record of appellant, the names of George F. Kenney, D. A. Schlemmer, A. Shapiro, and Goldberg & Shapiro, appear in a number of instances, showing that appellant knew of their activities and in many instances ratified their acts. Said records also show that numerous sums as commissions were paid to Tavares on subscriptions taken by these men. It is also significant that, in procuring the shares of stock to deliver to respondent, use was made of shares standing in the name of the secretary of Tavares, one B. Sperry, and also standing in the name of H. J. Redgrave and C. R. Cobb. None of these parties appeared as witnesses. The name of Sperry was known to the corporation as the secretary of Tavares. The names of the other parties were unknown to it, and it had no addresses by which to locate them. Not only this, but none of the four agents who perpetrated the fraud was produced by appellant, nor was Tavares. The correspondence between Tavares and respondent, introduced in evidence, shows clearly that treasury stock was purported to be delivered to respondent in each instance. In other words, Tavares confirmed, and aided by concealment, the fraud practiced upon respondent by the other agents.

The company knew or should have known that neither Tavares nor his secretary owned any stock of the corporation, and should also have taken heed as to whether the addresses of the above-mentioned parties were noted on its books. The court was warranted in believing that the whole transaction was one to circumvent the provisions of the permit which required sales to be for cash and did not contemplate an exchange of stock for the valuable securities of respondent. Why should numerous cash sales by these agents have been properly noted on the books of appellant while the transactions with respondent were not so noted?

The facts fully justified the court below in holding that said four named persons were agents of both appellant and defendant Tavares. It is also clear that the fraud practiced by them was committed in and as part of the transaction of the business of appellant. Section 2338, Civ. Code; Otis Elevator Co. v. First National Bank, 163 Cal. 31, 39, 124 P. 704, 41 L. R. A. (N. S.) 529; Johnson v. Monson, 183 Cal. 149, 151, 190 P. 635; Ruppe v. City of Los Angeles, 186 Cal. 400, 402, 199 P. 496.

It is not necessary to determine whether this cause is one on the law or the equity side of the court; if the former, it was properly appealable to the district court of appeal.

In order to avoid any possible question in this connection, the cause has been regularly transferred to this court for decision.

A consideration of the merits renders the motion to affirm a moot question and, accordingly, it is denied.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; IRA F. THOMPSON, J.; CURTIS, J.

NISBET et al. v. RHINEHART.*

Civ. 4996.

District Court of Appeal, Third District, California.

Feb. 17, 1934.

Rehearing Denied March 19, 1934.

Hearing Granted by Supreme Court April 16, 1934.

1. Insurance 🔑188(2).

Complaint for premiums due upon automobile policies sold to defendant by plaintiffs who failed to allege whether they acted as insurance agents or insurance brokers *held* sufficient as against general demurrer (Pol. Code, § 633a, as amended by St. 1931, p. 574).

> Complaint alleged that within one year last past plaintiffs sold and delivered to defendant policies of automobile insurance of certain companies; that the premiums thereof extended from and to specified dates; that the amounts thereof, which were specified, have not been paid or any part thereof; and that defendant has refused to pay such amounts which were due and payable to plaintiffs.

2. Appeal and error 🔑931(1).

On appeal, every presumption is in favor of judgment.

3. Appeal and error 🔑907(2).

Absent evidence in bill of exceptions on which appeal was taken, presumption exists that findings are supported by record and that no miscarriage of justice resulted (Const. art. 6, § 4½).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Alfred Nisbet and another against S. W. Rhinehart, doing business as Sam's Transfer Company. From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

Edward G. Benard, of San Francisco, for appellant.

Dennett & Zion, of Modesto, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment which was rendered for premiums due upon insurance policies. The complaint fails to allege that the plaintiffs acted as agents for the insurance companies, or that they sold the policies as independent brokers. A general demurrer to the complaint was overruled. Defendant's motion for judgment on the pleadings was also overruled. On appeal it is claimed the complaint fails to state a cause of action authorizing the plaintiffs to sue in their individual names for premiums due to the companies.

The cause was tried by the court sitting without a jury. The court found that the policies were solicited for the defendant and sold by the plaintiffs as independent brokers, and that they therefore had a right to maintain the action in their own names, that they had no contract with the insurance companies involved, and that the premiums were due to plaintiffs. A judgment was rendered accordingly against the defendant. From this judgment an appeal was perfected.

[1] The complaint was drawn in three counts. Each count alleges a separate amount of premium to be due from the defendant to the plaintiffs upon separate policies with different companies.

The language employed in the first count is as follows: "That within one year last past the said plaintiffs sold and delivered to the said defendant a policy of insurance of the Independence Indemnity Company for automobile insurance, and that the premium on said policy of insurance extended from October 26, 1932, to December 19, 1932, and that the amount of the premium is the sum of $231.96, which said sum has not been paid or any part thereof and which defendant has refused to pay, and which is now due and payable from said defendant to said plaintiffs."

The complaint fails to state the capacity in which the plaintiffs acted in procuring the sales of the insurance policies. Each of the other counts is couched in the same language. The demurrer was general, merely stating that the complaint fails to state a cause of action against the defendant. It failed to assign as a cause of demurrer that plaintiffs

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 42 P.2d 71.

lacked legal capacity to sue, or that it was uncertain for any reason. The complaint did allege that the premiums were due and owing to the plaintiffs.

[2] In the absence of a special demurrer pointing out the alleged defect, we are of the opinion the complaint stated a good cause of action for money due and owing to the plaintiffs. The appeal was taken on a bill of exceptions which does not include the evidence which was taken at the trial. The evidence is not before us. On appeal every presumption is in favor of the judgment. For the purpose of supporting the judgment, we may assume that the policies contained provisions making the insurance brokers personally liable to the companies for the premiums due upon contracts sold by them. The court does specifically find that: "The plaintiffs were insurance brokers; that as such insurance brokers the plaintiffs secured a policy of automobile insurance for the defendant." This finding will support the theory that plaintiffs acted as the agents of the defendant in procuring the insurance, or that they acted as independent insurance brokers.

Section 633a of the Political Code (as amended by St. 1931, p. 574) defines an insurance broker as follows: "An insurance broker is an individual, copartnership, association, or corporation that for compensation and on behalf of another party solicits, negotiates, or effects contracts of surety, indemnity, or insurance other than life with, but without authority to perform such acts on behalf of, any properly qualified insurance or surety company or association. An insurance agent may be a broker with relation to companies or associations for which he is not an authorized agent, but in order to act as a broker he must also be licensed as such."

Pursuant to the foregoing definition of an insurance broker, it is apparent that, in the absence of restrictions in the contract which is involved, the plaintiffs were authorized to solicit the policies as the agents of the defendant, in which event they may be liable to the insurance companies for the payment of the premiums. Indeed, the court specifically found that the plaintiffs had no contract with any of the insurance companies. Since it was also found that the premiums were due and unpaid, it may not be said there was a miscarriage of justice in rendering judgment against the defendant.

[3] Under the provisions of article 6, section 4½, of the Constitution of California, even though it may be held that the general demurrer in this case should have been sustained, the judgment will not be reversed, for the reason that we must assume, in the absence of the evidence, that the findings are fully supported by the record and that there is no miscarriage of justice.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

137 Cal.App. 55

WEINBERG v. JOHN A. VAUGHAN CORPORATION.

Civ. 8167.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1934.

1. **Estoppel** ⇨54.

Rule that estoppel is not favored applies only where party, against whom invoked, did not know of, nor acquiesce in, facts developed.

2. **Pleading** ⇨236(3).

It is ordinarily within trial court's sound discretion to permit amendments of pleadings to set up additional defenses during trial.

3. **Pleading** ⇨280.

Mere fact that application for leave to file supplemental answer, interposing additional defense, was not made until after one trial of cause, did not require refusal thereof.

4. **Judgment** ⇨713(3).

Plaintiff *held* not estopped to prosecute action against corporation for balance due on contract price of printing by prosecution of action against corporation's agent on complaint alleging that defendant had no authority to make contract for corporation.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Milton Weinberg against the John A. Vaughan Corporation. From a judgment for defendant and an order denying a motion to modify the judgment, plaintiff appeals.

Affirmed.

Charles A. Bank, of Los Angeles, for appellant.

Kemp, Partridge & Kemp, of Los Angeles, for respondent.

CRAIG, Justice.

In an action for an alleged balance remaining unpaid upon a contract price of printing, judgment in favor of defendant was rendered by the court without a jury. A motion to vacate said judgment was denied. The plaintiff appealed from the judgment and ruling last mentioned.

The parties having entered into a contract in writing for certain weekly advertising, through a purported agent of the respondent, and the same having been fully performed, suit was commenced for the amount claimed to be due thereon. Thereafter a motion for a new trial was granted. An action instituted in the municipal court against said agent for the same amount, upon a complaint wherein it was alleged that the defendant was an agent and officer of said corporation defendant in the superior court action, but did not have the right or authority to make said contract for his pretended principal, later resulted in a judgment in favor of the plaintiff. Subsequently thereto, in the instant case for the same obligation and upon the original contract, upon calling the same for a new trial the defendant corporation was permitted to file a supplemental answer in which it alleged all of the foregoing proceedings. The trial court has rendered findings of fact and conclusions of law in favor of the defendant, reciting that the plaintiff elected to hold said agent Richard Coburn and prosecuted his action to final judgment in the municipal court; "that plaintiff herein is estopped by his election to hold the said Richard Coburn * * * by his action in prosecuting the said claim to judgment * * * from prosecuting this action against the defendant herein upon the same claim"; and that "plaintiff should take nothing by his complaint herein."

[1-3] It is first contended that it was error to permit the defendant to file said supplemental answer and to introduce evidence thereon, interposing a defense of "estoppel by election." While, as the appellant assumes, estoppel is not favored (Murphy v. Clayton, 113 Cal. 153, 45 P. 267), the rule only applies where the party against whom it is sought to be invoked did not know of, nor acquiesce in, the facts developed (Weintraub v. Weingart, 98 Cal. App. 690, 277 P. 752). It is ordinarily within the sound discretion of the trial court to permit amendments setting up additional defenses (Harney v. Corcoran, 60 Cal. 314; Gould v. Stafford, 101 Cal. 32, 35 P. 429), during trial (Hagar v. Home Stores, 85 Cal. App. 533, 259 P. 1007; Tolbard v. Cline, 180 Cal. 240, 180 P. 610). The mere fact that application for leave to file the same be not made until there has been one trial of the cause does not demand its refusal. Goldstein v. Chicago City R. Co., 286 Ill. 297, 121 N. E. 726.

[4] Since it is insisted that upon the first trial in the superior court the plaintiff was kept in ignorance of Coburn's agency, and that in fact the judgment was then based upon nonagency, from this it is argued that he could not be estopped herein upon the second trial by election to proceed against Coburn personally. There is no contention that the plaintiff failed to recover in the municipal court against Coburn for the precise obligation upon which he was denied relief in the superior court upon evidence which he admits tended to disclose nonagency. The pleadings, evidence, and findings of the trial court in this action expressly state that in said municipal court action nonagency was pleaded and proved. It must therefore be presumed that the defendant corporation was not obligated by the alleged contract, and that omission of the allegation of proof thereof would have resulted in a miscarriage of justice, rendering possible a recovery against one not indebted to the plaintiff. It is admitted that the action which succeeded "was a recovery for breach of warranty of authority, under code provisions entitling one to recover as damages (and not as a contract liability) such amount as would compensate him for the fact that an alleged contract might not be enforcible against the supposed principal. Indeed, were it not for the existence of the code section specifically authorizing recovery against the agent, it is doubtful if there would otherwise exist any right of recovery whatever." It is unnecessary to enter upon a discussion of the technical application of the term "election," since the appellant is shown conclusively to have determined after trial of the present suit as to liability of Coburn for the amount demanded and to have recovered a judgment upon a claim for which there would otherwise have existed no right of recovery. The contention that an unsatisfied judgment against an agent will not bar an action against an undiscovered principal when discovered, if the plaintiff was ignorant of the fact as to agency, has no place here, and other questions presented do not require further disposition.

The judgment and order denying motion to vacate the same are affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

137 Cal.App. 114

FORNEY et al. v. SHELL OIL CO. et al.

Civ. 1296.

District Court of Appeal, Fourth District, California.

Feb. 26, 1934.

Mines and minerals ⚷79(6).

Lessors could not cancel oil lease for alleged failure to make proper accounting and to pay royalties accruing subsequent to serving of notice to make back payments, where lessee made back payments, and payment subsequent to notice was not required under lease and notice given.

> Lease provided that it might be forfeited on failure by lessee to perform covenants to operate producing wells and pay and deliver royalties therefrom, and continuance of such failure for ninety days after written demand by lessors specifying obligations to be performed. Notice given stated the violation complained of to be the failure to make payment or settlement of the royalties due on the twentieth days of certain named months, and the remainder of the notice was so worded as to relate to such particular violations, and within time named in the notice the amounts claimed by the lessors to be due were paid to the bank in accordance with another provision of the lease, and an account was rendered.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by William M. Forney and his wife against the Shell Oil Company and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Borton & Petrini, of Bakersfield, for appellants.

Harvey & Johnston, of Bakersfield, and Thomas B. Leddy, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

On August 5, 1927, the appellants leased a certain parcel of land in Kern county to the Shell Oil Company under a lease providing for the development and production of oil upon the property. Subsequently the Shell Oil Company transferred the lease to L. C. Osborn, who transferred it to Thomas B. Leddy, and he, in turn, transferred it to William H. Allen, Jr., who will herein be referred to as the respondent. The lease provided for a royalty to the appellants of one-eighth of all oil produced and saved from the land, and that the lessee should purchase and pay for said portion of the oil produced, rendering an account and making payment on or before the 20th day of each calendar month covering the royalty oil produced and saved during the preceding calendar month.

A producing well was brought in on November 19, 1930, and two payments on account of said royalty were made to the appellants. On October 10, 1931, the appellants gave notice of a violation of the terms of the lease, the material portion reading as follows:

"That said violation consists in that there has not been a payment or settlement of royalties due and as is required in said oil and gas lease on the 20th days of the months of June, July, August, and September, in the year 1931, which payments were required on the 20th days of the said months; and there have been no royalties at all paid the undersigned for and on account of oil produced, saved and delivered from said premises as is required in paragraph 2 of said lease;

"The undersigned therefore notifies you and each of you that if and in the event you fail, within 90 days after demand hereof, to comply with the provisions of said lease, then in that event appropriate action will be taken by the undersigned for the purpose of cancelling the lease in its entirety."

Within the ninety days specified in the notice the respondent paid to the First National Bank of Bakersfield, for the appellants, an amount covering the royalty on the claimed production for the months named in the notice. Letters were also sent to the bank and to the appellants containing a statement of the amount of oil produced from the premises during the period named. The lease provided that the lessee might make any payment to the lessors by depositing the same to their credit in this bank and constituting the bank an agent of the lessors for that purpose. The appellants refused to accept this payment and shortly after the expiration of the ninety days named in the notice brought this action to cancel the lease. The court found that "within the time specified in said notice said defendant accounted to said plaintiffs for all the oil produced and saved from said premises during the period specified in said notice and paid to said plaintiffs the royalties payable to them therefrom" and gave judgment for the respondent.

This appeal is based upon the contention

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

that the evidence and findings are not sufficient to support the judgment for the reason that, under the terms of the lease and of the notice given, an accounting and payment for the months named in the notice was not a sufficient compliance therewith. In this regard the appellants maintain that the notice required the respondent to fully comply with all the terms of the lease, particularly those in regard to rendering statements and making payments at specified times, during the ensuing months as well as to account and pay for the months named therein. Appellants argue: "This was not a notice to account for the production of June, July, August, and September, 1931, and pay for the same. It was a notice to comply with the provisions of paragraph 2 of the lease relating to the regular course of accounting and payment on the 20th day of each month." It is pointed out that the evidence shows that the respondent, from the time oil was discovered on this land, had many times violated the provisions of the lease with reference to the manner of accounting and with reference to the times at which the royalties should be paid, and that no payments had theretofore been made until the same had been enforced by the appellants' employing lawyers for that purpose. While the evidence shows that the respondent's conduct in this regard was far from commendable and while our sympathies are entirely with the appellants, we feel compelled to hold that, under the notice given, an accounting and payment of the amount due for the months named in the notice, within the time named, was sufficient to avoid a forfeiture for the time being and that, under the wording of the notice, the findings and evidence sustain the judgment.

The lease provides that the same may be forfeited on the failure by the lessee to perform the covenants to operate producing wells and pay and deliver royalties therefrom, and the continuance of such failure for ninety days after written demand by the lessors specifying the obligations to be performed. The notice given stated the violation complained of to be the failure to make payment or settlement of the royalties due on the twentieth days of certain named months, and the remainder of the notice is so worded as to relate to these particular violations. Within the time named in the notice the amounts claimed by the respondent to be due for those months were paid to the bank in accordance with another provision of the lease, and an account was rendered. The court found that the respondent had accounted for all of the oil produced and saved and had paid all of the royalties due for the period named in the notice. It is not contended that the evidence does not sustain this finding, unless it is insufficient by reason of the fact that the respondent was also required to make proper accounting for and to pay royalties accruing subsequent to the serving of this notice. This, we think, was not required under the terms of the lease and the notice given. Smith v. Edelman, 214 Cal. 488, 6 P.(2d) 508.

Under the view we take of the main issue presented, certain other question raised do not require consideration.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

137 Cal.App. 37

ANDERSON v. FIDELITY UNION CASUALTY CO. et al.

Civ. 8941.

District Court of Appeal, First District, Division 1, California.

Feb. 21, 1934.

Hearing Denied by Supreme Court April 20, 1934.

1. Guaranty ⇨1.

"Guaranty" is contract for direct payment of money (Civ. Code, § 2787).

[Ed. Note.—For other definitions of "Guaranty," see Words & Phrases.]

2. Guaranty ⇨27.

Guaranty prepared by guarantor, in case of uncertainty, should be interpreted most strongly against guarantor (Civ. Code, § 1654).

3. Guaranty ⇨27.

Contract of guaranty is subject to same rules of construction applicable to construction of other written instruments (Civ. Code, §§ 1641, 1649).

4. Principal and agent ⇨110(1).

Power of attorney authorizing agent to execute bonds, undertakings, recognizances, and contracts of indemnity authorized agent's execution of instrument purporting to "assure" payment of subcontractor.

5. Guaranty ⇨36(7).

Instrument reciting purpose to assure payment of subcontractor, although unsealed and possibly defective in technical elements of guaranty, *held* to make contracting party liable for unpaid indebtedness to subcontrac tor (Civ. Code, §§ 1614, 1615, 1641, 1649, 1654, 2787).

Instrument stated that alleged guarantor accepted and approved contract between subcontractor and general contractor covering the furnishing of labor and materials necessary for the completion of all brick work going into designated building, and that the contract price was $13,000, and related the terms of payment, and stated that "the purpose of this letter is to assure to you that payment will be made in accordance with the foregoing terms," and was signed by the alleged guarantor by its attorney in fact.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by N. A. Anderson against the Fidelity Union Casualty Company and others. From a judgment in favor of the named defendant, plaintiff appeals.

Reversed with directions.

Richard J. O. Culver, of Los Angeles, for appellant.

Hiram T. Kellogg, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This action was brought by plaintiff to foreclose a mechanic's lien for labor and material furnished in a building owned by defendant Paul I. Johnson under a subcontract entered into between plaintiff and defendant Bessolo & Gualano, Inc., and to recover from it the value of said labor and material, and also to recover from defendant, the Fidelity Union Casualty Company, the value of said labor and material under the alleged guaranty executed by said company. It was stipulated that the action for the foreclosure of the mechanic's lien was waived for the reason that the building against which the lien was claimed had been sold under a prior incumbrance. Johnson had executed his promissory note for $1,500 to plaintiff in part payment of said claim. Judgment was rendered against said Johnson for the amount evidenced by said promissory note and against Bessolo & Gualano, Inc., for the remainder of plaintiff's claim, and against plaintiff and in favor of the Fidelity Union Casualty Company. From the judgment in favor of the Fidelity Union Casualty Company, plaintiff appeals.

It appears from the evidence produced by appellant, respondent declining to produce any, that defendant Johnson, desiring to have an apartment house constructed, entered into a contract with Bessolo & Gualano, Inc., for that purpose. The contract price for the completion of the building was the sum of $160,000, $100,000 of this amount to be furnished by the Western Loan & Building Company, secured by a mortgage, and a deed of trust to be executed for $45,000, the remaining $15,000 to be paid by the said owner.

Prior to September 14, 1928, appellant was solicited by Bessolo & Gualano, Inc., the general contractor in charge of the construction of the said building, to take a subcontract from it for the brick work. Appellant, not being satisfied with the financial ability of either the said general contractor or the owner to meet his obligations, refused to sign said contract for the brick work until he received assurance that he would be paid. Having been informed that respondent, through its attorney in fact, Jay G. Frederic, was guaranteeing the payment of work done on said building, appellant called upon Frederic at his office and informed him that he would not sign the contract for the brick work unless respondent would guarantee its payment. Thereupon, Frederic stated to appellant that if he would take the building up to the roof he would be paid in full, and that respondent would give him a guaranty to that effect. On September 17, 1928, the said Frederic executed and delivered to appellant an instrument in writing which is as follows: "Fidelity Union Casualty Company, Los Angeles, California, September 17th, 1928. Mr. N. A. Anderson, Los Angeles, California. Dear Sir:—In re: Paul I. Johnson, Job, 1848 N. Gramercy Pl. Los Angeles, California. We hereby accept and approve contract between you and Bessolo & Gualano, Inc., general contractors under the above caption, covering the furnishing of labor and materials necessary for the completion of all brick work going into the above job. The contract price is $13,000.00, payable as and when received by the general contractors from the mortgage company, making the building loan on said property, as the building progresses; viz., the sum of $11,500.00 when the roof is on (designated as the 'second draw'). It is further understood that you have accepted a Trade Acceptance in the amount of $1,500.00 covering balance due under your subcontract as herein recited. The purpose of this letter is to assure to you that payment will be made in accordance with the foregoing terms. Yours very truly, Fidelity Union Casualty Company, By Jay G. Frederic, Attorney in Fact." Upon the execution and delivery of this instrument appellant executed the subcontract for the said brick work.

The power of attorney under which Frederic acted provided that as such attorney he was authorized to make, execute, seal, and deliver for and on behalf of respondent, as its act and deed, any and all bonds, undertakings, recognizances, contracts of indemnity, and other writings obligatory in their nature. This power of attorney was duly executed by respondent.

Respondent in its brief says that the sole question before the court on this appeal is this: "Did Jay G. Frederic have the authority to execute the instrument here sued upon?" It follows this with the further statement that the trial court must have decided the said instrument did not constitute a binding agreement, or that said Frederic, by virtue of his power of attorney, did not have authority to bind respondent. If the language used in the said instrument can be construed to be a binding obligation, then under the authority of Karsh v. Fidelity Union Casualty Co., 119 Cal. App. 543, 6 P.(2d) 980, and California S. F. Corp. v. Bessolo & Gualano, Inc. et al., 118 Cal. App. 323, 5 P.(2d) 478, it would bind respondent. Both of these cases arose upon instruments executed by Frederic purporting to act as attorney in fact for the indemnifying companies.

The contract entered into between appellant and Bessolo & Gualano, Inc., for said brick work provided that he should be paid the sum of $13,000, of this sum $11,500 to be paid him when the roof was on (designated as the "2nd Draw"), payable out of the funds as received by the general contractor as the building progressed. The $100,000 furnished by the Western Loan & Building Company was to be paid in installments as the work on the building progressed. By agreement of all the interested parties, the respondent and Bessolo & Gualano, Inc., were given joint control of the building funds, and checks for payment of the work done on said building were issued to them.

About the 1st of December, 1928, appellant called upon Frederic at his office and in the presence of a Mr. Chatfield, vice president of respondent, stated to Frederic that he was informed Bessolo & Gualano, Inc., were in financial difficulties, and asked him if that condition affected the work upon which appellant was engaged. In reply to this question Frederic said that while that condition might be true of other jobs on which they were engaged, it did not exist as to the job upon which appellant was working, for him to go ahead with the work, and that everything would be all right. Appellant completed the brick work about the middle of December, 1928.

In February, 1929, appellant called upon a Mr. Lund, who was the district manager of the Western Loan & Building Company, for payment of his claim. At this time there was some $65,000 unexpended in the loan fund. Chatfield, the vice president, was present at this interview. Lund suggested that appellant be paid 50 per cent. of his claim, but Chatfield refused to do this until the building was finally completed. No part of the $11,500 has ever been paid appellant.

[1, 2] A guaranty is defined by the Civil Code, § 2787, as a promise to answer for the debt, default, or miscarriage of another person. And a contract of guaranty is a contract for the direct payment of money. Tyson v. Reinecke, 25 Cal. App. 696, 145 P. 153; Mahana v. Alexander, 88 Cal. App. 111, 263 P. 260. The alleged guaranty in the instant case was prepared by respondent. Therefore, conceding that there is any uncertainty therein, it is to be most strongly interpreted against it. Civ. Code, § 1654.

[3] As was said in London & San Francisco Bank v. Parrott, 125 Cal. 472, 482, 58 P. 164, 165, 73 Am. St. Rep. 64: "But, for the purpose of ascertaining the meaning of the language which he has used, and thus determining the extent of his guaranty, the same rules of construction are to be applied as are applied in the construction of other written instruments. His liability is not to be extended by implication beyond the terms of his guaranty as thus ascertained. The language used by him is, however, to receive a fair and reasonable interpretation, for the purpose of effecting the objects for which he made the instrument, and the purpose to which it was to be applied." Austin v. Union Paving, etc., Co., 4 Cal. App. 610, 88 P. 731.

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Civ. Code, § 1641. "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Civ. Code, § 1649.

[4, 5] The evidence in this case is undisputed that appellant would never have signed the contract for the brick work had not respondent, through its attorney in fact, obligated itself to see that he was paid for said work. He went ahead with the work relying

solely upon its agreement that it would see that he was paid for it. Respondent had joint control, with the general contractor, of the fund advanced by the Western Loan & Building Company to apply on the work done on the building. The agreement executed to appellant by Frederic, under said power of attorney, provided that the contract with the general contractor for the brick work was accepted and approved; that the contract price was $13,000, and deducting therefrom the trade acceptance of $1,500 left a balance of $11,500 which was payable when received by the general contractor; that this sum was to be paid when the roof was on. Then followed the assurance that payment would be made in accordance with the foregoing terms. While technically the agreement may not have contained all the elements of a guaranty, yet, nevertheless, it constituted an obligation and came within the authority conveyed by the power of attorney. Respondent contends that there was no consideration for the said agreement for the reason that the seal of the company was not attached thereto. There is no merit in this contention. Section 1614 of the Civil Code provides that "a written instrument is presumptive evidence of a consideration" and section 1615 of said Code places the burden of want of consideration to support a written instrument upon the party seeking to invalidate or avoid it.

The judgment is reversed, with directions to the trial court to enter judgment for appellant against respondent in the sum of $11,500 with interest thereon at the rate of 7 per cent. per annum from July 15, 1929, until paid.

We concur: TYLER, P. J.; KNIGHT, J.

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137 Cal.App. 43

CLANCY v. BECKER-ARBUCKLE-WRIGHT CORPORATION et al.

Civ. 9348.

District Court of Appeal, First District, Division 2, California.

Feb. 21, 1934.

1. Evidence 🔑434(11).

Where written contract for sale of land provided that it contained entire agreement, purchaser could not rescind against owner because of alleged oral representations of representative of owner's selling agent that land could be resold for double price paid, and that value of land would be enhanced by building up surrounding tract and otherwise improving it.

2. Vendor and purchaser 🔑123.

In action by purchaser against selling agent of owner for rescission of land contract because of alleged promises and representations made by agent, nonsuit *held* properly granted, where agent was not party to contract, and plaintiff did not claim damages for fraud.

3. Judgment 🔑251(2).

In action by purchaser for rescission of land contract, relief could not be granted for failure of consideration where such failure was not pleaded.

4. Evidence 🔑432.

Where written land contract did not mention alleged promised improvements and stated that it contained entire agreement, purchaser could not rescind on ground that there was failure of consideration when improvements were not installed.

Appeal from Superior Court, Los Angeles County; Ellis A. Eagan, Judge.

Action by Fleta M. Clancy against the Becker-Arbuckle-Wright Corporation and others. Judgments for defendants, and plaintiff appeals.

Affirmed.

Kenneth C. Wiseman, of Los Angeles, for appellant.

Jennings & Belcher, of Los Angeles, for respondents Becker-Arbuckle-Wright Corporation, etc., and Commerce Casualty Co.

Keogh, Cate & Colver and Alfred E. Cate, all of Los Angeles, for respondent Title Guarantee & Trust Co.

SPENCE, Justice.

Plaintiff brought this action for the rescission of a contract to purchase real property and to recover the sum of $2,052.50 which had been paid under the terms thereof. Defendants' motions for nonsuit were granted, and from the judgments of nonsuit plaintiff appeals.

Defendant Title Guarantee & Trust Company, hereinafter referred to as the owner, was the owner with which plaintiff entered into the written contract to purchase the land. Defendant Becker-Arbuckle-Wright Corporation, hereinafter referred to as the selling agent, was the broker or selling agent in charge of the sale of the entire tract of which the lot in question was a part. Defendant Commerce Casualty Company, hereinafter referred to as the surety, was the surety on the bond of the broker or selling agent filed pursuant to law with the real estate commissioner.

In January, 1930, plaintiff answered an advertisement, and shortly thereafter accepted employment as a saleswoman for the selling agent on the tract in question. Said tract was known as the Toluca Lake tract, and was located in the city of Los Angeles. About one month later plaintiff signed a contract dated February 15, 1930, for the purchase of the westerly half of lot No. 11 in said tract. She continued in her said employment for five or six months thereafter. In February, 1932, being about two years after entering into said contract, she gave notice of rescission thereof, and subsequently brought this action.

The complaint was entitled "Complaint for Rescission." It contained two counts. The first count purported to allege fraud, and the second count purported to allege undue influence. The ground of undue influence was apparently abandoned by plaintiff on the trial, and is not urged on this appeal. The alleged rescission upon which plaintiff based her claim of fraud may be summarized as follows: That defendants could and would resell her lot at a profit and could and would double her money on the same; that defendants would install certain improvements on said tract without expense to plaintiff; that defendants would build bungalows, apartments, and residences on said tract of the best type and quality, and thereby enhance the value of plaintiff's lot; that the traffic plan commonly known as the "Five Finger Plan" would be installed at once by the city of Los Angeles connecting with said tract; that defendants had "inside information" on these traffic developments; that defendants "were making arrangements" whereby Riverside drive would soon be a "Second Wilshire Boulevard" and trolley service and bus lines would soon be installed; that "within a short time Boeing Air Port would employ hundreds of persons who would live on and near said tract," and that other industries "would soon greatly enlarge their plants in that vicinity"; that defendants "were selling plaintiff a $4,200.00 lot for $4,000.00." It was further alleged that said representations were false and fraudulent and that defendants' promises regarding reselling her lot, and so forth, were made without any intention of performing them. The complaint also contained allegations relating to the execution and filing of the bond by the surety and to the terms of said bond. The prayer asked that the contract be declared rescinded, and further asked for judgment for the amount paid by plaintiff, together with interest.

In support of the action of the trial court in granting the motions for nonsuit, respondents contend that there was no evidence showing actionable fraud, and that plaintiff was guilty of laches. We do not believe, however, that it is necessary to review the evidence relating to these contentions, for we are of the opinion that the judgments must be affirmed upon other grounds urged by respondents.

[1] We will first direct our attention to the question of the propriety of the trial court's ruling granting the nonsuit in favor of the respondent owner. The contract entered into by the appellant and the respondent owner contained the following provisions: "It is understood that this instrument contains the entire agreement between the parties, and the Buyer agrees that the Seller has not, and that no agent of the Seller has made any representation or promise with respect to, or affecting said property or this contract not expressly contained herein." It should be stated that appellant's claim of fraud rests solely upon certain alleged oral promises and representations made by the representatives of the selling agent, none of which alleged promises or representations were contained in the written contract with the owner. In view of the above-mentioned provision of the contract we are of the opinion that appellant may not rely upon said alleged oral promises and representations of the representatives of the selling agent in an action against the owner. Gridley v. Tilson, 202 Cal. 748, 262 P. 322; Speck v. Wylie (Cal. App.) 29 P.(2d) 312; W. J. Latchford Co. v. Southern California Gas Company, 125 Cal. App. 112, 13 P.(2d) 871; Campbell v. Title Guarantee & Trust Co., 121 Cal. App. 374, 9 P.(2d) 264; Warner v. Taft Land & Development Company, 113 Cal. App. 71, 297 P. 969; Munn v. Earle C. Anthony, Inc., 36 Cal. App. 312, 171 P. 1082; Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 P. 906; Pease v. Fitzgerald, 31 Cal. App. 727, 161 P. 506. The provision in the contract here and the provision under consideration in Campbell v. Title Guarantee & Trust Company, supra, are identical. In an attempt to escape the effect of the foregoing authorities, appellant cites Simmons v. Ratterree Land Company, 217 Cal. 201, 17 P.(2d) 727, and states that

the decision in Gridley v. Tilson, supra, has "been definitely clarified" in the later decision. We find these authorities entirely in accord. The Supreme Court said on page 729 of 17 P.(2d) in the Simmons Case: "The doctrine of Gridley v. Tilson, supra, would preclude plaintiff from relying on representations of the agents, contrary to the express provisions of the written contract, were it not for additional circumstances which operate in plaintiff's favor." The court then proceeded to point out the circumstance that the plaintiff in the Simmons Case was in legal effect coerced into the actual signing of the contract at a late hour in the evening without a full opportunity to consider it, and was compelled under the terms of the contract to permit the seller to retain the buyer's copy. It then distinguished the two cases by saying: "In Gridley v. Tilson, supra, the fraud was not in the execution of the contract, but antecedent thereto and in the inducement of the contract." Here we find no evidence of any circumstances which would take the case out of the operation of the rules laid down in the foregoing authorities, and we therefore conclude that the nonsuit was properly granted as to the respondent owner.

[2] After the trial court had made its order granting the motion of the respondent owner, the parties argued and were permitted to submit briefs on the motion for nonsuit made on behalf of the respondent selling agent. On the argument the trial court said: "It seems elementary to me that in a cause for rescission where the case falls against the principal, it would necessarily fall against the agent. * * * " Counsel for appellant asked for an "opportunity to look into that point," which opportunity was given. The complaint was not amended nor did appellant ask leave to amend. Appellant proceeded upon the theory that she was entitled to a judgment of rescission against the selling agent, but it appears that the selling agent was not a party to the contract which appellant sought to rescind. If the selling agent was guilty of actionable fraud, a recovery might have been had against the selling agent in an action for damages regardless of the nonliability of the owner resulting from the clause contained in the contract. But here the action was solely an action for rescission, and the complaint contained no allegations of damage, which allegations are essential in an action for damages for fraud. We are of the opinion that appellant was not entitled to a judgment for rescission against one who was not a party to the agreement and that the nonsuit was properly granted herein as to the selling agent. Marks v. Jos. H. Rucker & Co., 53 Cal. App. 568, 200 P. 655; Karst v. Seller, 45 Cal. App. 623, 188 P. 298. From this conclusion it necessarily follows that the trial court properly granted the motion for nonsuit made on behalf of the surety of the selling agent.

[3, 4] Appellant makes the further contention that, regardless of the question of fraud, there was a failure of consideration entitling her to rescind the contract. There are two sufficient answers to this contention: First, failure of consideration was not pleaded, the complaint alleging only fraud and undue influence; second, there was no failure of consideration under the contract of sale. The only basis for the claim of failure of consideration is that there had been a failure to install "promised improvements." There were no "promised improvements" mentioned in the contract which appellant seeks to rescind, and, for the reasons hereinabove stated, the owner was not bound by the alleged oral promises of the representatives of the selling agent relating to such improvements.

The judgments are affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

136 Cal.App. 717

PEOPLE v. KING et al.

Cr. 2448.

District Court of Appeal, Second District,
Division 1, California.
Feb. 16, 1934.

1. Licenses 🔑42(4).

Evidence of accused's connection with "travel club" *held* sufficient to sustain conviction for acting as motor carrier transportation agent without first obtaining license therefor (St. 1931, pp. 1362, 1363, §§ 1, 2).

2. Criminal law 🔑15.

Repeal of act penalizing unlicensed motor carrier transportation agents *held* not to require dismissal of prosecution for violation antedating repeal (St. 1931, pp. 1362, 1363, §§ 1, 2; St. 1933, p. 1011; Pol. Code, § 329).

3. Licenses 🔑14(2).

Act 1931 required license from railroad commission to negotiate for transportation of persons for hire by private or contract carriers, where transportation was over highways served by common carriers (St. 1931, p. 1362).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Clarence King and others were charged with engaging in the business and acting in the capacity of motor carrier transportation agents without first obtaining a license therefor, and defendant Victor L. Bentson appeals from judgment of conviction.

Affirmed.

Victor L. Bentson, of Los Angeles, in pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, Justice.

Defendant was charged with violation of chapter 638, p. 1362, Statutes of 1931 (Deering's Gen. Laws, Act 5130b), in that he and his codefendants on May 2, 1933, did willfully, unlawfully, and feloniously engage in the business and act in the capacity of motor carrier transportation agents without first obtaining a license therefor. The case was heard by the court sitting without a jury, and resulted in the conviction of defendant Bentson. He appeals to this court from the judgment of conviction and from the order denying his motion for a new trial.

Upon this appeal appellant contends that there is no evidence that Victor L. Bentson was an officer of the Safeway Travel Club, Limited, or owned or had any interest in the business; that the Safeway Travel Club, Limited, was not a common carrier, or a public utility, but was merely an incidental carrier, and, therefore, the railroad commission had no jurisdiction over its affairs. He also contends that there is no evidence that said Victor L. Bentson, for compensation, sold, offered for sale, or held himself out as one who sold or offered for sale any transportation; and that by reason of the repeal of chapter 638 of Statutes of 1931 by chapter 390, p. 1011, Statutes of 1933, this court will be obliged to dismiss the proceeding against him and order his release.

That portion of section 1, chapter 638, p. 1362, Statutes of 1931, under which conviction herein was had, provides as follows: "A motor carrier transportation agent within the meaning of this act is a person * * who, for compensation, sells or offers for sale, or negotiates for, and/or holds himself out as one who sells, furnishes or provides as principal or agent, transportation for persons over the public highways of this state, when such transportation is furnished, or is offered or proposed to be furnished by other than a carrier holding a valid certificate of public convenience and necessity issued by the railroad commission of the State of California permitting of such carrier transporting persons over such highways or any of them and between the points for which such transportation is sold; or, to the border line of the State of California when one of such points is without the state. * * *"

Section 2 of the act makes it unlawful for any person "to engage in the business, or act in the capacity of a motor carrier transportation agent within the meaning of this act without first obtaining a license therefor."

[1, 2] The evidence adduced at the trial of the case shows that the defendants Hayward and Bentson interviewed Mr. Buck, manager of a downtown hotel, and discussed with him the proposition of renting space for an office in the lobby of his hotel; that shortly thereafter defendant Hayward rented space at the rear of the hotel lobby and opened an office for the transaction of business under the name of "Safeway Travel Club." Defendant Bentson informed Mr. Buck that Miss Hayward would be in charge of the office, which she was until May 2, 1933, the date of arrest. Mr. Buck testified that he saw defendant Bentson in and about the hotel several times during this period and at one time saw said Bentson repairing an electric sign used to advertise the Travel Club.

Mr. Spaeth, an officer of the Better Business Bureau of Los Angeles, testified that in a conversation with defendant Bentson, the latter advised him that he was a field representative of the Travel Club, and that as such representative he contacted various hotels, barber shops, and beauty parlors, and arranged through them for the sale of memberships and transportation to points where the passengers would be carried; at the same time defendant Bentson stated that the various barber shops and beauty parlors contacted would receive 25 per cent. of any amount that would be taken in by the club upon transportation sold. Mr. Bentson then showed Mr. Spaeth a stack of blue forms containing the names of a number of hotels. In this connection said Spaeth testified: "I don't recall any of them at the moment, but there was at least 30 or 40 hotels and beauty parlors that he stated that he had contacted and that were sending their prospects to the

Los Angeles office of the Travel Club." Spaeth asked to see the corporate records and Bentson went to a closet in the rear of the hotel clerk's desk and obtained a brief case and took from it papers which he stated were the corporate records of the club. From these, it appears in evidence that a Mr. and Mrs. Stillman and Mr. Salge were the officers of the corporation.

Certain contracts entered into between the club and certain hotels were introduced in evidence dated March and April of 1933, which were signed by the Safeway Travel Club, by "V. L. B." When asked by Spaeth how many passengers had been handled since the club was opened, defendant Bentson answered "they had had 304."

According to the testimony of Officer Moore and Policewoman Lane, they called at the office of the Travel Club on May 2, 1933, and talked to defendant Hayward relative to procuring transportation to San Francisco, asking her if she had busses going to San Francisco, and she stated that they did not have busses, but that they furnished transportation in large private cars and that she could arrange passage for them to San Francisco. She told them it would be necessary for them to pay one dollar each to her as a membership fee in the club and that the balance of $4 each should be paid to the driver of the car that would take them to San Francisco. Thereupon they registered under the names of Mr. and Mrs. Porter, paid her the $2, and later in the day, defendant Osburn called for them at Mrs. Lane's home and took them and their baggage in a Pierce-Arrow car to an hotel on South Hill street, where they were transferred to another car of which defendant King was the driver. He drove to various places in the city collecting passengers, and later while traveling out the Roosevelt highway en route to San Francisco, just north of Castellamare, two police officers stopped the car and placed the driver under arrest. The following day, Moore and Mrs. Lane sought a refund of their $2 from Miss Hayward, which she agreed to return if they would bring in their pink slip or receipt. Later in the day they returned to the hotel together with Lieutenant Swan of the Los Angeles police department and found defendant Bentson seated in a chair by the desk in the office. While defendant Bentson denied having any connection with the Travel Club, his brief case was found in a closet opening off the lobby and in it were found, among other things, "receipts for money from different people" and a "list of fares from Los Angeles to different points."

Defendant Blair, whose testimony was given at the preliminary hearing and read at the trial, testified as to a conversation he had with appellant regarding a refund of money claimed by Blair to be due to him: "Bentson told me, 'Well you didn't pay us any money except $3.00, and we have given that back to you.' I said, 'That is perfectly all right, but what about the rest of the money?' He said, 'Well, I will take it up with the directors and see what we can do.' He said, 'I will let you know, and we will take care of you. We have never had any complaints before, and we will take care of you, and see that you get it back.' "

From this we believe it is clearly shown that appellant was directly connected with and actively engaged in promoting the business of the Travel Club as a motor carrier transportation agent, as that term is defined in section 1, chapter 638, Statutes of 1931. Chapter 638, supra, was in full force and effect at the time the transaction herein referred to took place and even at the time the appeal was taken from the judgment. The new section repealing chapter 638 did not become effective until August, 1933, while the appeal was taken on August 17, 1933. Furthermore, section 329 of the Political Code provides as follows: "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act."

[3] In answer to appellant's contention that the state railroad commission has no power to regulate private carriers of passengers over the highways of the state, it has been held in the case of People v. Henry, 131 Cal. App. 82, 21 P.(2d) 672, 676, that "no license is necessary to negotiate for the transportation of persons for hire by private or contract carriers over highways or parts thereof not served by common carriers. The converse of such statement shows the real meaning of the act, viz., that a license is necessary if the motor carrier transportation agent is negotiating for the sale, etc., of transportation over highways served by common carriers."

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

137 Cal.App. 112

TEXAS CO. v. MOYNIER et al.

Civ. 9408.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1934.

Rehearing Denied March 27, 1934.

Hearing Denied by Supreme Court April 30, 1934.

1. Appeal and error 🔑**1207(1).**

Trial court, directed by appellate court's remittitur to render judgment for plaintiff, had no discretion to do otherwise.

2. Appeal and error 🔑**1096(1).**

Question whether appellate court's opinion was based on issue not theretofore discussed, thus depriving appellant of day in court thereon, cannot be raised on subsequent appeal after denial of petition for rehearing in appellate court and petition for hearing in Supreme Court.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by the Texas Company, a corporation, against Marius Moynier and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

J. Wiseman Macdonald, of Los Angeles, for appellants.

Charles C. Stanley, R. K. Barrows, and J. A. Tucker, all of Los Angeles, for respondent.

CRAIG, Justice.

This appeal is from a judgment entered pursuant to a remittitur of this court on the previous appeal in the cause, reported in 129 Cal. App. 738, 19 P.(2d) 280. The remittitur there directed "that the judgment of the superior court in and for the county of Los Angeles in the above-entitled cause *be and the same is hereby reversed with directions to the trial court to render judgment as prayed for in the complaint.*" The complaint prayed for judgment for money paid for taxes assessed to plaintiff on certain property leased to defendants. The trial court rendered judgment for defendants, which was reversed, as above shown.

Upon this appeal both parties agree that the judgment appealed from was entered pursuant to the remittitur above quoted.

[1] As was said by our Supreme Court in Keller v. Lewis, 56 Cal. 466, in a similar situation, the trial court had no discretion. It could not do otherwise than as directed by the remittitur.

[2] Appellant asserts that our opinion on the former appeal was based upon a phase of the case not theretofore discussed and that he has not had his day in court on that issue. After petition for rehearing in this court and after petition for hearing in the Supreme Court, both of which were denied, it is now too late to raise this question.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

* * *

137 Cal.App. 167

SAXTON v. STATE BOARD OF EDUCATION et al.

Civ. 5043.

District Court of Appeal, Third District, California.

March 1, 1934.

1. Judgment 🔑**703.**

Proceedings before state board to revoke teacher's state diploma *held* not barred by res judicata, although charges, except one, were similar to those judicially declared untrue in previous proceedings before city board, to which state board was not party.

2. Judgment 🔑**634.**

Res judicata doctrine is inapplicable unless matters adjudicated and parties are same, or parties' successors claim same rights.

3. Limitation of actions 🔑**38.**

Limitation statute covering "actions" *held* inapplicable to proceedings before state board of education to revoke teacher's diploma (Code Civ. Proc. § 338).

[Ed. Note.—For other definitions of "Action; Action at Law," see Words & Phrases.]

4. Appeal and error 🔑**1036(2).**

Whether all defendants were proper parties *held* immaterial where all defendants had judgment.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by Lois S. Saxton against the State Board of Education and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

W. A. Alderson, of Los Angeles, for appellant.

Robert A. Odell, and John B. Beman, both of Los Angeles, U. S. Webb, Atty. Gen., L. G. Campbell, Deputy Atty. Gen., and Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiff against the state board of education of the state of California, the county board of education of the county of Los Angeles, the board of education of the city of Los Angeles, the state superintendent of public instruction, county superintendent of schools of Los Angeles county, and the superintendent of schools of the city of Los Angeles, and all the members of the respective boards individually for the purpose of restraining the proceedings instituted before the state board of education of the state of California, having for its purpose the examination into charges preferred against the plaintiff, and also the determination of the question as to whether the life diploma held by the plaintiff to teach school in the state of California should not be revoked. The defendants had judgment, and the plaintiff appeals.

Upon this appeal the only questions tendered for our determination are that the cause is res adjudicata, and, also, the proceedings before the state board of education are barred by the statute of limitations.

[1] The contention that the proceedings before the state board of education involved only issues which have been once determined, is based upon the case of Saxton v. Board of Education of Los Angeles City School District, reported in 206 Cal. 758, 276 P. 998. This case and the record before us shows that in the school year of 1925 and 1926, charges were preferred against the plaintiff by the superintendent of the Los Angeles city schools, and, after hearing had before said board, the plaintiff was dismissed from her position as a teacher in the schools of said district. Thereafter an action was begun in the superior court of the county of Los Angeles, which resulted in a judgment restoring the plaintiff to her position as a teacher of the school in said district. The action of the superior court was affirmed by the decision of the Supreme Court to which we have referred. In this action, based upon the provisions of section 1609 of the Political Code, as it then read, the trial court found that the charges preferred against the plaintiff were untrue; that the plaintiff had been wrongfully dismissed, and a writ of mandate was accordingly issued directing that the plaintiff be restored to her position as a teacher of the schools in said district. After the coming down of the decision of the Supreme Court affirming the action of the trial court in the case of Saxton v. Board of Education of the Los Angeles School District, supra, Frank A. Boullelc, superintendent of the Los Angeles city schools, on or about the 2d day of August, 1929, filed with the state board of education of the state of California charges against the plaintiff, alleging substantially the same charges which had been presented to the board of education of the Los Angeles city school district, save and except as to an additional charge that the plaintiff had testified, in 1926, that she had at a previous time, to wit, on or about the year 1922–1923, had improper relations with the superintendent of the Ninth street school, one of the schools of the Los Angeles school district. A copy of these charges was served upon the plaintiff, and also the taking of testimony and the inquiring into said charges, and the hearing of the same were referred to the county board of education of Los Angeles county, whereupon this action was begun to restrain all of the various boards herein referred to from taking any further proceedings with reference to said charges, or the hearing of the same. The trial court made no findings as to the truth of the charges, nor is any question as to the sufficiency thereof presented to us for our determination; nor is any question presented for our consideration as to whether injunction is the proper remedy. We may, however, state that in all the cases which have come to our attention, the proceedings wherein the sufficiency of the charges are presented for consideration have been by way of writs of review. As an illustration of such proceedings we cite the following cases: Raport v. Civil Service Commission of State of California et al., (Cal. App.) 25 P. (2d) 265; Bold v. Board of Medical Examiners (Cal. App.) 23 P.(2d) 826; see, also, Bold v. Board of Medical Examiners (Cal. App.) 26 P.(2d) 707; Traxler v. Board of Medical Examiners (Cal. App.) 26 P.(2d) 710.

While the charges preferred before the board of education of the Los Angeles school district and the board of education of the state of California are substantially the same, save and except as to the one item which we have mentioned, the purpose of the filing of the charges and the objects sought to be obtained are entirely distinct. The board of education of the school district of the city of Los Angeles has jurisdiction only of city schools, of the employment of teachers, and the dismissal of the teachers within the area of the Los Angeles city school district. Whether circumstances had occurred which justified the city board of education dismissing the plaintiff from her position as a teacher were essentially distinct and different in the conclusions from that which could or might be reached by the board of education of the state of California. The results of the conclusions reached by the respective boards would necessarily be distinct, while the action of the state board of education, if resulting in a revocation of the right of the plaintiff to teach within the state of California, would necessarily remove her from the school department of the city of Los Angeles, the dismissal of the plaintiff from the schools of Los Angeles by the city board of education would have no legal effect upon her right to teach in any other school within the state; nor would the dismissal of the plaintiff from her position as a teacher in one of the schools of the city of Los Angeles district act as a bar to prevent the city board of education of said city re-employing the plaintiff.

The state board of education was not a party to the proceedings had before the board of education of the Los Angeles school district resulting in her dismissal and the annulment of such dismissal by the action prosecuted in the superior court of Los Angeles county. That action did not involve the right of the plaintiff to hold a diploma or certificate entitling her to teach in any of the schools of the state of California. It thus appears that the parties were and are distinct, and the purposes of the two proceedings were and are likewise distinct and separate proceedings, having different objects and purposes in view.

[2] In order that the doctrine of res judicata may apply, even in courts of general jurisdiction the matters adjudicated must be the same, and the parties the same, or the successors of the parties basing their claims upon the same rights. As said in 15 California Jurisprudence, page 107: "Regardless of the character of the tribunal and proceedings in other respects, they both must have been such as to give 'concurrent jurisdiction' over the matter adjudicated, in order that the judgment may be conclusive in subsequent proceedings." Also, on page 106, of the same volume, we find the following: "The principle of res judicata applies not only to courts in the narrow sense of the term, but likewise to the final adjudications of all boards or officers acting in a judicial capacity upon matters within their jurisdiction. Whenever any board, tribunal or person is by law vested with authority to judicially determine a question, such decision, when made, is res judicata and as conclusive of the issues involved in the decision as though the adjudication had been made by a court of general jurisdiction."

The board of education of the Los Angeles city school district had no jurisdiction to determine, as we have said, the right of the plaintiff to teach in any other of the schools of the state of California. All the jurisdiction such board possessed was confined to the question of determining whether the plaintiff should or should not be dismissed as a teacher in the school where she was then employed.

In the case of Bold v. Board of Medical Examiners (Cal. App.) 26 P.(2d) 707, the plaintiff in that case was tried upon a criminal charge of malpractice and acquitted. Thereafter, proceedings were instituted before the board of medical examiners of the state, resulting in the revocation of the petitioner's license to practice. The court held that the principle of res judicata did not apply, and the fact that the plaintiff had been tried upon a criminal charge and found not guilty was no bar to the proceedings before the board of medical examiners, having for their purpose the revocation of the license held by the plaintiff. The same rule was followed in the case of Traxler v. Board of Medical Examiners of State of California, supra.

In view of the facts set forth herein showing the dissimilarity of the proceedings and the cases which we have cited, further discussion seems unnecessary to justify the holding of the trial court that the principle of res judicata is inapplicable to this case.

[3] Is the contention of the appellant that the proceedings before the state board of education were and are barred by the provisions of section 338, Code of Civil Procedure, well founded? That section specifies that certain actions shall be commenced within three years, the plaintiff calling attention to the first subdivision, which reads: "An action upon a liability created by statute, other than a penalty or forfeiture."

The contention of the appellant is answered in the negative by the opinion of the court in Bold v. Board of Medical Examiners (Cal. App.) 23 P.(2d) 826. The question there presented and determined was whether the provisions of section 339, Code of Civil Procedure, limiting actions to two years, barred proceedings before the board of medical examiners. It was there held that the proceedings before the board of medical examiners not being a civil action or special proceeding in court, the bar of the statute did not apply.

In 16 California Jurisprudence, page 407, the text, supported by numerous authorities, reads: "The statute of limitations operates only as a bar to actions or proceedings in a court of law. If one has a remedy which can be availed of without suit, and in no other way, as where a statute provides for the collection of assessments by sale of the property affected, and no provision is made for a suit to enforce such assessment, the statute has no application. The statute is complete in the provisions made for the limitation of time upon proceedings instituted before a court of law."

In view of the recent holding in the Bold Case, supra, and the cases supporting the text in California Jurisprudence, supra, we deem it unnecessary to cite further authorities.

The question of laches raised by the appellant is likewise negatived in the case of Bold v. Board of Medical Examiners (Cal. App.) 23 P.(2d) 826.

[4] As the defendants all had judgment, it is unnecessary to pass upon the question as to how many of them were proper parties.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

In re DI CARLO'S ESTATE.*

DI CARLO v. ANGELONI.

Civ. 9325.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1934.

Rehearing Denied March 12, 1934.

Hearing Granted by Supreme Court April 16, 1934.

1. Guardian and ward 🔑144.

Probate court, which appointed uncle guardian of his niece's estate which consisted of money from two Ohio estates whose administrator paid such money without court order to uncle who then petitioned probate court for letters of guardianship, *held* to have jurisdiction to settle final account of guardian (Probate Code, § 1440).

2. Guardian and ward 🔑7.

Guardian who has procured his own appointment is estopped from denying jurisdiction of court by order of which his appointment was made.

3. Guardian and ward 🔑141.

Guardian was bound to faithfully administer trust not only as to ward's money from two Ohio estates whose administrator paid such money without court order to guardian who was in possession thereof when appointed, but also as to any other assets of ward thereafter coming into guardian's possession.

4. Guardian and ward 🔑141.

Omission by guardian to promptly account to probate court for receipt of assets of ward could not relieve guardian from faithfully administering trust with respect thereto.

5. Guardian and ward 🔑58.

On final account of guardian of ward's estate, which consisted of money from two Ohio estates whose administrator paid such money to guardian without court order, money paid by guardian to administrator for taxes accruing against estates of intestates *held* properly disallowed (Probate Code, §§ 1501, 1502).

6. Guardian and ward 🔑160.

On final account of guardian of ward's estate, probate court could re-examine guardian's former account and disallow expenditures allowed in former account.

7. Appeal and error 🔑901.

Appellate court need not search record to ascertain whether any contention of appellant should be sustained.

8. Guardian and ward 🔑161.

Absent evidence in record, presumption exists that evidence was sufficient to justify conclusion reached by probate court in settling final account of guardian.

9. Guardian and ward 🔑161.

Guardian cannot complain because on settling his final account probate court ordered him to pay 6 per cent. interest on ward's funds in his hands and not legal rate of 7 per cent. (Civ. Code, §§ 2261, 2262).

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate and guardianship of Triestina Di Carlo, a minor. On petition by Lorenzo Di Carlo to settle his final account as guardian, opposed by Pasquale Angeloni. From an order settling his final account, petitioner appeals.

Affirmed.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 44 P.2d 562.

Loucks & Phister, of San Pedro, and Tanner, Odell & Taft, of Los Angeles, for appellant.

Entenza & Gramer, of Los Angeles, for respondent.

HOUSER, Justice.

It appears that without having any authorization by any court order so to do, an administrator in the state of Ohio, of two different estates of deceased persons, there located, paid a considerable sum of money which was a part of the assets of said estates to one Lorenzo Di Carlo, who was an uncle of, but who at that time bore no official relation to, one Triestina Di Carlo, a minor, the latter of whom being the only heir of each of said deceased persons; and that thereupon the said Lorenzo Di Carlo brought the said money and his said niece to and within the county of Los Angeles; following which event, on his application to the probate court therefor, letters of guardianship of the person and the estate of said minor were ordered to issue and were issued by said court to the said uncle. More than ten months thereafter, the said uncle filed with said court his account current and report as said guardian, which account and report were subsequently approved and settled by said court. After having acted as said guardian for a period of approximately two and one-half years, the uncle resigned his position as such, and thereafter filed his final account and report in the matter of said estate; to which specified objections were interposed by one Pasquale Angeloni, who, following the resignation of said uncle, had been appointed guardian of the ward. On the issues thus presented, following a hearing had thereon, the probate court made its order by which certain items of the guardian appearing in said account were disallowed; besides which the uncle was charged interest on each of three different sums of money that had come into his possession as such guardian, during his administration of the estate of said ward. In addition thereto, the probate court reopened and reconsidered its former order by which the first account of the guardian had been settled and approved, and thereupon in its final order modified such former order by reducing in amount a credit therein and theretofore thus allowed. It is from such order that the instant appeal is prosecuted by the former guardian of said estate.

[1, 2] Appellant's first general question as to whether the probate court had jurisdiction is answered in the affirmative by the express provisions of section 1440 of the Probate Code. The incidental point as to whether the probate court was authorized to try the assumed issue of title to the assets of the estate is not properly involved in this inquiry. The purported assets of the estate of the minor (being a part of the assets of the two Ohio estates, of which said minor was the only heir) had been delivered to and received by the guardian; he had brought them and the person of the minor into the county of Los Angeles; on his petition therefor, he had been regularly appointed guardian of such estate; and for two and one-half years he had assumed to act and had acted as such. In such circumstances, whether the guardian, or the administrator of the two estates in the state of Ohio, was legally entitled to the possession of such assets was immaterial. The court had general jurisdiction of the person and the estate of the minor, and all it was attempting to do was to determine whether the guardian had faithfully and legally administered his trust. Many authorities attest the rule that a guardian who has procured his own appointment is estopped from denying, and will not be heard to deny, the jurisdiction of the court, by the order of which his appointment was made. Fox v. Minor, 32 Cal. 112, 120, 91 Am. Dec. 566; Harbin v. Bell, 54 Ala. 389; Bryan v. Walton, 14 Ga. 185; Hines v. Mullins, 25 Ga. 696; Portis v. Cummings, 21 Tex. 265; Anderson v. Anderson, 45 Okl. 653, 146 P. 709; Bombeck v. Bombeck, 18 Mo. App. 26; 28 Cor. Jur. 1160; and other authorities in such cases respectively cited.

[3, 4] The guardian appointed by the probate court having qualified and having conducted himself as such regarding the assets of the minor then in his possession was bound to faithfully administer the trust, not only as to those assets of the estate, but as well as to any other assets that might thereafter come into his possession, and which purportedly were the property of the minor and which were so received and subsequently so recognized and treated by said guardian. The fact that he omitted promptly to account to the probate court for the receipt of such assets could not relieve him from his responsibility in that regard. In other words, he may not avail himself of his own wrong in the premises as a legal cause for thereafter not being compelled to perform his duty.

[5, 6] Appellant predicates prejudicial error on the fact that on the hearing of the final account of the uncle as guardian of said estate no allowance was made for alleged

expenditures made by him and a companion in traveling from Los Angeles to Ohio, hotel bills and return railroad fare for himself, the minor, and her nurse to the city of Los Angeles; also for certain sums of money paid by the guardian to the administrator of the two estates in Ohio for and on account of taxes which had accrued against those two estates. Especially as to the latter item, that an order by the probate court disallowing such items was within its power is not only indicated by the provisions of sections 1501 and 1502 of the Probate Code, but as well is inferentially recognized by the ruling in each of the cases of In re Ceas' Estate, 134 Cal. 114, 116, 66 P. 187, and In re Eschrich, 85 Cal. 98, 24 P. 634. However, following the decision in the case entitled In re Beisel's Estate, 110 Cal. 267, 40 P. 961, 42 P. 819, it well may have been within the province of the probate court, upon a proper showing in the evidence adduced relating thereto, to make an allowance for the first of such items. That item was as follows:

"Paid for tickets for Lorenzo Di Carlo and Domenick Jafraty to go East to take charge of Alex Di Carlo's Estate, expense of seven weeks in Steubenville, bringing Triestina Di Carlo from Steubenville, ticket for Triestina and nurse to San Pedro, California, $1,000.00."

It appears that such item was included within the first account and report by the uncle as guardian of the estate of the minor, and that by order of the probate court it was settled and allowed.

In the case of In re Wells' Estate, 140 Cal. 349, 353, 73 P. 1065, where several authorities are cited in support of the rule there announced, it was held (syllabus) that "the court had no power to re-examine and revise settled items of the guardian's former accounts. * * *" Citing Brodrib v. Brodrib, 56 Cal. 564, 566; Lataillade v. Orena, 91 Cal. 576, 27 P. 924, 25 Am. St. Rep. 219; Estate of Adams, 131 Cal. 417, 63 P. 838; Estate of Grant, 131 Cal. 429, 63 P. 731. But an examination of such authorities reveals the fact that each of them is clearly distinguishable, not only from the cited case, but as well from the case at bar.

In the first case (Brodrib v. Brodrib, supra), it was held that as to a final account, the bondsmen of a guardian would not be permitted to question its correctness; in the second (Lataillade v. Orena, supra), that in a separate action, following the rendition of a final account by guardian, the ward was permitted to attack it on the ground of alleged fraud practiced upon him by the guardian; in the third case (Estate of Adams, supra), an executrix of an estate was allowed an item of credit to herself which she had omitted to itemize and claim in a former account rendered by her; and in the last case (Estate of Grant, supra), it was held that in an executor's account an order by the court by which an item was allowed was not subject to attack on the rendition by him of a subsequent account.

On the other hand, in the case of In re Guardianship of Cardwell, 55 Cal. 137, it was directly held that the settlement of the guardian's "intermediate account" is not conclusive; but that it is "merely prima facie evidence of its correctness, subject to be inquired into." In that case it was also held that, although by the terms of section 1789 of the Code of Civil Procedure all the proceedings as to accounting and the settlement of accounts of guardians must be had and made as required concerning estates of deceased persons, that statute did not make applicable to the accounts of guardians the provisions of section 1637 (erroneously stated in the case as section 1738; now in substance included in section 931, Probate Code), which at that time provided that "the settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive * * * saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account. * * *" The attention of this court has been directed to no other statute by the provisions of which the settlement by the probate court of an intermediate account of a guardian is made conclusive.

In the absence of any statute by which either the conclusiveness of the guardian's account might be provided, or the right of re-examination of such account might be made available, and taking into consideration the lack of uniformity in the decisions of the courts of this state which relate to the question here involved, a reference to other authorities may not be unprofitable.

In Mr. Woerner's work on "The American Law of Guardianship," after what would appear to be a fairly complete summary of views that affect the general subject, on page 325 he says:

"It seems clear on principle, and the current of authority unaffected by special statutory enactments, is decidedly to the effect, that the allowance by the court of a partial or periodical accounting or settlement, made by a guardian without notice to the parties concerned, and particularly where the ward has not been authoritatively represented, can constitute no adjudication, and is therefore conclusive of nothing, but operates as an admission against interest by the guardian, and is therefore prima facie evidence against him; while the evidence upon which the court bases its decision in passing, or allowing, the account is a sufficiently solemn showing to support it as prima facie evidence, liable to be corrected, rebutted, or explained by parol proof or otherwise, in a final settlement, or in a suit between competent parties."

In 12 Ruling Case Law, at page 1154, it is said: "The annual account is a part of the regular administration of the court, is intended to inform the judge and also interested parties of the status and general conduct of the guardianship, and is usually accepted and filed ex parte and without a hearing. Besides, the ward, who is the party in adverse interest, is legally and usually actually incapable of protecting his own interests, and the one whom the law charges with the duty of asserting and protecting his rights is in this matter the adverse party. It would therefore be grossly unjust to make the annual accounts conclusive against the ward, though they have been accepted by the court. They are prima facie evidence of the state of the account, but are subject to re-examination in settling later accounts."

And in 28 Corpus Juris, at page 1239, the rule is expressed as follows: "Annual or partial accounts of a guardian, although approved by the court, have not the force and effect of a final judgment and are in no sense conclusive of the correctness thereof, unless made so by statute, although the rule has been qualified in some jurisdictions. These accounts may be reviewed and corrected at any time before final settlement, or on final settlement of the accounts, at which time the guardian's whole administration of the trust is subject to challenge and examination."

See, also, section 522 of the subject of Guardian and Ward in the Century Edition of American Digest; and 🔑160 of the same subject, as treated in the several decennial editions of the same work.

From a consideration of the foregoing authorities, this court is of the opinion that the weight of authority favors the conclusion that by its order of settlement of the former account rendered by the guardian, the probate court was not precluded from a re-examination thereof, and that on such re-examination it had power and authority to correct, revise, or modify in amount any item or items of expenditure theretofore settled, allowed, or approved by it, or to entirely disallow and withhold its approval or settlement of such item or items.

[7, 8] Finally, appellant complains of the fact that in adjusting his final account the probate court ordered that he pay 6 per cent. interest on certain funds in his hands and which funds were the purported property of the estate of the ward. In that connection, it is noted that his exception to the order is that the item "is not justified by the evidence." No authority in support of his position in that regard is cited by appellant. Of what the evidence consisted is not stated; nor is this court directed to any place in the record wherein or whereat the evidence which related to the question presented may be found. In such circumstances, it is a well-settled rule of procedure that on appeal from a judgment no duty rests upon an appellate court to search the record for the purpose of ascertaining whether any contention on the part of the appellant should be sustained. It must therefore be assumed that the evidence was sufficient to justify the conclusion reached by the probate court. Moreover, the duty of a trustee with regard to trust funds in his possession, and the penalty for his failure to perform such duty, are prescribed in sections 2261 and 2262, respectively, of the Civil Code, as follows:

"2261. A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

"2262. If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is willful."

In addition thereto, in the case of In re Guardianship of Cardwell, 55 Cal. 137, 142, it is said: "Where a guardian acts in good faith, does not make any use for himself of the funds, and makes no profit to himself, the law does not fix a penalty in the nature of 'smart money,' but charges him with the statutory rate of interest only. * * *"

To the same effect is the language found in Re Dow's Estate, 133 Cal. 446, 450, 65 P. 890; also, Estate of Cousins, 111 Cal. 441, 44 P. 182.

[9] The point made by appellant that, since the legal rate of interest in this state is 7 per cent. per annum, the court had no authority

to charge him at the rate of 6 per cent., is not well taken. He certainly has no cause for complaint because the probate court did not exact from him the legal rate of interest.

The order or decree from which the appeal is taken herein is affirmed.

We concur: CONREY, P. J.; YORK, J.

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137 Cal.App. 125

ROGELMAIR et al. v. CITY OF LOS ANGELES et al.

Civ. 9345.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1934.

1. Easements 🔑36(3).

Landowners *held* not entitled to easement over strip of land in park, where evidence did not show any grant or use of strip.

2. Easements 🔑1.

Desirability and convenience to adjoining landowners cannot be made basis for decree granting private easement over park or for decree enjoining erection of fence along park boundary line.

3. Easements 🔑61(2).

Landowners could not enjoin park commissioners from erecting fence along park boundary line because of right of way of necessity, where property owners had means of ingress and egress outside of park, and, if necessity existed, right of way created by operation of law would have been over remaining land of landowners' grantors.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Anthony L. Rogelmair and another against the City of Los Angeles and others. Judgment for plaintiffs, and defendants appeal.

Reversed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and D. M. Kitzmiller, Deputy City Atty., all of Los Angeles, for appellants.

William Dellamore and James F. Kelly, both of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiffs, as owners of a piece of real property bordering upon Griffith Park in the city of Los Angeles, claimed an easement for ingress and egress to and from said property over a strip of land situated within said park. They brought this action to enjoin the defendants from constructing a fence along the boundary line of said park upon the portion thereof over which plaintiffs claimed such easement. Judgment was entered in favor of plaintiffs, and from said judgment defendants appeal.

It is extremely difficult to give a detailed description of plaintiffs' land and the courses of the roads now and heretofore leading into Griffith Park to the north of said property. Several maps were introduced in evidence for this purpose. We believe, however, that, despite the irregular shape of Griffith Park, the irregular shape of plaintiffs' land, and the irregular courses of said roads, a rough description may be given which will suffice for the purposes of this appeal.

Plaintiffs' lot consists of a long, wedge-shaped piece running in a general northerly-southerly direction; said lot being narrower at the northerly end than at the southerly end. It is contiguous to the easterly boundary line of said park. It was formerly a part of a larger tract of land, which larger tract was bounded on the west by said park and on the north by what was formerly known as Tropico avenue. Said larger tract was then unsubdivided. Said Tropico avenue was then a 40-foot road which ran up to a point near the easterly boundary line of said park and then turned in a southwesterly direction into the park and shortly thereafter crossed a bridge over a flood control channel. In 1909 said road was widened to 60 feet. Its name was then changed to Los Feliz boulevard. In 1922 plaintiffs' predecessor in interest, who was the original subdivider of the large tract, placed on record a tract map and dedicated to public use an additional 20-foot strip on the south side of Los Feliz boulevard, which strip curved slightly to the southwest as it approached the easterly boundary line of Griffith Park. Thereafter Los Feliz boulevard was improved up to said boundary line as a 100-foot road. With the dedication and improvement of said boulevard as widened to 100 feet, plaintiffs' lot for the first time became contiguous to a road. The narrow blunt northerly end of plaintiffs' wedge-shaped lot then had a curved frontage of approximately 46 feet along the property line on Los Feliz boulevard. Thereafter, the course of the road through the park was altered slightly to the north in order to connect with a new bridge over the flood control channel, which new bridge was slightly to the north of the old bridge. But, despite this change, the maps show that plaintiffs had ample means of ingress and egress to and from their property over land dedicated for use as a public street outside of the park boundary. There is no evidence to show that there was ever a road within the park contiguous to the westerly boundary line of plaintiffs' property, and from plaintiffs' own exhibits it appears that the roads above mentioned merely crossed the easterly boundary line of the park and continued into the park in a southwesterly direction without touching plaintiffs' land at any point after so crossing. If the course of the road within the park had not been altered to the north so as to run over the new bridge, said road within the park would have been closer to plaintiffs' westerly property line than the present road, but it would not have been contiguous to the westerly property line thereof. The practical reason for plaintiffs' desire to obtain an easement over the park property and to enjoin the defendants from building a fence upon the boundary line of said park property may be easily understood. As above stated, plaintiffs have a curved frontage on Los Feliz boulevard of about 46 feet at the property line. If plaintiffs' easterly and westerly lines are extended, they converge and form the point of the wedge near the center of Los Feliz boulevard. Plaintiffs may therefore be said to have a smaller frontage at the curb line than at the property line. It is plaintiffs' desire to have a frontage at the curb line on the road as it extends into the park equal to the amount of frontage which they have at the property line. The result of the trial court's judgment was to award to plaintiffs a private easement over what we may term an inverted wedge-shaped strip of park property; the point of said wedge being at the place where the boundary line of the park is intersected by the northerly property line of plaintiffs' land. An easement over this strip would give plaintiffs access to the present road within the park boundary over park property not otherwise used for road purposes.

[1] Appellants make several points in support of their contention that the judgment should be reversed. They argue that, under the charter of the city of Los Angeles and under the grant by which said city acquired Griffith Park, appellants were without power to grant a private easement over any portion of said park. They further argue that such an easement over public park property could not result from the use of the property. There appears to be merit in these contentions, but we refrain from discussing them because a reversal is required upon other grounds urged by appellants. Even if we assume that such easement could have been acquired by grant, there was no evidence of any grant of any kind, and, even if we assume that such easement could have been acquired by use, there was no evidence whatever of any use of the strip in question. In the absence of such evidence, we are unable to determine either the theory upon which respondents asserted their claim or the theory upon which the trial court based its judgment. Respondents' brief throws little, if any, light upon the subject. We may pause to state that the only heading found in said brief is the heading "Statement of Facts." No attempt has been made to comply with section 2 of rule VIII of the Rules of the Supreme Court and District Courts of Appeal, which requires that the brief "must present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made." After reading said brief, we are still at a loss to know the theory upon which respondents rely to support the judgment. We do not find any fact or facts mentioned therein to support respondents' claim to such easement nor do we find a single authority cited.

[2] Respondents state that the trial court granted the injunction "after having viewed the property and ascertaining the facts, which could only be had by the examination of the conditions prevailing at the site, where it was readily seen that if the defendants' and appellants' threatened acts were not enjoined, that plaintiffs' and respondents' property would be practically destroyed." But respondents do not suggest any material fact that could have been ascertained only by an inspection of the property, and could not have been ascertained from the maps and photographs in evidence. It can be readily seen from said maps and photographs that respondents' property would probably be more desirable if they had such an easement and if appellants were enjoined from building a fence along the park boundary line. The occupants of respondents' property would then have a better view of the park and the roadway therein as well as a more convenient means of ingress and egress. But mere considerations of desirability and convenience from the standpoint of the adjoining land-

owners certainly cannot be made the basis for a decree granting a private easement over public property or for a decree enjoining the erection of a fence along the park boundary line.

[3] While respondents do not claim a right of way of necessity over the strip in question, we are in accord with appellants' contention that any such claim would necessarily fall. This is true, first, because the undisputed facts showed that no necessity existed as respondents had a means of ingress and egress to and from Los Feliz boulevard outside of the park boundary line; and, second, because, if such necessity existed, the right of way of necessity which would have been created by operation of law would have been a way running over the remaining land of respondents' grantor and not a way running over other land located within a public park. Mesmer v. Uharriet, 174 Cal. 110, 162 P. 104; Bully Hill Copper Mining, etc., Co. v. Bruson, 4 Cal. App. 180, 87 P. 237; 9 Cal. Jur. 967, § 17.

The judgment is reversed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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137 Cal.App. 98

WANTZ v. UNION BANK & TRUST CO. OF LOS ANGELES et al.*

Civ. 8080.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1934.

Rehearing Denied March 28, 1934.

Hearing Denied by Supreme Court April 26, 1934.

1. Appeal and error 🔑768.

Where appellant contends judgment is not supported by evidence, respondent has duty to point out to reviewing court evidence he deems sufficient to support judgment, or admit truth of appellant's contention.

2. Fraud 🔑58(1).

In action for fraud inducing purchase of realty, evidence connecting bank which held property in trust, with fraud, *held* insufficient to sustain verdict against bank.

3. Corporations 🔑34(3).

One suing for fraud inducing him to enter into written contract with development company *held* not entitled to deny corporate existence of company.

4. Corporations 🔑32(1).

Name of sales agency including word "company" created no presumption company was incorporated.

5. Fraud 🔑30.

One purchasing realty under agreement to improve and sell such realty and manager of resale project *held* liable for alleged misrepresentations of lecturer whom they introduced to prospective purchaser, inducing purchase and contracts for improvement, where company ostensibly in charge of such sales was not shown to be a corporation.

6. Appeal and error 🔑882(11).

Defendants in action for fraud inducing purchase of realty could not complain that jury found against them on evidence which they might have controverted but did not.

7. Pleading 🔑403(3).

Failure of complaint in action for fraud inducing purchase of realty to allege rescission of transaction *held* cured by allegations in answer of rescission and demand for repayment of money paid.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Carl W. Wantz against the Union Bank & Trust Company of Los Angeles and others. Judgment for plaintiff, and defendants appeal.

Reversed in part, and affirmed in part.

Walter M. Campbell, of Los Angeles (Loeb, Walker & Loeb, of Los Angeles, of counsel), for appellants.

Robert L. Hubbard and Mart Coles, both of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal by defendants from a judgment against them based on the verdict of a jury awarding $21,269.21 as damages for alleged fraudulent representations in the purchase and sale of lands and as inducement to plaintiff's entering into contracts for the improvement of the lands so agreed to be purchased.

It appears without question that the defendant Union Bank & Trust Company held the legal title to the lands in question for the benefit of the owner, Los Angeles County Farm Land Company, and J. M. Barteaux, who was purchasing them under an agreement to improve and sell the same, and that at the time plaintiff made his first purchase of land the improvement and development of the tract was being done by the Calivalli Development Company.

*Rehearing denied 31 P.2d 826.

On April 17, April 19, May 24, and May 31, in 1928, plaintiff entered into four separate agreements with the defendant Union Bank & Trust Company of Los Angeles for the purchase of four parcels of land aggregating 100 acres, and on the same dates also entered into four separate agreements, called "Development Contracts," with said Calivalli Development Company for the development of such tracts "in conjunction with a general planting scheme on said Calivalli Farms," by developing water for said tracts at the expense of said development company, clearing the lands of brush and vegetation, and planting same "to first-class fig stock, approximately 126 to the lot," or in lieu thereof to plant in its nursery "sufficient first-class fig stock to insure said number of first-class fig trees to the lot," in which event said development company was to transplant to said lands said number of first-class uniform fig trees as soon as the same were properly rooted; and said company agreed to cultivate, prune, irrigate, and care for said trees for three years, the actual cost of such clearing, planting, and cultivating and irrigation, as well as harvesting, to be paid for by plaintiff, plus 10 per cent. Any crops harvested on said lands were likewise to be marketed by said company, plaintiff to receive the proceeds thereof less 25 per cent. of the net profits realized. Three of such development contracts were signed "Calivalli Development Company, by J. M. Barteaux," and to the fourth the name of the company was signed "By John E. Elliott." To none of the four was a corporate seal affixed, and the official designation of the party signing them for the company nowhere appears. Each of the contracts, however, contains language only applicable to a corporation, so far as their reference to the second party, Calivalli Development Company, is concerned. For instance, the grant by plaintiff as party of the first part of an eight-year right to all water in or under the property described, to a right of way for laying pipe lines, and to enter for the purpose of drilling wells and laying pipe lines, is to the "party of the second part, *its successors or assigns*," in each instance. The bills rendered plaintiff for his pro rata of the cost of such work done on the parcels purchased by him are from the "Calivalli Development Company, Inc.," and such corporation is named as payee in the checks drawn by plaintiff to pay the same. It also appears, without any contradiction that we have found, that plaintiff attended a stockholders' meeting of such corporation in May, 1928. The development contracts above referred to recite that the "Calivalli Development Company, party of the second part, * * * is engaged in the development and improvement of Calivalli Farms, consisting of that certain land described in Trust No. 533, in the Union Bank & Trust Company of Los Angeles."

The fifth cause of action set out in the complaint sought the recovery of $616 and $990, paid on June 15, 1928, and July 10, 1928, respectively, to apply on development work done under said contracts on the four parcels agreed to be purchased. These sums were paid by plaintiff's checks, made payable to "Calivalli Development Company, Inc." There is no allegation in the complaint that the respective contracts have been rescinded or that the land is worthless. A demurrer was sustained to the original complaint, and permission to amend given. One of the false representations alleged to have been made is that the land sold "was of the value of $400.00 per acre." The allegation as to the falsity of such representation was originally that the defendants "well knew that said land was not of the value of $400.00 per acre or of any value whatever *greater than $30.00 per acre*." The amendment made of such complaint, by stipulation and after demurrer sustained, was accomplished by striking out the words above italicized and inserting instead, "for the purposes for which said lands were sold to plaintiff by defendants." The complaint sought the recovery of the money paid by plaintiff on both the purchase and development contracts.

Appellants urge that the evidence is insufficient to support the verdict and judgment.

[1, 2] Plaintiff testified that just before the first purchase contract was signed he had a conversation with D. M. Cameron, a trust officer of defendant trust company; that Mr. Cameron was very busy at the time, and that defendant Barteaux, who accompanied plaintiff, apparently for the purpose of having such contract executed, remained outside the railing which surrounded Cameron's desk; that plaintiff went inside and asked Mr. Cameron about Barteaux, and that "he told me Mr. Barteaux was a rich man" and "understood farming," and "had his confidence." Asked as to what else Mr. Cameron said, plaintiff replied: "I told Mr. Cameron, 'You understand, I am not buying acres, but development.' He answered and said that the development goes with the acres." Appellants urge that this is all the evidence in the case as to statements made by any one connected with the defendant trust company. Respondent, without calling our attention to any other evidence, answers such challenge by saying merely, in substance, that he cannot be com-

pelled to set out evidence at great length to prove there is ample to support the verdict. In our opinion it is the duty of a respondent whose judgment is being questioned on appeal on this ground to point out to the appellate court the evidence he deems sufficient to support such judgment, particularly where, as here, the claim is made that all of such evidence connecting a particular appellant is set out in appellants' brief, or else admit the truth of the statement, if none can be found. We have taken the time, without such help, to search the voluminous record before us, and are compelled to say that we find appellants' claim to be sound. Neither are any of the statements made by any one connected with the defendant trust company set out as the alleged false representations made by defendants inducing plaintiff to enter into the agreements mentioned; nor do we find any evidence to show that Mr. Barteaux was not a rich man who understood farming, and who, at least at that time, did not have the confidence of Mr. Cameron. It appears, moreover, that plaintiff had then seen the property several times and apparently had verbally agreed to buy a parcel, and that he was in the office of the company with Mr. Barteaux for the purpose of making his down payment and executing the written purchase agreement. Just what plaintiff meant by the statement he made to Cameron, that "he was not buying acres, but development," or understood by the reply which he testified Cameron made thereto, to the effect that "the development goes with the acres," we cannot conceive, as it is not alleged as a fraudulent representation and could not very well be so alleged, as each sale contract expressly provides that it "covers the sale of unimproved and undeveloped land," and each contract executed concurrently with each purchase, between plaintiff and the Calivalli Development Company, provides that, while the work is to be done by the development company, the actual cost thereof is to be paid by plaintiff, plus 10 per cent., and the fifth cause of action is for the recovery of money so paid on such development contracts.

[3, 4] The complaint alleges that, in furtherance of a conspiracy to cheat, wrong, and defraud plaintiff, the defendants agreed "among themselves to and did cause defendants J. M. Barteaux and John E. Elliott to assume and pretend to do business" in developing said lands "under the spurious name of Calivalli Development Company," and entered into agreements with plaintiff for such development "under the pretense and claim that said Calivalli Development Company was [a] corporation; that said so called 'Calivalli Development Company' was not a copartnership doing business under a fictitious name, nor was it a corporation or other or any form of organized or associated persons," but that the name was used by defendants Barteaux and Elliott "individually and independent of each other" in the sale of said lands as the representatives of defendant trust company, "the true owner of said lands and the real party in interest" in the transactions with plaintiff. Our attention has not been called to any evidence supporting such allegation, particularly as to the name "Calivalli Development Company" being used by Barteaux and Elliott in the sale of said lands as representatives of defendant trust company, "the true owner of said lands *and the real party in interest*" in the transactions with plaintiff, nor have we found any that does. The evidence shows without conflict that the defendant bank was not the real party in interest, as we have said, but only held the title to said lands in trust for the benefit of the real parties concerned, viz. the Los Angeles County Farm Land Company and defendant Barteaux, and that it had no other interest therein; and the only evidence we have found in the record concerning the status of such Calivalli Development Company supports the conclusion that it was a corporation at the time plaintiff became interested in the tract and was engaged in the development of the tract and not in its sale. Under the undisputed evidence it would seem that plaintiff is in no position to question the corporate capacity of said development company (Burrows Shoe Company, Inc., v. Brotherton, 106 Cal. App. 162, 288 P. 879), and it does not appear that defendants Barteaux and Elliott owned all the stock of such corporation or were its alter ego. Mr. Cameron, the trust officer of defendant bank, on cross-examination by plaintiff, testified that the Calivalli Farms Company had the sale of the land, while the Calivalli Development Company agreed to put in the improvements. It also appears without contradiction that defendant Elliott was sales manager. That Calivalli Farms Company had the sale of the land as testified by the witness Cameron is shown by a plat of the tract and some posters advertising the tract purporting to be put out by "Calivalli Farms Company," introduced in evidence by plaintiff. The mere name "raises no presumption whatever that it is an incorporated company; * * * nor is there any other proof of the fact in the case." Briggs v. McCullough, 36 Cal. 542, 550. The language used in the case

cited is particularly appropriate here, so far as the name "Calivalli Farms Company" is concerned.

[5, 6] Plaintiff testified that he was taken out to the property by a Mrs. Ward and a Mr. Johnston, that he found a large pavilion there in which a lecturer named Claude Adams told him the lands were well adapted to the growing and successful raising and profitable marketing of Kadota figs, and that the climatic conditions were especially suited to such planting and cultivation. As to the truth of such evidence there is a sharp conflict. Among other statements made by Adams, according to plaintiff's testimony, was one to the effect that they would plant potatoes each year the fig trees were growing, which should return $300 per acre per year, and that the third year the figs would produce $100, making the total revenue to the buyer in three years $1,000, which statement might under the evidence be inferred to have been one made without any intention of carrying it into effect.

Inasmuch as the evidence does not show that Calivalli Farms Company was a corporation, but does show that defendant Barteaux under the trust agreement was purchasing the property under an agreement to improve and sell the same, and that he went with plaintiff to the bank to obtain his first purchase agreement, that defendant Elliott was the sales manager of the selling enterprise and that both at times introduced the lecturer, and that the first contracts to sink wells on the tracts were apparently made with "Barteaux & Elliott" prior to the organization of the Calivalli Development Company, we cannot say that there is not sufficient evidence to sustain the implied finding of the jury that such defendants at least were responsible for the representations made by the lecturer and other selling agents which induced the purchases by plaintiff. If the Calivalli Farms Company was in fact a corporation and not merely a name under which Barteaux and Elliott were engaged in selling the tract, it was within the power of such defendants to have produced such evidence; and they cannot now complain if the jury found against them on evidence they might have controverted but did not. There would seem to be a fair presumption as the record stands that, if they had spoken on the subject, it would have removed all doubt as to the inference so drawn by the jury being correct. Bone v. Hayes, 154 Cal. 759, 765, 99 P. 172.

[7] A more serious question is whether or not the complaint as amended states a cause of action. We are of the opinion that it presents a very defectively stated cause of action. The amendment did not correct the defects which made the original pleading obnoxious to the demurrer which was sustained. The action is brought for the recovery of the amounts paid on the respective contracts, and yet fails to allege a rescission. No objection seems to have been made to the complaint as amended, however, and the fourth cause of action of defendants' answer alleges the service of a notice of rescission by plaintiff and demand for the repayment of the money paid on such contracts, and that, relying thereon, defendants sold the land involved to third persons, who expended large sums in improving the same. This would seem to remedy such defect. See the case of Shively v. Semi-Tropical L. & W. Co., 99 Cal. 259, 33 P. 848, 849, where a similarly defective complaint was held to be cured by a similar allegation in the answer, the court saying: "That a defective complaint may be cured by admissions of the answer is well settled." See, also, Schenck v. Hartford Fire Insurance Co., 71 Cal. 28, 11 P. 807, where the answer set out matter necessary to be alleged in the complaint to state a cause of action.

Judgment reversed as to appellant Union Bank & Trust Company and affirmed as to appellants Barteaux and Elliott.

We concur: STEPHENS, P. J.; CRAIG, J.

MASTRANGELO v. WEST SIDE UNION HIGH SCHOOL DIST. OF MERCED COUNTY et al.*

MASTRANGELO et ux. v. SAME.

Civ. 4815.

District Court of Appeal, Third District, California.
Feb. 26, 1934.

Hearing Granted by Supreme Court April 26, 1934.

1. Negligence 🔑**136(1).**

In negligence action, nonsuit should not be granted except when it clearly appears there is no material issue left for jury.

2. Trial 🔑**142.**

Nonsuit should be granted only when, accepting full force of evidence adduced, together with every reasonable inference and pre-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 42 P.2d 634.

sumption favorable to plaintiff and excluding all evidence in conflict therewith, it appears that plaintiff cannot recover.

3. Schools and school districts ⚷122.

In action for injuries sustained by high school pupil from explosion in gunpowder experiment occurring when mixture containing a wrong ingredient was being ground in iron mortar contrary to instructions in text-book, school district's negligence *held* for jury under evidence.

Under evidence, it was for jury to determine whether school district was negligent in failing to exercise reasonable care in providing and labeling dangerous materials to be used in chemical experiments, and in failing properly to instruct and supervise selection, compounding, and handling of dangerous ingredients used in manufacturing explosives.

4. Negligence ⚷121(1).

In negligence action, plaintiff has burden of making prima facie showing of defendant's negligence.

5. Schools and school districts ⚷122.

High school pupil suing for injuries sustained in chemical experiment could not be nonsuited if prima facie establishing facts reasonably warranting inference that school district was negligent, or that teacher was under legal duty to warn and protect pupil against injury and failed to perform duty.

6. Negligence ⚷136(2, 26).

Ordinarily, negligence and contributory negligence are for jury.

7. Schools and school districts ⚷122.

In view of evidence that 16 year old high school student, injured in explosion, was ignorant of danger of gunpowder experiments and that neither text-book nor teacher warned him against mixing ingredients in mortar, question whether pupil was contributorily negligent in mixing ingredients in mortar instead of pulverizing them separately on sheets of paper as directed by text-book *held* for jury.

Appeal from Superior Court, Merced County; S. L. Strother, Judge.

Suits, consolidated for trial, by Elge Mastrangelo, a minor, by his guardian ad litem, P. A. Mastrangelo, and by P. A. Mastrangelo and wife against the West Side Union High School District of Merced County and the Board of Trustees of said district. From a judgment of nonsuit, plaintiffs appeal.

Reversed.

Andrew R. Schottky and H. K. Landram, both of Merced, for appellants.

F. M. Ostrander, of Merced, for respondents.

Mr. R. L. THOMPSON delivered the opinion of the court.

The plaintiffs have appealed from a nonsuit which was granted upon the completion of their evidence at the trial of suits for damages for personal injuries sustained as a result of alleged negligence.

The above-entitled causes were consolidated for the purpose of trial. The appeals in both cases are determined by the same facts and law. To avoid confusion reference will be made only to the first above-entitled cause. For convenience the defendants will be hereinafter referred to as the defendant.

The defendant Union High School District of Merced county is organized under the provisions of law. The course of instruction includes the teaching of elementary chemistry. For the purpose of teaching chemistry, a laboratory was provided with appropriate equipment, including chemical substances with which to perform the standard experiments prescribed by the text-books. Among the equipment of the laboratory which was provided by the school for that purpose was a sink, benches, a cabinet containing various ingredients used for experiments, and an iron mortar and pestle. The experiments were presumed to be supervised by the teacher of chemistry. Greer & Bennett's Elementary Chemistry was used as a text-book on that subject. Among the experiments which were required in that course was the compounding of certain explosives. This experiment was designated as No. 40. It described the process of making ordinary gunpowder. After a general recital of the component parts to be used for compounding solid explosives, and the effect of oxygen and heat upon them, the following instructions were given for performing the experiment:

"(a) Put a little sulphur on a sheet of paper on your desk. Powder it very thoroughly by using a dry bottle as a rolling pin. Describe the solid. Much of the success of the experiment depends on the thoroughness with which the substance is powdered.

"(b) On another piece of paper, put an equal bulk of wood charcoal. Powder it also. Describe the solid.

"(c) On a third piece of paper put twice as much potassium nitrate as you have sulphur. Pulverize this. Describe the solid.

"(d) Now mix the contends of papers used in (a) and (b) by pouring the powders back and forth from one paper to the other at least a dozen times. Thorough mixing is necessary to make this a successful explosive. Now, pour this mixture on the paper in (c) and mix these substances as you did the first ones. What is the color of the mixture now?

"(e) This mixture is composed of the same ingredients as gunpowder. Make a little heap of it on a stone table top, or a brick or an iron pan. Lay the Bunsen burner on its side so that the flame plays on the edge of the pile of powder. Stand back. What takes place? What odor do you notice? * * *

"From this experiment, we see that solids may explode. Solid substances will not generally explode, however, unless they are (1) in very finely powered form, and (2) mixed with oxygen, air, or an oxygen compound which gives up its oxygen readily when heated.

"The oxygen compound commonly used in gunpowder is niter or saltpeter; its chemical name is potassium nitrate; its formula is KNO_3."

The plaintiff Elge Mastrangelo was a boy of good intelligence. He was sixteen years of age when the accident which is involved in this suit occurred. He had attained the grade of a junior in the high school. He was a member of the chemistry class and had just commenced his laboratory work in company with other students under the supervision of Mr. Williams, the chemistry teacher. Various ingredients used for performing the required experiments, such as charcoal, sulphur, potassium nitrate, and potassium chlorate were kept in the laboratory in a cabinet or on a shelf in small pasteboard boxes. The plaintiff, in company with two other students, had twice previously performed the gunpowder experiment. In the laboratory, under the supervision of the chemistry teacher, on October 27, 1930, Elge was attempting to repeat the same experiment for the third time. Instead of pulverizing the ingredients upon separate sheets of paper as directed by the text-book, they were mixed together and ground in an iron mortar by means of a pestle. Instead of using potassium nitrate as directed by the text-book, either by mistake or otherwise, potassium chlorate was substituted therefor, or both substances were used. Both of these ingredients were kept in similar separate boxes on the shelf directly in front of the bench where the students were performing the experiment. While the plaintiff was mixing the ingredients, an explosion occurred which blew off his left hand and seriously injured his right hand. His right eye was completely destroyed, and his left eye was injured. He is now scarcely able to read or see. He was compelled to procure a glass eye to replace his destroyed right eye. His injuries are serious and permanent.

Suit for damages for personal injuries sustained as a result of alleged negligence in failing to properly instruct or supervise the performance of highly dangerous experiments on the part of the students, was commenced. Upon trial of the cause before a jury, at the close of the testimony which was adduced on behalf of the plaintiffs, a nonsuit was granted. From this nonsuit, the plaintiffs have appealed. They contend the record discloses ample evidence of negligence proximately causing the accident, which required the submission of the facts to the jury.

We are of the opinion the evidence is adequate to have required the submission of the cause to the jury for its determination of the facts, and that the nonsuit was therefore erroneously granted.

[1, 2] The theory of the law is that a complainant has a right to have every material issue of fact, arising in a suit based upon negligence, determined by the jury. A motion for nonsuit should not be granted except when it clearly appears there is no material issue left for the decision of the jury. A nonsuit should be granted only when, accepting the full force of the evidence adduced, together with every reasonable inference favorable to the plaintiff, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes the plaintiff from recovering a judgment under such circumstances. A multitude of authorities has uniformly held the following principles to apply to a motion for nonsuit. The evidence must be construed most strongly against the defendant. Every favorable inference and presumption which may be fairly deduced from the evidence should be resolved in favor of the plaintiff. The plaintiff's evidence must ordinarily be accepted as true, and evidence which is contradictory thereof should be disregarded. Upon a motion for nonsuit the credibility of witnesses is ordinarily not involved. 9 Cal. Jur., p. 551, § 35.

[3] Applying the foregoing rules to the record in the present case, it may be reasonably inferred there is substantial evidence to indicate that the defendant was guilty of negligence in failing to exercise reasonable care in providing and labeling dangerous materials to be used in chemical experiments, and in failing to properly instruct and supervise the selection, compounding, and handling of dan-

gerous ingredients used in manufacturing explosives. It is not unreasonable to assume that it is the duty of a teacher of chemistry, in the exercise of ordinary care, to instruct students regarding the selection, mingling, and use of ingredients with which dangerous experiments are to be accomplished, rather than to merely hand them a text-book with general instructions to follow the text. This would seem to be particularly true when young and inexperienced students are expected to select from similar containers a proper harmless substance rather than another dangerous one which is very similar in appearance. It is the province of the jury to determine whether the mixing of the ingredients which were used to compound gunpowder in a mortar by means of a pestle, increased the danger of an explosion; whether the plaintiff was without previous knowledge or instruction regarding that danger, and whether that process was knowingly permitted to be followed by the pupil without warning from the teacher. It may also be a proper question for the determination of the jury as to whether the delivery of a text-book to an inexperienced pupil with mere instructions to follow the text, in the performance of a dangerous experiment in chemistry, is a sufficient exercise of care. In other words, if the jury should find that it was highly dangerous to mix together potassium chlorate, charcoal, and sulphur in an iron mortar by means of a pestle, it would become a further question of fact for the jury to determine whether the teacher was negligent in failing to warn the pupil of that danger, particularly if he observed the boy following that method and knew that he was inexperienced in that science.

[4-7] It is true that the burden is on the plaintiff to establish a prima facie showing of negligence against the defendant, and, if he fails to do so, that a nonsuit may be properly granted. To justify the denying of a nonsuit it is necessary only that a prima facie case of negligence be shown, from which the jury may reasonably infer that the defendant was guilty of negligence, or that the teacher was under a legal duty to warn and protect the plaintiff against the injury which he received. 19 Cal. Jur., p. 739, § 142. Ordinarily the presence of both negligence and contributory negligence are questions for the determination of the jury. 19 Cal. Jur., p. 719, § 133; Id., p. 742, §§ 141–143. Under the circumstances of this case, we are of the opinion both of these questions should have been submitted to the jury. Regarding the question of contributory negligence, upon which the respondent relies, the fact that the ingredients which were used in manufacturing gunpowder were mixed together by the plaintiff in a mortar instead of pulverizing them separately on sheets of paper as directed by the text-book presents a proper question regarding the presence of contributory negligence for the jury to determine, in view of the age and inexperience of the student, especially since neither the text-book nor the teacher warned him against mixing the ingredients in that manner. There is evidence that he was ignorant of the dangerous character of this experiment. The plaintiff's alleged contributory negligence was therefore a proper question to be submitted to the jury.

The evidence shows that Mr. Williams, the chemistry teacher, was present in the laboratory during the experiment which resulted in the explosion; that he stood immediately behind the plaintiff and saw or may have seen not only the selection of the ingredients, but the fact that they were being mixed together in the iron mortar instead of pulverizing them separately on sheets of paper as directed by the text-book; and that he failed to warn the student of the danger of that method. The plaintiff testified in that regard:

"Q. Do you know whether or not Mr. Williams was in the room at any time during the time that you were doing the experiment upon the day of the explosion? A. Yes sir. He was there. * * * When I and Angelo were mixing this ingredient, he just walked behind us. * * *

"Q. At the time that you and Angelo were mixing these ingredients, Mr. Williams walked by you? A. Yes sir. * * * We just had thrown them in. * * * In that iron mortar.

"Q. You say he didn't say anything to you? A. No sir.

"Q. Do you know where Mr. Williams was at the time of the explosion? A. Yes sir.

"Q. Where? A. Well, he was about 15 feet behind me. * * * He was looking right towards me."

From the foregoing evidence a reasonable inference may be drawn that the chemistry instructor saw the grinding of the ingredients in the iron mortar with the pestle, yet he failed to warn the boys against the danger of that method of mixing them. He knew the boys were then compounding the materials for the experiment of manufacturing gunpowder. The plaintiff testified that just before they began the experiment he "went up to Mr. Williams" and said "I and Angelo are going to make that gunpowder experiment." The instructor consented to their doing so.

The plaintiff testified that he did not know the difference between potassium nitrate and potassium chlorate; that they looked the same to him. They were kept in similar boxes on a shelf near the mortar where they were mixing the ingredients. Regarding his ignorance of the difference between these elements, and a lack of instruction in that regard, the plaintiff testified:

"Q. Do you know the difference between those two matters? A. No sir.

"Q. Had Mr. Williams or anyone else in authority in the school ever told you that it was dangerous to use potassium chlorate in the performing of the explosion or gunpowder experiment? A. No sir.

"Q. Had Mr. Williams or anyone else in authority of the school ever told you it was dangerous to grind sulphur, carbon and potassium chlorate or potassium nitrate together in that iron mortar? A. No sir. * * *

"Q. Had Mr. Williams or anyone else in authority ever warned you against using potassium chlorate in the performance of this experiment 40 or the making of an explosive? A. No sir.

"Q. Had Mr. Williams or anyone else in authority ever warned you that it was dangerous to mix these various ingredients together * * * in the mortar * * * by pounding or working it around? A. No sir. * * *

"Q. The second time that you did this experiment * * * was Mr. Williams present at that time? A. Yes sir.

"Q. And he did not at that time or afterwards discuss the experiment with you? A. No sir."

In support of his claim that he did not know the difference in appearance between potassium nitrate and potassium chlorate, the plaintiff said:

"Q. Do you know what the other one was? A. They both look alike. * * *

"Q. You mean you don't know what the fourth ingredient was? A. No, I don't remember. They both,—chlorate and nitrate, as I know them, both look alike."

The plaintiff used the same ingredients at the time of the explosion which he had previously used. He testified in that regard:

"Q. Why did you use potassium chlorate? A. That is what I used before.

"Q. The book called for potassium nitrate? A. Yes sir. * * * I didn't know it at the time, though. * * *

"Q. The materials were kept in that cabinet, weren't they? A. No sir.

"Q. As a rule? A. No sir.

"Q. Did you observe or have handed you a paper apparently mimeographed, entitled 'Rules for Conduct in the Chemical Laboratory'? A. No sir.

"Q. Did you see on the wall such a paper? A. No sir.

"Q. You knew that you were supposed to ask for ingredients? A. No sir.

"Q. Before you get them, didn't you? A. No sir.

"Q. You did not? A. No sir.

The respondent argues that the plaintiff recklessly experimented with the dangerous ingredients with knowledge of that danger, just to get the thrill from an explosion. Fairly considered, we think the evidence discloses no previous knowledge on his part of the identity or danger of using potassium chlorate, or of mixing together in an iron mortar the ingredients for compounding gunpowder. The reasonable inference secured from the record is that the plaintiff was mixing the gunpowder ingredients for the very purpose of obtaining an explosion, which is the result for which the text-book experiment is intended. The text reads: "From this experiment we may see that solids may explode." The plaintiff testified in that regard:

"Q. As a matter of fact you were performing this experiment to get a kick out of the explosion, weren't you? * * * A. No, I was not.

"Q. What? A. No, sir.

"Q. What was your purpose? A. Well, to make a pop out of it.

"Q. To make a pop out of it? A. Sure.

"Q. You wanted to see it go off, is that right? A. Yes sir.

"Q. And you and Angelo Marchese decided because it hadn't popped sufficiently on another occasion that you would add a little something to it to see if you couldn't get a bigger pop, didn't you? A. No sir.

"Q. What? A. No sir.

"Q. Well, why did you use potassium chlorate? A. That is what I used before. * * *

"Q. Then, on each occasion, you used the potassium chlorate out of this particular container? A. Yes sir."

The judgment of nonsuit is reversed.

We concur: PLUMMER, J.; PULLEN, P. J.

137 Cal.App. 117

SAN FRANCISCO STEVEDORING CO. et al. v. ASSOCIATED INDUSTRIES INS. CORPORATION.

Civ. 9170.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1934.

Hearing Denied by Supreme Court April 26, 1934.

1. Contracts ⇨346(16).

One suing on written agreement as modified by executed oral agreement and showing that oral agreement was not executed cannot recover on proof of oral agreement as new contract, where defendant is not permitted to plead to such contract (Civ. Code, § 1698).

2. Pleading ⇨387.

Plaintiff must recover on cause of action set out in complaint, and not on another cause developed in proof.

3. Insurance ⇨645(5).

Plaintiffs seeking to recover from insurer money paid widow of deceased employee *held* not entitled to recover on proof of oral executory agreement to insure, where suit was brought on allegations of written policy extended by executed oral agreement, since defense of limitations was open to insurer had executory agreement been pleaded (Civ. Code, § 1698).

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by San Francisco Stevedoring Company and another against Associated Industries Insurance Corporation. From an adverse judgment, defendant appeals.

Reversed.

Daniel W. Burbank, C. F. Laumeister, and Sidney L. Weinstock, all of San Francisco, for appellant.

Lillick, Olson & Graham, Ira S. Lillick, Joseph J. Geary, and Gilbert C. Wheat, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

The plaintiffs sued on two policies of insurance, alleging that the sum of $12,500 had been paid by them to the widow of an employee of the stevedoring company who was killed during the course of his employment and that the sum of $2,000 had been paid as attorneys' fees in the settlement of that claim. Trial was had with a jury, resulting in a joint verdict and judgment for the plaintiffs for $14,500 and interest. From this judgment the defendant has appealed upon typewritten transcripts.

The death of the employee occurred on November 19, 1926. Settlement of the claim was made March 7, 1929. On May 20, 1929, plaintiffs filed a complaint framed in two causes of action; one based upon a policy covering employers' liability as amended and modified by an oral agreement; the other based upon a policy of public liability as amended and modified by the same agreement. A demurrer to this complaint was sustained and an amended complaint was filed alleging that the defendant had issued "a certain written agreement of insurance" under which it gave plaintiffs jointly both employers' and public liability coverage and that said written agreement was extended to cover the plaintiffs jointly and severally from any and all injury or death resulting to any person during stevedoring operations on the steamer Point Judith, and that said extension was by means of an executed oral agreement. A demurrer to this amended complaint having been overruled, and the defendant having answered, the cause was tried upon the plaintiffs' theory that two separate written contracts of insurance were modified and extended by one executed oral contract of insurance running to both plaintiffs jointly and covering all operations performed by each. During the course of the trial the plaintiffs, being unable to prove that this oral contract was executed, abandoned this theory and proceeded upon a new theory of a single oral contract of insurance covering all these operations. Motions for nonsuit as to each plaintiff having been denied, the defendant moved that the court require the plaintiffs to so amend their complaint that their pleading would conform to the proofs in respect to the oral contract upon which they relied. This motion was denied, and this is assigned as error by the defendant for the reason that if such amendment had been made the defendant would have been in a position to plead the statute of limitations as to such oral contract.

The parties have assigned numerous questions as those involved in this appeal and in this respect they are not in agreement. We do not deem it necessary to state the questions thus assigned because the appeal should be determined on the single issue whether a party suing upon a written contract alleged to have been modified by an executed oral contract can recover upon proof alone of an unexecuted oral contract which, if pleaded, might have been barred by the statute of limitations.

The facts as to this issue are not in material dispute. The respondent Swayne & Hoyt, Inc., is a corporation engaged in the business of owning and operating freight vessels. The respondent San Francisco Stevedoring Company is a corporation engaged in the business of stevedoring vessels at the port of San Francisco alone. The two companies occupy the same offices and employ a joint manager. Swayne & Hoyt is also engaged in the business of stevedoring vessels at the port of Los Angeles, where it conducts its business under the name of "Commercial Stevedoring Company." In January, 1926, the appellant issued two policies of indemnity insurance covering stevedoring operations to Swayne & Hoyt, the San Francisco Stevedoring Company, and to Swayne & Hoyt doing business as Commercial Stevedoring Company. The policies were to run until February 1, 1927. One was an employers' liability policy indemnifying the insured against loss by reason of injury or death sustained by its employees. The other was a public liability policy indemnifying the shipowners against loss by reason of injuries or death sustained by persons not in their employment. Both policies had attached to them written indorsements expressly excluding from coverage the vessel Point Judith. For some time prior thereto the respondent Swayne & Hoyt as shipowners held a public liability policy in another association covering the Point Judith. On October 21, 1926, this policy was renewed but with a provision excluding from coverage claims arising from stevedoring operations. On November 19, 1926, while the stevedoring company was engaged in stevedoring the Point Judith in the port of San Francisco under contract with Swayne & Hoyt, an employee of the stevedoring company, while engaged in stevedoring work on the vessel, sustained injuries from which he died. The stevedoring company reported the death to appellant and a conference was then had between a representative of the appellant and the operating manager of the respondents at which time the attention of the latter was directed to the rider in the policies expressly excluding operations on the Point Judith. As a result of this conference the appellant agreed with the representative of the respondents that it would accept and endeavor to adjust (without admitting liability) the claim as to the stevedoring company, but that it would assume no responsibility under the public liability policy on the part of the shipowners. This offer was accepted by the respondents and the claim arising out of the death in so far as it related to the liability of Swayne & Hoyt as shipowners was placed in the hands of the other insurance carrier under its policy of October 21, 1926. Thereafter a suit was commenced by the widow of the deceased employee against both Swayne & Hoyt and the stevedoring company wherein it was alleged that the death occurred through the negligence of the shipowner in that the handholds on the hatch cover upon the ship were unsafe and insufficient and that by reason thereof the deceased, while putting a hatch cover in place, and also by reason of the carelessness and negligence of a fellow stevedore, was pulled forward into the hatch and fatally injured. When summons and complaint were served upon the two respondents, counsel for the appellant was directed to appear and defend on behalf of the stevedoring company, and other counsel, representing the other insurance concern, was directed to appear and defend on behalf of Swayne & Hoyt. Separate appearances and separate answers were duly made in accordance with this agreement. Thereafter the operating manager of the respondents notified appellant that Swayne & Hoyt would seek to hold appellant for the loss sustained under its public liability policy. Such a demand was made in writing on May 4, 1928, wherein the respondent Swayne & Hoyt claimed coverage under the *written* contract of public liability insurance. Denying its liability under this policy, the appellant notified the respondents that unless they complied with the terms of the agreement heretofore mentioned, the appellant would withdraw from the defense of the action in so far as the stevedoring company was concerned. As the parties could not agree, other counsel was employed by both respondents and a compromise was effected with the widow of the deceased employee on March 7, 1929. As the result of this arrangement $12,500 was paid by the stevedoring company, but at the time of the trial no segregation of this amount was made as to each respondent's liability and no portion of the amount had been paid by Swayne & Hoyt.

Upon these facts the appellant urges that, the sum paid the widow being far in excess of the sum commonly awarded on account of death of an employee under the workmen's compensation statutes, it is fair to assume that a considerable portion of that sum was paid on account of the widow's claim of the shipowners' negligence; that if this be so then some of the loss sustained by the respondents was within the contemplation of the public liability policy issued to the shipowners while another portion of the loss was within the contemplation of the employers' liability policy; that, if these assumptions are not sound, Swayne & Hoyt had no cause of action because of the admission that it was not engaged in stevedoring the Point Judith and that the deceased was not in its employ; that, if these assumptions are sound, the appellant was entitled to defend on the basis of the liability claimed under each policy of insurance and was prejudiced by the joinder of the respondents in one cause of action as though but one policy of insurance was involved.

[1] In the entire record there is no evidence of a contract, either written or oral, whereby the appellant was obligated to the shipowners under the public liability policy. The undisputed evidence is that by express writing this liability was excluded on the Point Judith. There is some conflict in the evidence as to the oral contract covering the policy of employers' liability which we will hereafter refer to. But with no conflict in the evidence as to the appellant's nonliability to the shipowners and with the express admission that no part of the compromise or of the counsel fees was paid by Swayne & Hoyt and hence no evidence of loss by that corporation, it is further evident that the appellant was seriously prejudiced by the joinder of Swayne & Hoyt as a party plaintiff under allegations of a joint and several coverage and a joint and several loss. Though numerous errors are assigned for a reversal of the judgment, we prefer to place our reasons for reversal upon the single ground that under our statutes a written contract cannot be modified by an oral agreement unless such oral agreement is executed; that when a party sues on a written agreement as modified by an executed oral agreement and upon his own case proves that the oral agreement was unexecuted he should not be permitted to recover upon proof of the oral agreement as a new contract where defendant is denied the right to plead to such contract.

[2, 3] To understand the question involved it is necessary to repeat that respondents sued on allegations of a single written policy of insurance extended by an executed oral agreement. They proved two separate written policies each carrying distinct coverage and each expressly excluding in writing coverage of the Point Judith upon which the claim of loss arose. They offered evidence of one oral agreement that at a future date the Point Judith would be covered for stevedoring operations. This is plainly a modification and not an extension of the written policies because it definitely alters the express writing excluding such coverage. As such it was a good modification only if executed. Section 1698, Civ. Code. Respondents concededly failed to prove that this oral contract was executed. They then changed their theory and sought recovery on the basis of an unexecuted oral contract which was not pleaded. There is no possible foundation for the verdict and judgment except this unexecuted oral contract. We do not refer to the cases cited by respondents from other jurisdictions holding that a written contract of this kind can be modified or extended by an oral agreement. They are not applicable to this case because of the provisions of section 1698, Civil Code, requiring that such oral agreement be executed.

But respondents' evidence on this phase of the case tended to prove a contract *to insure* and not a contract *of insurance.* Thus respondents' manager testified on this subject:

"As I recall it, he (appellant's agent) agreed to issue the additional coverage. * * * He agreed to cover the insurance risk on those two vessels on the date that we wanted it done.

"Q. Was it your understanding that he was going to endorse the policy? A. I believe that was the procedure."

In fact, this witness knew that such was the procedure because he had been dealing with the appellant for several years and had accepted many policies of insurance and modifications of existing policies, all of which were indorsed by the executive officers in writing and, in all his dealings with this agent, the manager had not on any occasion accepted a policy or modification executed or indorsed by the agent.

From respondent's evidence of this oral contract the most that can be said for it is that respondents assumed from such conversations had with an agent of appellant that they would have the risk on the Point Judith covered after October 21, 1926. The undisputed evidence is that this claim of an oral contract was not brought to the knowledge of appellant until several months after the fatal accident; that no premium was paid or agreed to be paid for coverage of the public liability of the shipowners; that no premium was paid or agreed to be paid by Swayne & Hoyt covering the Point Judith on either policy; and that the premium paid by the stevedoring company on the basis of its pay rolls was not accepted by appellant with notice or knowledge that the pay rolls or the premium included operations on the Point Judith. The evidence fails to show actual or ostensible authority of the agent to make the contract, or ratification or estoppel on the part of the principal.

But, disregarding all these considerations, respondents recovered judgment upon proof of an unexecuted oral contract which was not pleaded whereas appellants were required to defend a pleading of a written contract modified by an executed oral agreement. It is a fundamental principle that "a plaintiff must recover, if at all, upon the cause of action set out in his complaint, and not upon some other which may be developed by the proofs." Mondran v. Goux, 51 Cal. 151, 153; Schirmer v. Drexler, 134 Cal. 134, 139, 66 P. 180; Nichols v. Randall, 136 Cal. 426, 431, 69 P. 26; Cordes v. Paulson, 78 Cal. App. 90, 99, 248 P. 546; Feig v. Bank of Italy, etc. (Cal. Sup.) 21 P. (2d) 421.

The prejudice to the appellant is apparent. If the written policy was modified and extended by an oral agreement as alleged in the complaint, the action was on the writing and well within the period of limitations. If the action was on a separate oral contract, the appellant was denied the right to raise the defense of the statute of limitations in bar to the oral contract upon which recovery was had and it was thus deprived of a substantial right. Nichols v. Randall, supra, page 431 of 136 Cal., 69 P. 26.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

136 Cal.App. 778

GUMP v. McPHERSON.

Civ. 8194.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1934.

Limitation of actions ⇨174(1).

That statute of limitations had run against trust deed note in which a one-half interest was purchased by plaintiff who was guaranteed payment thereof by third party who paid interest thereon to time of his death *held* not to bar claim by plaintiff against estate of guarantor on his written guaranty.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by John A. Gump against Mary E. McPherson, administratrix with the will annexed of the estate of A. W. McPherson, deceased. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Walter J. Little, of Los Angeles, for appellant.

Fogel & Beman, of Los Angeles, for respondent.

STEPHENS, Presiding Justice.

This is an appeal from a judgment for the sum of $12,500 with interest upon a disallowed claim against the estate of A. W. McPherson, deceased. Appellant contends that the judgment cannot stand for the reason that the statute of limitations had run against a promissory note with a trust deed securing its payment before the claim was presented to the probate court.

The facts are as follows: On the 23d day of January, 1928, John A. Gump (plaintiff-respondent) delivered his check to C. D. Francis, trustee in a trust deed later herein mentioned, for the sum of $12,500 and received back the following writing, to wit:

"Santa Monica, California,
"January 23rd, 1928.

"Whereas, John Gump has this 23rd day of January, 1928, purchased a one-half interest in and to that certain trust deed note of $25,000 dated Oct. 17th, 1924, due one year after date, executed by Charles L. Forgey in favor of C. P. Thomas, said note having been assigned in blank by C. P. Thomas dated December 10th, 1924, executed by Charles L. Forgey in favor of C. P. Thomas, recorded in book 621, page 448 of official records of Riverside county, California, I do hereby agree to protect said John Gump from any loss by reason of his purchase of one-half interest in said note and trust deed. Interest to start and run from 1/23/28.

"A. W. McPherson.

"We hold the above note for collection,
"The First National Bank in Santa Monica,
"C. D. Francis."

The note referred to was an ordinary promissory note dated October 17, 1924, for the sum of $25,000, payable in one year after date, bearing interest at 7 per cent. per annum, signed Charles L. Forgey and assigned in blank December 10, 1924. The transfer is indorsed as accepted by C. D. Francis, trustee. The note was secured by deed of trust on real property. Francis testified that he had a personal interest in the note on the day of this transaction.

On October 1, 1929, Francis and McPherson exchanged letters. Francis stated in his letter that he is, at McPherson's request, deeding half of the trust deed property to Gump. The deed to be delivered when Gump returns the trust deed which he was holding for security. McPherson wrote in response as follows:

"Santa Monica, Cal.,
"October 1st, 1929.

"Mr. C. D. Francis,
"Santa Monica, Cal.

"Dear Sir: Re: J. A. Gump mortgage Loan.

"Your even date re. above subject: When you assigned a one-half interest in the Riverside County mortgage—Forgy Trust Deed—to Mr. J. A. Gump for which he paid you $12,500., I gave Mr. Gump written guarantee as to its payment.

"I think Mr. Gump has the same security now for his money as he had before, namely a one-half interest in the land in lieu of a one-half interest in the mortgage. As the mortgage was expiring because of limitation I see no other way for you to secure him.

"However, he does not want the land, and I wish to protect him as I had agreed. I am therefore signing a demand note for $12,500 in his favor and this you will kindly attach to the deed, and the deed may be cancelled if you sell the land and return this note to me, and pay him $12,500.00. He will be willing to take a three year 7% mortgage for $12,500.00 on the land as a whole.

"I think this makes plain the purpose for which I signed the note.

"Yours truly,
"A. W. McPherson,
"A. W. McPherson.

"Please attach this letter to the note and deed.

"A. W. M.

"Deed and note delivered to collection department 2/24/30."

On January 16, 1930, Francis, as trustee, executed a complete reconveyance of the property described in the trust deed and acknowledged full satisfaction for the note. Immediately after the signature of Francis as trustee on this release, there is appended a confirmation signed, "J. A. Gump, by A. W. McPherson."

McPherson died on July 9, 1930, and up to the last quarter before his death had paid interest to Gump according to the terms of the agreement.

During the trial J. A. Gump was sworn and testified that he had been paid nothing on account of principal of the loan and that he did not authorize the signing of his name to the reconveyance. To this an objection was interposed that a party to a suit against the personal representative of a deceased person cannot testify (section 1880, Code Civ. Proc.), but the objection was overruled.

It would seem that the objection was good, but it can make no difference in this case. There is absolutely no evidence to show that McPherson had any right to sign Gump's name to anything. Moreover, the McPherson letter to Francis plainly states that whatever arrangement may be made about the land he is to protect Gump according to his contract. There is nothing in the evidence to indicate that Gump ever received any payment of the debt and the payment of the interest indicates that there had been none made to him. Whatever was the transaction of McPherson and Francis regarding the note and trust deed, Gump seems to have had no part in it. McPherson regarded his contract with Gump as independent of the security on the note, and we think its terms are plain that this was the mutual intention. "Contracts of guaranty are not affected by rules different from those employed in construing other contracts. * * *" First Nat. Bank v. Bowers, 141 Cal. 253, at page 261, 74 P. 856, 860. "Accordingly the rule is that the creditor loses no rights against the indorser, whose liability has become fixed, by simple failure to enforce his lien against property mortgaged for security of the debt." Carver v. Steele, 116 Cal. 116, at page 119, 47 P. 1007, 1008, 58 Am. St. Rep. 156. To like effect, Kinsel v. Ballou, 151 Cal. 754, at page 760, 91 P. 620. The cases of Ebner v. West Hollywood Transfer Co., 45 Cal. App. 186, 187 P. 114, and Anderson v. Shaffer, 98 Cal. App. 457, 277 P. 185, cited by appellant, do not appear to us as being in point. It follows that the running of the statute of limitations as to the note and trust deed is of no consequence in the case.

The judgment is affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

137 Cal.App. 73

PEOPLE v. CASCINO et al.

Cr. 1761.

District Court of Appeal, First District, Division 1, California.

Feb. 23, 1934.

1. Burglary 🔑41(1).

Evidence *held* to sufficiently establish that grocery store was burglarized and that defendants committed burglary, warranting conviction of burglary in second degree.

2. Burglary 🔑41(4).

Evidence *held* to sufficiently establish entry into grocery store and attempt to steal, as basis for conviction of burglary in second degree.

3. Criminal law 🔑829(1).

Refusal of defendants' requested instructions which were, in substance, covered by charges given, did not constitute error.

4. Criminal law 🔑808½.

In burglary prosecution, instructions in statutory language upon doctrines of presumption of innocence and reasonable doubt *held* sufficient without further instructions (Pen. Code, §§ 1096, 1096a).

5. Criminal law 🔑805(1).

Defendants' requested instruction which was loosely drawn and, consequently, confusing in effect, was properly refused.

6. Criminal law 🔑782(1).

Defendants' requested instruction embracing self-evident proposition that defendants could not be found guilty of crime if prosecution legally failed to establish commission of crime *held* properly refused.

7. Criminal law 🔑786(2).

In burglary prosecution against three defendants wherein one voluntarily became witness for defense, instruction that defendant cannot be compelled to be witness against himself, and stating duty of jury when defendant takes witness stand, *held* not erroneous (Pen. Code, § 1323).

8. Criminal law 🔑792(3).

In burglary prosecution against three defendants, instruction, in statutory language, defining principals, stating meaning of word "abet," and using word "permit" instead of word "promote," *held* not prejudicial (Pen. Code, § 31).

9. Criminal law 🔑1172(8).

Giving of instructions defining burglary in the first degree, and submission of verdict for burglary in first degree, *held* not prejudicial where defendants were found guilty only of burglary in second degree, and evidence supported such verdict.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

James Cascino and others were convicted of burglary in the second degree, and they appeal.

Judgment and order denying new trial affirmed.

Nathan C. Coghlan, Harry S. Whitthorne, and William Ferrier, all of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

KNIGHT, Acting Presiding Justice.

The appellants, Cascino, Tartaro, and Cirimele, were found guilty by a jury of the crime of second degree burglary, and they have appealed from the judgment of conviction, urging as grounds for reversal insufficiency of evidence and error in the giving and the refusal to give certain instructions.

[1] The place alleged to have been burglarized was a grocery store on the corner of Fillmore and Jackson streets, San Francisco. Shortly after midnight Officers McLaughlin and Schuler, while patroling their district in a radio-equipped police car, received instructions over the radio to proceed to said corner, and as they approached the grocery store they observed two men standing close to the side door thereof located on Jackson street twenty-eight feet from the corner of Fillmore and set in from the property line about twelve inches. Officer McLaughlin alighted, and as he neared the side entrance he saw a third man "coming out" of the doorway. The door had been broken in from the outside, evidently by some one forcing his weight against it, because the door casing had been torn away. The man seen coming out of the doorway proved to be Tartaro. He was a large man, about six feet tall and weighed some 240 pounds. McLaughlin asked him what he was doing there and he replied he had been urinating. Meanwhile, upon the approach of the police car, the other two men, who were subsequently identified as Cascino and Cirimele, started to walk away, but were halted by Officer Schuler. Upon being questioned Cascino gave the fictitious name Arieta, and both denied having any acquaintanceship whatever with Tartaro. When asked to explain their presence there,

they stated that Cascino lived in an apartment house across the street on the corner and they were just out for a walk, to smoke a cigarette. Being interrogated further, they said they had been drinking and had just come from a dance hall on Ellis and Fillmore streets; that they started to walk to the apartment house, across the street, where Cascino lived, but upon reaching the corner Cirimele became sick and stopped to vomit. The three men were asked if they had an automobile and they stated they had not. All of the foregoing statements were shown to be false. Immediately after taking the men to the police station the officers returned to the scene of the burglary and found a small truck with the lights burning parked at the curb near the side entrance to the grocery store. It belonged to Cascino. And the falseness of the rest of the statements made by Cascino and Cirimele was established at the trial by the testimony of Tartaro, who was the sole witness for the defense, and whose testimony was at variance also with the story he told to the officers on the night of the burglary. He testified he had been friendly with Cascino for upwards of fifteen years and with Cirimele for more than five years; also, that Cascino did not live in the vicinity of Fillmore and Jackson streets at all, but in a distant part of the city, on Polk street at Broadway. Continuing, he testified that earlier on the night of the alleged burglary he and Cirimele visited Cascino at his home on Polk street, where they drank some wine, and afterwards all three drove to a dance hall in Cascino's truck, where they consumed more liquor; that shortly after midnight they left the dance hall to go home in Cascino's truck, but when they reached the corner of Fillmore and Jackson streets Cirimele got sick; that Cascino stopped the truck and let Cirimele out; that he got out also, and Cascino drove on a little farther, parked the truck, and got out too; that after Cirimele alighted he continued to throw up, some of the vomit getting on his (Tartaro's) trousers; that just as they were about to return to the truck he (Tartaro) stepped in toward the side door of the grocery store to wipe off his pants and to urinate; and that as he was walking away from the doorway he was accosted by the police. The statements made by Tartaro on the witness stand and by his companions on the night of their arrest as to Cirimele's intoxication and vomiting were shown to be false, however, by the testimony of the police officers. They stated that soon after they apprehended the men they smelled Cirimele's breath and could detect no odor of liquor; and that while they found a few wine stains on Cirimele's trousers, they saw no evidence of vomit on his clothing, on the clothing of the other men, at the scene of the crime, nor in the truck. The foregoing facts and circumstances are legally sufficient in our opinion to support the conclusion drawn by the jury therefrom that a burglary was committed and that appellants were guilty thereof.

[2] Appellants argue that the evidence fails to prove either an entry or an intent to steal, both of which are essential elements of burglary. This argument is based upon the claim that Tartaro was seen only "coming away" from the side door of the store, and upon the testimony of the proprietor of the store that so far as he could observe none of the goods in the store had been removed. The police officer insisted, however, both on direct and cross-examination, that he saw Tartaro "coming out" of the doorway, and not "away from" it, as counsel for appellants attempted to have him say; therefore, in view of the broken condition of the door, and the admitted fact that Tartaro was in no way connected with the operation of the store, the jury was justified in concluding that after breaking in the door he entered the store with burglarious intent, but that before any goods could be removed therefrom the criminal enterprise was interrupted by the unexpected arrival of the police.

[3, 4] Nor do we find any ground for reversal in the giving or refusal to give any of the instructions. Those proposed by appellants to the effect that before appellants could be found guilty the prosecution was required to prove that "a crime was actually committed"; that appellants "did something more than give evidence of a mere intention to commit a crime"; and that the facts must do more than to "arouse suspicion of guilt, no matter how grave that suspicion might be," were in substance covered by the court's charge to the jury. In this respect the court read to the jury the charging part of the information; also the Code section defining burglary and the degrees thereof; it then instructed that, appellants having pleaded not guilty to the charge, it was the duty of the people to prove to the jury's "satisfaction, beyond all reasonable doubt, and to a moral certainty, the truth of each and every one of those allegations" of the information; also, that in every crime or public offense there must exist a union or joint operation of act and intent, and that the intention is manifested by the circumstances connected with the offense, etc. Continuing, the court instructed upon the doctrines of presumption

of innocence and reasonable doubt, in the exact language of section 1096 of the Penal Code, which was sufficient without giving any further instructions on those doctrines. Pen. Code, § 1096a.

[5, 6] An analysis of appellants' proposed instruction embodied in their fifth assignment of error shows that the instruction was loosely drawn and consequently confusing in effect. Upon that ground alone the court was justified in refusing to give it. Apparently the intention was to have the jury informed thereby that the evidence adduced must show beyond a reasonable doubt the existence of every element necessary to constitute such crime before the question of appellants' guilt thereof could be considered. But as pointed out, the court had already instructed the jury as to the degree of proof essential to establish every allegation contained in the information; and obviously the remainder of the requested instruction embraced merely a self-evident proposition and not a principle of law, namely, that appellants could not be found guilty of a crime, the existence of which the prosecution failed legally to establish. Therefore, even though an instruction to that effect, properly drawn, were presented, there would have been no prejudicial effect in refusing to give it.

[7] Of its own motion the court gave the following instruction:

"A defendant, in a criminal action or proceeding, cannot be compelled to be a witness against himself, but if he offers himself as a witness, he may be cross-examined by counsel for the People, as to all matters about which he was examined in chief. The neglect or refusal of a defendant to be a witness, cannot in any manner prejudice him, nor be used against him on the trial or proceedings.

"Further, in this connection, I will instruct you that a defendant, under the laws of the State of California, has a right to take the witness stand in his own behalf, and one of the defendants in this case did that; and it is your duty to carefully weigh and consider his testimony, as you would consider and weigh the testimony of any other witness who has appeared before you. You should not reject or disregard his testimony, merely because he is a defendant in the case, but you should apply to his testimony the same rules in determining the credence to which the same is entitled as you would apply to any other witness in the case." (Paragraphing ours.)

The first paragraph thereof is in the exact wording of section 1323 of the Penal Code, and appellants assign the giving of that portion as error, citing the case of People v. Emmons, 13 Cal. App. 487, 110 P. 151. If, as in the Emmons Case, there had been but one defendant on trial here, and as in that case also he had not offered himself as a witness, the portion of the instruction complained of, standing alone, would doubtless be subject to the criticism directed against it in that case. But the situation here is quite different. Three defendants were on trial for the same offense, one of whom voluntarily became a witness for the defense; and when the entire instruction here given is read, it will be seen that the second clause of the first paragraph thereof, which was the subject of criticism in the Emmons Case, was intended to and did refer only to the defendant who did so testify and not to those who did not. Consequently the criticism relied upon in the Emmons Case is not applicable here.

[8] The court also gave an instruction in the language of section 31 of the Penal Code, defining principals in the commission of a crime, and then amplified the same by stating the meaning of the word "abet" as used in said definition. The entire instruction was in the exact wording of the one considered and approved in People v. Matezuski, 11 Cal. App. 465, 105 P. 425, except that in the present case, evidently through inadvertence and typographical error, the word "permit" was used instead of the word "promote." The evidence as a whole is sufficient, however, to sustain the inference that Cascino and Cirimele knowingly and with criminal intent, by act and counsel, aided and encouraged Tartaro in the commission of the offense; and that being so it cannot be said that the inadvertent use of the word "permit" in said instruction misled the jury, if in fact it was noticeable at all.

[9] Complaint is made also of the giving of certain instructions defining first degree burglary, and in submitting to the jury, along with other forms of verdicts, one covering first degree burglary. It is true, the evidence introduced would not have supported such a verdict if rendered. But it cannot be held that appellants suffered any prejudice as the result of giving said instructions because they were found guilty only of second degree burglary, and the evidence is legally sufficient to support such a verdict.

The judgment of conviction and the order denying a new trial are affirmed.

We concur: CASHIN, J.; JAMISON, Justice pro tem.

137 Cal.App. 29

WOODY et al. v. SECURITY TRUST & SAVINGS BANK et al.

Civ. 1294.

District Court of Appeal, Fourth District, California.

Feb. 20, 1934.

Hearing Denied by Supreme Court April 20, 1934.

1. Estoppel 🔑78(1).

Estoppel by contract cannot exceed terms of contract.

2. Waters and water courses 🔑231.

Patentee's signing of agreement waiving objections to formation of irrigation district and issuance of bonds and pledging payment of taxes and assessments *held* not to estop patentee's successors from attacking assessment of their land to pay district bonds and subsequent sale thereof under assessment, where patentee's land was never part of district and agreement related only to property forming part of district (St. 1887, p. 29).

3. Estoppel 🔑78(1).

Contract upon which estoppel is based must not contravene law or public policy.

4. Waters and water courses 🔑231.

As respects assessment, irrigation district possesses governmental functions and can only be brought into being under direct authority of state, and cannot be created by contract, nor can property be brought within its jurisdiction otherwise than as provided by statute (St. 1887, p. 29).

5. Waters and water courses 🔑231.

Signature of patentee whose land was not part of irrigation district to agreement to pay district taxes *held* without consideration, in view that Wright Act provides that district water must be apportioned among owners of property forming part of district (St. 1887, p. 29; St. 1891, p. 142).

6. Waters and water courses 🔑231.

Statute providing for cancellation of assessments upon public lands *held* inapplicable, where patent was issued in 1892 and irrigation district assessment was levied in 1918, so that failure to remove assessment by statutory method did not preclude attack upon assessment and sale thereunder (Pol. Code, § 3805a, as amended by St. 1905, p. 90).

7. Waters and water courses 🔑231.

Statute providing for repayment of amount of assessment in event of judgment quieting title against tax deed *held* limited to tax sales had under Political Code sections, and not applicable as respects proceedings under Wright Act and Irrigation District Act governing proceedings in irrigation districts (Pol. Code, §§ 3771, 3897, 3898, subd. 5; St. 1887, p. 29; St. 1897, p. 254).

8. Waters and water courses 🔑231.

In action, by successors of patentee of land not forming part of irrigation district, to quiet title against purchaser at sale under district assessment, plaintiffs *held* not required to repay purchaser's expenditure, where land was never liable for district assessment (St. 1887, p. 29; St. 1897, p. 254).

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by S. A. Woody and others against the Security Trust & Savings Bank and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Frank P. Doherty, William R. Gallagher, and Bourke Jones, all of Los Angeles, for appellants.

M. G. Brittan, of Bakersfield, for respondents.

MARKS, Justice.

Plaintiffs brought this action to quiet title to eighty acres of land in Kern county. The answer of defendants is not in the record. No point is made of this omission, and, as both counsel agree that the answer denied title of the land in the plaintiffs and stated no affirmative defense, we will assume that this correctly summarizes the missing pleading. Judgment went for plaintiffs, and defendants have appealed.

On April 22, 1890, David S. Coverdale filed his application in the United States land office to homestead land in Kern county, of which that involved in this action was a portion. The land was then a part of the public domain belonging to the government of the United States. A patent was issued to him dated the 21st day of June, 1892.

On September 22, 1888, the Poso irrigation district was formed. It continued to exist as a legal entity until March 1, 1923, when it was dissolved by a decree of court. The property here involved is located within the exterior boundaries of the district. Some time prior to September 10, 1889, the district, which had been organized under the Wright Act (St. 1887, p. 29), took the necessary steps to issue bonds which were subsequently validated by a decree of court.

On March 20, 1918, the board of supervisors of Kern county caused an assessment to be levied on all the real property in the district for the purpose of making payment on these outstanding bonds. An assessment was levied upon the property here involved, which was not paid. The property was sold to W. J. Williams and J. W. Deyoe, who transferred their interests to the Security Trust & Savings Bank as trustee and C. H. Barlow as beneficiary. A deed was issued to the purchasers. The complaint alleges that the property was in the possession of appellants. It is quite evident this was an error and that appellants never were in possession.

It is admitted by both parties that this property was part of the public domain at the time the district was organized and the bonds issued, and therefore was not a part of the district. It has been held in California that land owned by the United States government and located within the boundaries of an irrigation district when it is organized cannot be assessed to pay the debts of the district after it goes into private ownership. Nevada National Bank v. Poso Irrigation District, 140 Cal. 344, 73 P. 1056, 1058; Bishop v. Jordan, 104 Cal. App. 319, 285 P. 1096.

Appellants attempt to distinguish the instant case from that of Bishop v. Jordan, supra. On May 21, 1894, David S. Coverdale, with others, signed an agreement which appellants maintain estopped him and his successors in interest from denying that the property was subject to the assessment. Bishop signed the same agreement as did Coverdale, but did not receive his patent until after the execution and delivery of that document. In the instant case Coverdale's signing of the instrument was after he had received his patent and was the owner of the property. In this respect only the instant case differs factually from the Bishop Case.

Respondents urge that estoppel is an affirmative defense, and, as it was not pleaded, it cannot be urged by appellants. While this is ordinarily true, the record shows that evidence of the facts upon which the purported estoppel is based was admitted without objection, and that this objection was not urged in the trial court.

If the case of Bishop v. Jordan, supra, does not decide this question of estoppel contrary to the contention of appellants, still we have concluded that this defense is not available to them.

[1, 2] If estoppel is to be found, it must be estoppel by contract. It is fundamental that such estoppel cannot go beyond or exceed the terms of the contract itself. The instrument signed by Coverdale, after reciting the organization of the district under the Wright Act, the issuance of the bonds and a deed of trust, covering the canals and other district property, to secure their payment, contains the following: "Now therefore in order to induce capitalists to purchase the said bonds we do hereby declare that we waive all objections to said bonds and do hereby ratify and approve the issue thereof, and we do hereby ratify and approve in all respects the action of the Board of Directors of said District in executing and delivering the said deed of trust to carry out the purpose of the laws aforesaid, to-wit: The construction and maintenance of a system of irrigation works for said district hereby pledging ourselves to pay the taxes and assessments imposed under and pursuant to said laws and in event of our failure so to do we hereby jointly and severally vest in the California Safe Deposit and Trust Company as Trustee all and singular the powers and authorities conferred or purporting to be conferred upon said Company as Trustee under the said trust deed of the 16th day of September, 1893, hereinbefore referred to. It is understood that by this instrument we obligate ourselves to comply with the said irrigation laws, known as the 'Wright Act' by the payment of the taxes or assessments levied thereunder and that we do not hereby assume any greater obligation or liability than such as are imposed by said laws, assuming them to be valid." The fair construction to be placed upon this language is that each owner of property forming a part of the Poso irrigation district waived any objection which he otherwise might have been able to urge against the legality of any of the proceedings leading up to the organization of the district, the authorization and issuance of the bonds, their delivery, and the execution and delivery of the deed of trust, and that he thereby agreed to pay taxes and assessments lawfully levied under the provisions of the Wright Act upon the property composing the district. The property here in question was never a part of the district, and could not be assessed to pay any of its obligations. The patent from the United States of America to Coverdale was recorded in the office of the county recorder on August 11, 1892. Appellants and Williams and Deyoe had constructive notice on that date that the title to the property was vested in the United States of America at the time of the organization of the district and the issuance of the bonds. On September 25, 1903, the Supreme Court of California decided that land owned by the United States government could not become "a part of the Poso Irrigation District, is not subject to any lien

of said judgment in favor of the plaintiff, nor to any assessment for the payment thereof, or of any debt or liability of the said Poso Irrigation District." Nevada National Bank v. Poso Irrigation District, supra. Williams and Deyoe purchased the property at the tax sale on September 25, 1918.

As the Coverdale property was not a part of the Poso irrigation district and could not be assessed to pay any of its debts or liabilities, and as the instrument signed by Coverdale on May 21, 1894, can only fairly be construed to be a waiver by the owners of property lawfully a part of the district of informalities in the organization of the district, the issuance of the deed of trust and the issuance and sale of the bonds cannot be construed as estopping the successors in interest of Coverdale from asserting that the assessment of their property to pay the debts of the district, and its subsequent sale, were illegal and void.

[3, 4] It is well established that a contract upon which an estoppel is based must not contravene the law or be against public policy. The interpretation which appellants would have us place upon the agreement of May 21, 1894, in order to sustain their theory of estoppel, would have the effect of placing, by contract, private property within the irrigation district, and making it a part of the district without following any of the provisions of the law whereby such a result may be obtained. The Wright Act, and the acts amendatory and supplementary, provided in detail the manner in which irrigation districts could be formed and what property could be included therein or excluded therefrom or annexed thereto. An irrigation district possesses governmental functions, and is a creature of law which can only be brought into being under the direct authority of the state. It cannot be created by contract nor can property be brought within its jurisdiction in any other way than that provided by statute.

[5] It seems to have been held in American National Bank v. A. G. Sommerville, Inc., 191 Cal. 364, at pages 371, 372, 216 P. 376, that estoppel by contract can only arise in cases where the contract is supported by a consideration. If this is a fair construction to be put upon the holding in this case, estoppel by contract cannot arise in the instant case because there was no consideration flowing to Coverdale for his signature on the agreement of May 21, 1894. The Wright Act and the amendments of 1891 (St. 1891, p. 142) clearly provide that the water belonging to the district must be apportioned among the owners of property forming a part of the district in the proportions there determined. No authority is given to furnish water to any lands not forming a part of the district. As the lands of Coverdale did not form a part of the district, he could receive none of its water and could receive no consideration for his signature to the agreement.

[6] Appellants contend that section 3805a of the Political Code (St. 1905, p. 90) furnished a way for respondents to remove the assessment from the land, and, having failed to do so, they cannot now complain of the assessment and the sale. It should be sufficient to note that the patent to the property was issued in 1892 and the assessment was levied in 1918. With these dates in mind, the inapplicability of the section to the facts of this case is apparent, as the United States had parted with its title to the property in 1892 and the land was privately owned when the assessment was levied in 1918.

[7, 8] Appellants maintain that the judgment must be reversed because it did not provide for the repayment to them of the amount of the assessment as provided in subdivision 5 of section 3898 of the Political Code. The provisions of this subdivision are limited by its terms to tax sales had under sections 3771, 3897, and 3898 of the Political Code. The Wright Act and the California Irrigation District Act (St. 1897, p. 254), which supplemented it, contain detailed provisions for the assessment of property and the collection of delinquencies which control such proceedings in irrigation districts coming under their provisions. McDonough v. Cooper, 179 Cal. 384, 177 P. 153. These acts contain no provisions similar to those of subdivision 5 of section 3898 of the Political Code. Tender or repayment of the money paid by appellants is not required by any statute as a prerequisite to quieting title against them. However, it has been held that the familiar rule, that one seeking equity must do equity, applies to those actions to quiet a title against a tax deed where the plaintiff in good conscience should have paid the tax in the first instance. In Cordano v. Kelsey, 28 Cal. App. 9, at page 22, 151 P. 391, 397, 398, it is said: "Respondents cite Cooley on Taxation, vol. 2, pp. 455, 1458, where it is said: 'If the tax were wholly illegal in its essentials, of course no such requirement (to reimburse the purchaser) could be made, for it would not be supported by any equity. As in removing cloud, he who seeks relief against a tax deed must pay or offer to pay whatever taxes, interest, costs, etc., are justly chargeable against the land, and payment will be required by decree, otherwise the taxes were absolutely void.'" In

Coleman v. County of Los Angeles, 180 Cal. 714, at page 718, 182 P. 440, 441, it is said: "It was also held that where the assessment itself was void, as well as the sale, that no payment would be required from the owner as a condition precedent to the quieting of his title." The property in question here was never a part of the Poso irrigation district, and it could never become liable for any tax or assessment levied by or on behalf of the district. Nevada National Bank v. Poso Irrigation District, supra; Bishop v. Jordan, supra. It follows that no obligation, either moral or legal, could be imposed on the owners of the property to pay any assessment levied for the benefit of the district and consequently it would be inequitable to order the repayment of money voluntarily paid by appellants in satisfaction of a nonexistent indebtedness.

All other contentions of appellants are resolved against them by the cases of Nevada National Bank v. Poso Irrigation District, supra; and Bishop v. Jordan, supra.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

137 Cal.App. 148

MATTISON et al. v. ITALO PETROLEUM CORPORATION OF AMERICA et al.

Civ. 8214.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1934.

1. Corporations 🔑432(6).

Authority of agent to act for corporation may be shown by evidence that such person does business for corporation as agent with knowledge and acquiescence of directors.

2. Corporations 🔑432(12).

Evidence *held* to support finding that general manager of corporation had authority to employ accountant to audit books and prepare financial statement for corporation.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by M. W. Mattison and others, copartners doing business under the firm name and style of Mattison, Davey & Winters, against the Italo Petroleum Corporation of America and others. From a judgment in favor of the plaintiffs, the defendant named appeals.

Judgment affirmed.

Norman T. Mason, of Los Angeles, for appellant.

Roland Rich Woolley, of Los Angeles, for respondents.

CRAIG, Justice.

Professional services having been rendered by the plaintiffs for the defendant corporation at the instance and request of its representatives, and a portion only of the fees therefor having been paid, suit was instituted for the balance, in which a judgment was rendered in favor of the plaintiffs. Defendant corporation appealed.

From the testimony of the defendants, it appeared that defendant Wilkes, as general manager of the company, employed the plaintiffs to audit and prepare financial statements of its business, and that, while they were at work thereon, he wrote and delivered to plaintiffs a letter confirming such employment at the offices of the company. It was contended upon the trial that Wilkes was not authorized to bind the company, and that his act in so doing was not ratified, nor did the company receive the benefit of said services. Wilkes swore that as vice president and general manager he managed the business of the corporation in directors' meetings, that they knew all the time and for some months that they needed the audit and had discussed it among them; in fact, that he "talked with them that morning" before giving instructions to call the plaintiffs to the office, and later informed them that the plaintiffs were working on the company's books; that he devoted all of his time to the business of the corporation, was interested in no other matters, and was "interested in seeing the Italo Petroleum Corporation put the deal through" for which said audit was required. The official auditor received from Wilkes, from the secretary, and from others of the company complete instructions to render assistance to the plaintiffs, and co-operated with them. Much other evidence of like character might be presented.

[1, 2] Since numerous cases "lay down the well established rule that the authority of an agent to act for a corporation may be shown by evidence that the person does business for the corporation and in its behalf as

agent with the knowledge and acquiescence of its directors" (Stevens v. Selma Fruit Company, 18 Cal. App. 242, 123 P. 212), the conclusion of the trial court that the sole defense of nonemployment was not sustained, but that employment was sufficiently shown, is supported by the evidence.

The remaining questions argued are dependent thereon, and the above conclusion renders them untenable.

The judgment is affirmed.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

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136 Cal.App. 722

PEOPLE v. JONES.

Cr. 1328.

District Court of Appeal, Third District, California.

Feb. 16, 1934.

1. Homicide 🔑253(6).

Evidence *held* to sustain verdict that codefendants were engaged in conspiracy to rob, justifying conviction for murder of accused who allegedly was unarmed when conspirator killed night watchman in commission of robbery.

2. Homicide 🔑234(5).

In homicide prosecution, testimony that defendants by word of mouth entered into conspiracy to rob is unnecessary to establish fact of concerted scheme.

3. Homicide 🔑29.

Accused who knew his codefendants were armed, was responsible for all consequences that followed attendant on robbery in which night watchman was killed, notwithstanding accused was unarmed.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

George Jones was convicted of robbery and first degree murder, and he appeals.

Judgment affirmed.

William E. Ferriter, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the defendant was jointly indicted with Tony Cardinale, Ralph Thatcher, Charles F. Gingg, and F. B. Hoyt (otherwise known as Bernard Felts), tried and found guilty of two robberies, and also the offense of murder. The verdicts returned against the defendant George Jones found him guilty of robbery on one of the counts in the second degree; guilty of robbery in one of the counts in the first degree; and guilty of murder in the first degree, with the punishment fixed at life imprisonment. The defendant Jones appears alone upon this appeal from the judgments pronounced upon the verdicts finding him guilty of the offenses just named. Upon this appeal the appellant contends the evidence is insufficient to support the verdict as to counts 1 and 2. No contention is made as to the sufficiency of the testimony to support the verdict finding the defendant guilty as charged in count 3.

The record shows the following facts: That on or about the 20th day of February, 1933, the defendant Gingg and one Mareck, at a meeting in San Francisco, planned to visit the city of Santa Rosa for the purpose of committing robberies. At the time of making these plans, the defendant Tony Cardinale was also present, but we do not find in the record that he participated in the conference.

The defendant Jones, prior to this date, had been, and was at the date mentioned, engaged in the grocery business in San Francisco. As such grocer he became acquainted with Mareck and others of the group, through the delivery of groceries to the Mareck home in San Francisco. In delivering groceries Jones had visited the Mareck home some ten or fifteen times, and became known by the name of "Clicker" through his manner of handling a gun shown to him. At the Mareck home the defendant met Cardinale and another man known as Slim Hoyt. On the night of February 25, 1933, Mareck, his wife, and Slim Hoyt left San Francisco and proceeded to Santa Rosa, going to the apartment occupied by the defendants Gingg and Thatcher at 124 West Eighth street in Santa Rosa. On the following day Tony Cardinale and the appellant, George Jones, arrived in Santa Rosa, going to the apartment just mentioned. The first robbery was committed at a place known as the "Dorothy Leonard" place, also called "101 Ranch," situate a short distance south of the city of Santa Rosa. This robbery was committed on or about 8 o'clock on the night of February 26, 1933. As stated, no contention is made that the evidence is not sufficient to support the verdict of guilty as to this offense.

After committing this robbery, all of the defendants returned to 124 West Eighth street in Santa Rosa. Within a short time after such return, Mareck and Gingg left the apartment and went to a speakeasy adjoining the Buon Gusto Hotel at No. 513 Adams street, to which place they gained entrance. Gingg and Mareck then returned to the apartment at 124 West Eighth street, and, thereafter, all of the defendants, excepting Thatcher, left the apartment and proceeded down to the vicinity of the speakeasy at 513 Adams street. The purpose, as shown by the record, was to rob the place, and also secure the contents of the slot machines there being operated. The defendant Jones drove his car to a place near the speakeasy at 513 Adams street, having with him Tony Cardinale. The other defendants proceeded to the designated place in a car driven by the defendant Gingg. Upon arriving at a point near 513 Adams street, the defendants got out of the respective cars in which they had been riding. Mareck, Cardinale, and Hoyt went up the alley about 90 feet to the speakeasy in question. Mareck, Cardinale, and Hoyt entered the speakeasy and proceeded to rob the people present. Some one made a remark that the night watchman would soon be coming. The defendant Hoyt immediately left the place and encountered the night watchman named Carlos R. Garrick, whom he then and there shot and killed.

The defendant Jones claims that after driving to the place near the speakeasy he abandoned the enterprise, and therefore was not responsible for any offense or offenses committed by the other parties. All the offenses of which the defendant was found guilty were committed within a period of four hours on the night of February 26, 1933.

[1] We do not deem it necessary to set out all the testimony included within the appellant's briefs, as the following portion of the transcript printed in the respondent's brief we think amply supports the verdict of the jury that the defendants were engaged in a conspiracy to rob, went to the city of Santa Rosa for that purpose, and proceeded immediately to carry out their criminal designs.

As to the robbery of the place known as "101 Ranch," we set forth the following portions of the cross-examination of the defendant:

"Q. Later, Mareck asked you to go to the 101 Ranch? A. Yes, sir, he did.

"Q. And Tony Cardinale gave you a gun? A. He did.

"Q. Did he say anything about why he was giving you a gun? A. There was not anything for me to say; Tony said it himself.

"Q. When you took the gun what did you say? A. I don't remember saying anything.

"Q. You didn't say, 'What need is there for me to take this gun?' Didn't say anything like that? A. I took it; didn't say anything at all; nothing for me to say."

Following this incident the appellant went with the other defendants and proceeded to take part in the robbery as charged in the indictment. As to the circumstances attending the robbery of the speakeasy and the shooting that there occurred, the defendant testified: "We left the apartment house and came down First street; Gingg was ahead leading the way; I followed. I stopped my car directly in front of his (Gingg's car). Mareck, Slim Hoyt and Tony Cardinale went down to the alley in the order named; I got out of my car as soon as they went out of sight in the alley, and ran as fast as I could. I heard shots. I believed that Mareck and the boys were back there shooting. I don't remember having any conversation with Frank Gingg in front of the alley. When I stopped running I ducked down behind the picket fence. I saw a car that looked like my car pass, so I turned up the street here and went to the apartment." The defendant Gingg, as to this incident, testified as follows:

"Q. What did you do when you parked your car in front of the alley-way or passageway to 513 Adams street? A. I stopped the car there—didn't stop the car—just stopped there and let Mareck off, and they went in and the light went off in the alley.

"Q. How long after you parked your car there did the lights go off? A. Right away.

"Q. How long did you remain there? A. The heavy-set fellow was there; he didn't go in with the rest of them.

"Q. What do you mean by the heavy-set fellow? A. The man known as Jones; I didn't know his name at that time. He said something about the lights going off; he said, 'Looks like something is going on there; I know there is; I'm getting out.' I left then.

"Q. What, if anything, became of the car in front of your car? A. I couldn't say.

"Q. What, if anything, did you see relative to this short, stout man you described? A. I don't know what became of him, I didn't see him any more."

The appellant, Jones, further stated in one of his conversations as follows:

"Q. Did you stay in your car, or did you get out? A. I stayed in my car about three minutes until they all got out.

"Q. Then what did you do? A. I left—ran from the spot as hard as I could; knew something terrible was going to happen."

The record also contains testimony of independent witnesses who saw persons running after the shooting, dressed exactly as the appellant was dressed at the time of the commission of the offense. The appellant also described the way he ran from the speakeasy to the apartment and found that his car had been driven back to the apartment. This testimony, however, we deem immaterial as being simply a circumstance occurring after the offense and the way in which the appellant got away from the scene of the robbery and murder.

[2] The facts we have set forth we think clearly justified the jury in coming to the conclusion that the defendants had been engaged in a concerted scheme to commit different robberies in the city of Santa Rosa. To be sure no one testified that the defendants, by word of mouth, entered into a conspiracy, but such testimony is not necessary to establish the fact of a concerted scheme.

In the case of People v. Burke, 18 Cal. App. 72, 122 P. 435, we find the following statement which clearly sets forth the rule of law in relation to the evidence necessary to establish a conspiracy (we quote from the syllabus): "In proving a conspiracy, it need not be shown that the parties actually came together and agreed to enter into and pursue a common design. The existence of the assent of minds which is involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from proof of the facts and circumstances which, taken together, apparently indicate that they are mere parts of some complete whole." To the same effect is the case of People v. Schmidt, 33 Cal. App. 426, 165 P. 555. Also, People v. Revley, 67 Cal. App. 553, 227 P. 957.

In 5 California Jurisprudence, page 497, the rule as to the requisite proof is thus stated: "It requires at least two persons to conspire. But while this is so, and the common design is the essence of the charge, it is not necessary to constitute a conspiracy that two or more persons should meet together, and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the detail of the plans or means by which the unlawful combination was to be made effective. It is sufficient if they, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design."

Here, the testimony in the record, in addition to what we have quoted, shows that the defendants became acquainted with each other in the city of San Francisco, where they resided; that they left the city of San Francisco and arrived in Santa Rosa at about the same time, or within a very short time; that they met at 124 West Eighth street. That a common meeting place must have been agreed upon is evident from the fact they all met at the place just mentioned. A short time after the meeting they proceeded to rob the place known by the two names of 101 Ranch and Dorothy Leonard's. They then came back to the apartment house; two of the defendants visited the speakeasy at 513 Adams street, returned to the apartment house, and then all of the defendants, excepting one, left in two automobiles and drove down to a place near the speakeasy. Three of the defendants went into the speakeasy for the purpose of robbing the place. The night watchman, appearing upon the scene, was shot and killed. The appellant drove to the designated place in his own car, and accompanying him was one of the defendants who actually entered the speakeasy. The appellant's testimony then is that he formed the design and carried out the purpose of abandoning the enterprise, left his car standing at the designated spot, and ran away on foot. Having participated in the intended robbery up to the point where the other defendants entered the speakeasy, he had aided and abetted, by the presence and use of his car, in the commission of the offense therein committed.

[3] The appellant in the first robbery went armed. Whether he was armed at the time of going to the speakeasy does not appear from the record, but he knew his codefendants were armed, and just as held in substance in the case of People v. Thomas (Cal. App.) 27 P.(2d) 765, 767, the defendant was responsible for all the consequences that followed attendant upon the robbery of the speakeasy. It is there said: "The question of the scope of the conspiracy was therefore essentially a question for the jury to determine. As was said in People v. Kauffman, 152 Cal. 331, at page 335, 92 P. 861, 863: 'If, as a matter of law, it can be said that the criminal combination embraced no more than this contemplated

burglary, and that the shooting of Robinson was not within the reasonable and probable consequences of the common unlawful design, it would follow that no case was made out against the appellant. But whether or not the act committed was the ordinary and probable effect of the common design or whether it was a fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury. Bowers v. State, 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247; Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898. And, if there be any evidence to support the finding of the jury on this question, its determination is conclusive.' In People v. Woods, 147 Cal. 265, at page 272, 81 P. 652, 655, 109 Am. St. Rep. 151, the court said: '* * * The jury would have been justified in concluding that a part of the common design was to resist arrest by the use of the pistols with which the defendants armed themselves.'"

Having participated in the robbery of the 101 Ranch, otherwise known as the Dorothy Leonard place, and within a very limited time thereafter proceeded with his automobile to the speakeasy, conveying one of the defendants, we do not deem it necessary to comment upon the appellant's testimony that he withdrew from the enterprise and ran away after three of his codefendants had entered the speakeasy. We think he had gone too far in aiding and abetting the common undertaking to warrant any jury in concluding that he should be held not guilty.

The judgment and order are affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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137 Cal.App. 61

PEOPLE v. ZINGARELLI.

Cr. 156.

District Court of Appeal, Fourth District, California.

Feb. 21, 1934.

Rehearing Denied Mar. 6, 1934.

Hearing Denied by Supreme Court March 22, 1934.

1. Jury 🔑116.

Motion to discharge entire panel because of improper question asked prospective juror *held* properly denied, since challenge to panel can be founded only on material departure from prescribed forms for drawing and returning jury (Pen. Code, § 1059).

2. Criminal law 🔑1166½(6).

Refusal to discharge entire panel because attorney for codefendant asked prospective juror question as to effect of showing that accused had been previously convicted of felony *held* not reversible error, in view of statements of district attorney and accused's attorney, court's instruction to disregard, and accused's failure to challenge for cause panel members who heard question.

> District attorney stated that since the filing of the information, which included a charge of prior conviction of a felony, he had learned that the previous conviction referred to had not been for a felony, but for a lesser offense, and district attorney moved to dismiss such portion of the charge, and accused's attorney stated that the previous charge arose out of a boyhood fight, and that the way the case was determined, it was no offense at all.

3. Criminal law 🔑1163(1).

Substantial showing of prejudice is required to permit conviction to be overthrown by actions of codefendant.

4. Criminal law 🔑956(4).

Refusing new trial for grand theft for newly discovered evidence relating to defense of alibi *held* not abuse of discretion.

5. Criminal law 🔑792(3).

Instruction predicating conviction for grand theft upon finding that accused merely aided, abetted, or encouraged the stealing *held* not erroneous as authorizing conviction upon finding that accused innocently aided codefendant, who allegedly committed theft or upon finding that codefendant aided, abetted, or encouraged third party in the stealing.

6. Criminal law 🔑1170½(6).

Question, asked accused's witness, as to whether at various times accused's family had been in court witness had supported them with his testimony, although improper, *held* not reversible error, in view of exclusion of question and instruction.

> Court, in reply to accused's request to instruct jury to disregard district attorney's statement that the question was asked for purpose of impeachment and to disregard the question, stated that there was nothing that justified the court in instructing the jury and that the question was asked and objection sustained and that there was nothing before the jury, but later instructed jury to disregard all statements of counsel and not to draw any con-

clusions or inferences from questions propounded by counsel and ruled out by court.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Henry Zingarelli was convicted of grand theft, and he appeals.

Affirmed.

B. W. Gearhart, Louis J. Coelho, and Lindsay & Gearhart, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Glenn M. Devore, Dist. Atty., and Rae B. Carter, Deputy Dist. Atty., both of Fresno, for the People.

BARNARD, Presiding Justice.

On the night of January 6, 1933, or the early morning hours of January 7, about seven tons of raisins were stolen from a vineyard in Fresno county, owned by the Wishon-Watson Company. Sixty-seven boxes of raisins had been emptied and ten boxes were missing. On the soft earth were found the imprint or impressions of certain well-known automobile tires, indicating that an eight-wheel truck and an ordinary passenger car had been used in connection with removing the raisins. From the tire marks the officers were able to name the make of tire that had been on each respective wheel of the truck and automobile thus used. Plaster casts were taken of the tire marks or impressions and, a little later, it was ascertained that the truck and automobile used on that occasion were, in fact, owned or possessed by the defendant Zingarelli. When the truck was found at this defendant's home, raisins of the same variety as those stolen were found in the cracks on the body of the truck. At first this defendant denied any knowledge of the matter under investigation and told the officers that he had never loaned his truck to anyone and that no one but himself had ever driven it. After being confronted with the plaster casts of the tire marks, he told the officers that on the night the raisins were stolen he had loaned the truck to one Leo Moreno. Zingarelli and Moreno were jointly charged with grand theft, were separately represented by counsel, and, at the trial, each endeavored to pin the theft upon the other. The jury was unable to agree as to the defendant Moreno, but found the defendant Zingarelli guilty, and he has appealed from the judgment and from an order denying his motion for a new trial.

It is first urged that the court erred in denying a motion made by the appellant for the discharge of the entire jury panel. The information filed had also charged the appellant with a prior conviction of a felony, which charge had been admitted by him upon arraignment. While the jury was being chosen, counsel for Moreno started to ask a prospective juror a question as follows: "If it appears from the evidence that Mr. Zingarelli has been previously convicted of a felony—." Interrupting the question, the appellant's counsel cited the same as prejudicial misconduct and asked that the jury be advised to disregard it, and the court so instructed the jury. Thereupon, the district attorney stated that since filing the information he had learned that the previous conviction referred to had not been for a felony, but for a lesser offense, and moved to dismiss that portion of the charge. Thereupon counsel for the appellant stated that the previous charge was only a boyhood fight which had resulted in the appellant being sent for a few months to Preston, that the way the case was determined it was no offense at all, that by reason of this interjection by counsel for the other defendant the appellant had been prejudiced, and, after thanking the district attorney for his very fair statement of the matter, asked that the entire panel be discharged and a new panel summoned. The court denied the motion, but instructed the jury to disregard everything in connection with the matter thus brought to its attention.

[1-3] If this motion be considered a challenge to the panel it was properly denied, since a challenge to a panel can be founded only on a material departure from the prescribed forms for drawing and returning a jury. Pen. Code, § 1059; People v. Giminiani, 76 Cal. App. 352, 244 P. 625; People v. Raymond, 87 Cal. App. 510, 262 P. 442. Had this information been so prejudicial it could not be cured by the court's instruction, it would have been ground for a challenge for cause as to each member of the panel who heard it. But the appellant neither attempted to challenge any prospective juror for such cause nor exhausted his peremptory challenges. As a practical matter, while the question was improper, a similar question would have been proper for impeachment purposes when the appellant took the stand, as he later did. In fact, no more injury could have resulted than would have resulted from a proper question later on. Any possible injury, after being minimized by the explanation of the district attorney and the statement made by appellant's counsel, was cured by the instruction given, and it is not reasonable to believe that the incident affected the verdict. It should also be remembered that the ques-

tion was asked not by the district attorney, but by a codefendant, and it should require a substantial showing of prejudice to permit verdicts in criminal cases to be overthrown by the actions of a codefendant which are beyond the control of the prosecution and which might even be done deliberately for the purpose of upsetting any verdict. After examining all of the record, we are of the opinion that no miscarriage of justice has occurred and that a reversal is not required because of what happened in this connection.

[4] What appears to be the main point relied upon for reversal is that the court abused its discretion in denying a motion for a new trial on the ground of newly discovered evidence. This point requires a somewhat lengthy consideration. The principal defense of the appellant was that of an alibi. In support thereof he testified that on the evening of January 6, 1933, he and his family had dinner at the home of his father; that he spent the evening there with a number of other relatives; and that about 10 o'clock on his way home he took an uncle and aunt to their home. This uncle, possessed of a long and difficult name, was throughout the trial referred to as "Joe" and will be herein thus designated. The appellant testified that as they parted at the uncle's house Joe asked him to go with him early the next morning, before they both had to go to work, to get a load of olive pits for fuel; that he agreed to use his truck for this purpose; that shortly after he got to his own home the defendant Moreno came and asked to borrow his truck, stating that he desired to go into the country to get some barrels of whisky; that Moreno also asked to borrow his automobile to the end that only one of the men involved would be caught in the event the officers interfered with the enterprise; that he objected at first, but changed his mind and loaned Moreno the truck and automobile; that he was awakened soon after 4 the next morning by Joe, who told him it was time to go for the olive pits; that he told Joe he could not go because he had loaned the truck and it was not yet back; that Joe did not believe him and he arose and went out and showed him that the truck was gone; that Joe then left and he went back to bed and slept until about 7, when he was aroused by another man who had come to take him to his work; that he then found the truck had been returned and noticed there was some raisins on it; that he went over to Moreno's place, about a block away, and accused Moreno of deceiving him by hauling raisins on the truck when he had borrowed it only for the purpose of transporting whisky; and that he then returned home and went with the other men to his work.

The uncle, Joe, testified that he quit work at 6 o'clock on the night of January 6th and immediately after supper went to the home of the appellant's father; that certain relatives were there, including the appellant and the appellant's brother, Frank; that the appellant took him home about 10 o'clock, at which time they made an appointment to go after olive pits the next morning; that soon after 4 the next morning he went to the appellant's house, found him asleep, and roused him; that he doubted the statement that the truck was not there and the appellant got up and showed him that it was gone; that he then left, as he had to be at his work at 6 o'clock; that during this period he was working day times at an olive oil factory; and that on January 6th and also on January 7th he worked there from 6 in the morning to 6 at night. When asked, on cross-examination, if he was certain that he worked at that place all day on January 7th he replied that he was and that they could call his boss to prove that fact. Thereupon the district attorney sent for the proprietor of the olive oil factory. After he came Joe talked to him and the next morning he took the stand for the purpose of correcting his testimony, given the day before, whereupon he testified that he had refreshed his memory and looked at the time book and discovered that he had not worked on January 7th. However, he stated that he went to the plant on the morning of the 7th and finding there was no work to be done, waited there until 11 o'clock. He also stated that he had talked to his employer, who told him that the district attorney had been over to see about when he had worked, and that his employer had shown him from his time book that he had worked on January 4th, 5th, and 6th, but not on January 7th and 8th. Joe's employer was then called as a witness for the appellant and testified that Joe had worked on January 3d, 4th, 5th, and 6th, but that he had not worked on January 7th or 8th. The employer testified that he only had three men working on the day shift and three other men on the night shift at the time, and that the men knew when they left on one day whether or not they were to come back the next day. However, on cross-examination, Joe's employer testified that during that week Joe was working on the night shift and that he worked from 6 o'clock on the night of the 6th to 6 o'clock on the morning of the 7th.

On motion for a new trial affidavits were introduced to the effect that this employer would now testify that he made a mistake when he testified that Joe worked on the night of January 6th; that in fact he fired him after the night of January 5th; and that he did not work at all on the 6th, 7th, or 8th. The appellant contends that Joe's testimony as to finding the appellant asleep shortly after 4 o'clock on the morning of the 7th, at which time the truck was not on the premises, was the very foundation of his defense; that this defense was blasted by the unexpected testimony of his own witness, the employer, to the effect that Joe was working at the olive oil plant all of that night; that this employer later discovered that this testimony was a mistake; and that it was an abuse of discretion to refuse a new trial in order to permit that mistake to be corrected.

It should first be observed that it is not too apparent that a mistake was made. The employer testified that he had only three men on the day shift and three men on the night shift, and he stated that he could remember which men were on the respective shifts and that, being so few, it was impossible for him to make a mistake. His time book was introduced in evidence and he had this before him at the time he testified. From this he testified that Joe worked all of the night of the 6th to 6 o'clock on the morning of the 7th. The time book which was introduced in evidence shows that Joe was credited with fourteen hours on January 2d, twelve hours on January 3d, twelve hours on January 4th, twelve hours on January 5th and twelve hours on January 6th. On the time book there is a line drawn between the entry for January 5th and the one for January 6th, and opposite January 7th is written "Pd." According to the offer of newly discovered evidence the employer now wishes to testify that the line between January 5th and January 6th indicates that he discharged Joe at that time. The presence of the figure "12," indicating twelve hours on January 6th, is not explained nor is the fact that the notation "Pd." is below that entry. The offer itself is far from convincing and the trial court may well have considered this as merely an attempt on the part of the witness not only to impeach his own testimony, but to place an interpretation on the entries in the time book not justified by the record itself.

Even if the newly discovered evidence thus relied on were to be received, the fact would still remain that this employer's testimony would still impeach the statement made by Joe to the effect that he quit work at 6 o'clock on the evening of January 6th, and also his statement that after he aroused the appellant early on the morning of the 7th he left and went to his work as he had to be at his work at 6 o'clock, and also his statement that during all of that week he had worked on the day shift. Joe was also impeached by a statement made by the appellant's brother, Frank, who told the officers immediately after the appellant's arrest that on the evening of the 6th the appellant left his father's home immediately after supper, going away in his automobile and that he did not see him again until the next morning, although Joe testified that the brother Frank and the appellant were present at the father's home all of that evening.

The appellant urges that the motion for a new trial should have been granted because, without the asserted mistake of the employer referred to, the jury could not have believed the appellant guilty of the charge. Not only was the evidence of an alibi greatly shaken by evidence other than that sought to be corrected, some of which we have referred to, but the other evidence is ample to justify the action of the jury. The appellant admitted and stipulated that the raisins in question were hauled in his truck. There was other evidence that about that time he asked permission of a man named Costa, at whose house Moreno was staying, to store raisins in his garage and that a few mornings later, when Costa arose, he found these raisins in the garage; that the appellant, with two Mexicans helping him, was seen working in this garage dumping the raisins from one set of boxes to another, at a time when Moreno was not there; and that when the raisins were sold the appellant received all of the money with the exception of $10. Certain phases of the story told by the appellant would tax the credulity of any jury. He stated that he did not want to loan his truck and car to Moreno, but consented after being told that a car was also needed in order that only one man would be involved in case the truck was taken by the officers. That this explanation should be satisfactory when he must have known of the danger that his truck would be confiscated in that event, is hard to believe. It seems rather unusual to thus loan the truck immediately after having promised its use to another, and this without even notifying the first man, who was only about a block away. It also seems strange that when he was awakened by his uncle the next morning shortly after 4 o'clock, he knew the truck was not back before he had looked. Another strange incident is that when he was aroused about 7 o'clock that morning by the men who were to take him to his work, and in the few minutes they allowed him to get ready to go, he discovered there were raisins on the truck and became so much excited over the idea that they had used the truck for hauling raisins instead of whisky that he went immediately to Moreno's home to upbraid him for having deceived him, and then, although he had found raisins on the truck and saw a large quantity of raisins in the garage at Moreno's home, that he immediately accepted Moreno's story that he had brought in one small box of raisins for the children, and did not for a moment suspect that the larger quantity of raisins in the garage had also been hauled on his truck.

While the appellant insists that from beginning to end he told the same story, the record shows the contrary. He first told the officers that he knew nothing of the matter under investigation and that he had not loaned the truck to anyone else. After being confronted with evidence which he could not meet, he changed his story and thereafter insisted that he had loaned the truck to Moreno. A number of inconsistencies appear in his second story. He told the officers that when he went to see Moreno on the morning of the 7th, after discovering raisins on the body of his truck, he found Moreno in the garage filling boxes with raisins and that Moreno then told him to keep his mouth shut as the trouble was all over. While on the witness stand he stated that on this occasion he found Moreno in the house, that Moreno took him in and showed him a small box of raisins which he said was all he had brought, and that as he left he saw other raisins in the garage and some Mexicans filling the boxes. Altogether the record shows that he changed his story four times with reference to where Moreno was on this occasion and what he was doing. Again, he stated that he loaned some of his boxes to Moreno because he expected to buy the raisins himself. Later he testified that he loaned the boxes to Moreno, but told him that if he sold the raisins to a warehouse not to sell them in his boxes as he wanted to use them soon. At another time he testified that when he loaned the boxes to Moreno he told him not to sell the raisins in his boxes because "my box they are known in the packing house."

We have not attempted to summarize all of the evidence, but we think the above is sufficient to show that under the state of the record the court was justified in closely examining the proffer of newly discovered evidence and that, in view of all of the facts, it cannot be said that the denial of the motion was an abuse of discretion.

[5] The appellant attacks one instruction, reading as follows:

"All persons concerned in the commission of a crime, whether it be a felony or a misdemeanor, whether they directly commit the act constituting the offense or aid and abet in its commission, are principals in any crime so committed.

"You are therefore instructed that where a person stands by and aids, assists or encourages in the perpetration of a crime, he is just as guilty as the person who does it and is to be treated as a principal, so that if you believe beyond a reasonable doubt and to a moral certainty from all the evidence, circumstances and facts in this case that either or both of these defendants merely aided, abetted or encouraged the stealing of the personal property described in the information, then you should find these defendants guilty as charged in the information."

It is argued that this instruction authorized the jury to find the appellant guilty even if it merely believed that he innocently aided the other defendant by loaning him a truck, and also that it authorized the jury to find the appellant guilty if it believed that the other defendant aided, abetted or encouraged some one else in the stealing, although the appellant had nothing whatever to do with it. While the instruction is not perfectly worded, the interpretation placed upon it by the appellant is so subtle and remote that he deemed it necessary, in his brief, to present it with an elaborate system of underlining and diagramming in red pencil, in order that the court might see the points raised. It is neither to be assumed that the jury would make such a microscopic analysis of the language used nor accept it as an authorization to find guilty a defendant whose participation in the crime, if any, was entirely innocent. In view of the ample evidence of the appellant's guilt, it is inconceivable that the jury based its verdict upon the construction which the appellant now places upon this instruction. The jury was also instructed that one of the defendants could be found guilty and the other not guilty, and all of the instructions taken together are such that the jury must have understood that either or both of the defendants were to be found guilty only in the event it was convinced that any defendant found guilty had aided or abetted in the actual commission of the crime.

[6] It is next urged that the district attorney was guilty of deliberate and willful misconduct in asking the witness Joe the following question: "Very well, Joe, in the various

times that the Zingarelli family have been in court, you have been in court with them, supporting them with your testimony, haven't you?" The district attorney first stated that he would ask the question for the purpose of impeachment. An objection to the question was sustained by the court. Counsel for the appellant then asked the court to instruct the jury to disregard the statement and the question. The court replied: "Of course, there is nothing in the record." Counsel again asked that the jury be instructed to disregard the question. The court replied: "Well, I don't think there is anything that justifies the Court in instructing the jury. The question was asked and the objection sustained. There is nothing before the jury." However, the court did later instruct the jury to disregard all statements of counsel and not to draw any conclusions or inferences from questions propounded by counsel and ruled out by the court. While we think the question was improper, even for impeachment purposes, we think the court's ruling and instructions sufficiently protected the interests of the defendants and that the matter is not sufficiently prejudicial to justify a reversal, especially when taken in connection with all of the facts appearing in the record.

The last point raised is that the district attorney was guilty of misconduct in that his prosecution of the defendant Moreno was not conducted with as much zeal as was his prosecution of the appellant. It is argued that the district attorney indulged in facial expressions, tones of voice, gestures, and other theatrical effects which disclose that his prosecution of Moreno was unreal and insincere, and which were designed and calculated to secure conviction of the appellant alone. We regard this point as utterly without merit. While the theatrical effects complained of may not be perfectly presented in the record for our review, we find nothing in the record to indicate that the district attorney failed in any respect to present to the jury any evidence of which he had knowledge, which would throw any light upon Moreno's connection with the crime in question.

We are unable to see how the jury could have arrived at any other verdict with reference to the appellant. The evidence presented against him by the prosecution was strong and any possible doubt left by the same must have been completely removed by the nature of the evidence given by and on behalf of the appellant. His own story should convince any juror that he was not telling the truth and his defense of an alibi was thoroughly discredited. This is true, even if the testimony of his employer that he was working on the night of January 6th, which it is now claimed was a mistake, be entirely eliminated from the case. In view of the evidence, it does not seem possible that the verdict could have been affected by the matters here complained of and we are far from convinced that any miscarriage of justice has occurred.

The judgment and order appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

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136 Cal.App. 765

W. ROSS CAMPBELL CO. v. SEARS, ROEBUCK & CO.

Civ. 8171.

District Court of Appeal, Second District, Division 2, California.

Feb. 20, 1934.

1. Release 🔑55.

Stipulation showing that affirmative defense of release was apparently good, burden devolved on plaintiff to show otherwise.

2. Pleading 🔑165.

Under statute, affirmative defense of release is deemed controverted, and plaintiff, without replication, may offer evidence rebutting that establishing defense (Code Civ. Proc. § 462).

3. Evidence 🔑441(15).

Alleged prior parol agreement to pay balance of commission if optionee exercised option could not be deemed real consideration for broker's releasing vendor from paying such balance so as to permit parol evidence of agreement in order to show failure of consideration for written release (Code Civ. Proc. § 1856).

4. Release 🔑12(2).

Under statute, formal, express, written release of obligation to pay balance of broker's commission required no consideration (Civ. Code, § 1541).

5. Evidence 🔑434(8).

Parol evidence is admissible to show fraudulent representation of material matter inducing execution of writing, though instrument ostensibly contains entire agreement.

6. Evidence 🔑441(15).

Alleged prior parol agreement to pay balance of broker's commission if optionee exercised option being necessarily superseded by written release of payment of such balance, and being no evidence of terms of release, could not be relied on as fraudulent representation inducing release so as to justify parol evidence (Code Civ. Proc. § 1856).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by the W. Ross Campbell Company against Sears, Roebuck & Co. Judgment for defendant, and plaintiff appeals.

Affirmed.

Roy V. Rhodes, of Los Angeles, for appellant.

O'Melveny, Tuller & Myers, William W. Clary, and Pierce Works, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Appeal by plaintiff from a judgment in favor of defendant.

Suit was brought by plaintiff to recover a balance of $3,500 on an earned commission of $8,500. It was admitted that defendant agreed in writing to pay the total commission of $8,500 and that but $5,000 thereof was actually paid. Defendant set up as an affirmative defense that the purchaser to whom the property was sold, on which sale the commission was earned, defaulted and refused to perform its obligation to purchase and asked to be relieved from such obligation. This was agreed to by defendant, providing the latter was released from paying the balance of such commission. On April 4, 1929, plaintiff executed and delivered to defendant the following writing:

"April 4, 1929.

"Sears, Roebuck and Co., Los Angeles.

"Gentlemen: With reference to the purposed sale of your property at the N. E. corner of 59th St. and Vermont Ave., being in size 200′ x 150′, to the Urban Properties Co., which was negotiated by us as your agent and in the course of which there was paid to us the sum of Five Thousand Dollars ($5000) on account of commission earned by us, we hereby accept said sum of Five Thousand Dollars ($5000) in full settlement and satisfaction of our claim for Eighty-five Hundred Dollars ($8500), together with any and all claims accruing to us as agents in the negotiation of said sale.

"We hereby release you from any further payment or obligation to us on account of the negotiation of said sale.

"Yours very truly,
"W. Ross Campbell Co.,
"By C. A. Greese,
"C. A. Greese, Asst. Secy.-Treas."

A written stipulation filed by the parties in effect sets out the foregoing facts as well as others which we do not deem material here, but which tended to show that the original escrow was not canceled, but was kept alive by agreement pending action upon an option given to Mr. Van Vleet, the president of Urban Properties Company, to purchase the property in question, which option was finally taken up and title to the property was vested in said company, which in turn executed deeds to the real purchasers, evidently to save sending such deeds back to Chicago to be executed by defendant corporation.

[1] A prima facie case having been made by plaintiff, and the stipulated facts showing that the affirmative defense of a release was apparently good, the burden then devolved upon plaintiff to show that in fact it was not. Plaintiff accepted such burden and introduced evidence tending to show that Mr. Humphrey, regional manager for defendant during the negotiations leading up to the execution of the release, told Mr. King, outside man for plaintiff, that he had given an option to purchase the property to the president of said Urban Properties Company, so that if purchased, the $15,000 paid by such company would be saved, and that if such option was taken up, the balance of the commission would be paid by defendant; and that such promise was communicated to plaintiff corporation, which thereupon executed and delivered said release. Such evidence was objected to by defendant upon the ground that it was an attempt to vary the terms of a written instrument by evidence of a prior parol agreement. The objection was overruled, but at the close of such testimony it was stricken on motion of defendant. Appellant urges that it was error so to do.

[2] Under section 462, Code of Civil Procedure, the affirmative defense alleged was at the trial deemed to be controverted, and plaintiff was entitled to offer evidence rebutting that establishing such affirmative defense without a pleading by way of replication. Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986. Appellant urges that such evidence was competent and admissible

not only to show that the true consideration for the execution of the release had failed, inasmuch as the promise inducing the release was not performed, but also to show fraud in inducing its execution, i. e., by a promise made with no intention of performing the same.

[3] That such prior parol agreement would vary the written release would seem to be unquestioned. In such case, may the rule be avoided, under the rule of failure of consideration, by treating the prior parol promise as the real consideration for the release? In our opinion it cannot.

In the case of Hendrick v. Crowley, 31 Cal. 471, evidence was excluded, as here, which tended to vary the terms of a written instrument. In that case plaintiff recovered judgment against defendant for an assessment levied on defendant's property. In his answer the latter averred that the true consideration for an assignment made by him to plaintiff was not the $100 expressed in the assignment, but was the parol agreement that defendant should not be required to pay his share of the assessment sued on. At the trial defendant offered evidence to prove such affirmative allegation, which offer was rejected. Defendant's motion for a new trial was granted and plaintiff appealed from such order. It was urged on appeal that there was no error in excluding such evidence, because it was within the rule forbidding the introduction of parol evidence to contradict or vary a written instrument and not within the exception which allows a consideration to be shown other and different from that expressed. It was further argued that the direct legal effect of such evidence was to defeat the written assignment in part by showing that there was a contemporaneous agreement limiting its operation and effect. The order was reversed, the court saying (page 476 of 31 Cal.): "The point as made by the respondent on his motion was certainly very ingenious, and, as suggested by counsel for appellant, was well calculated to mislead the court. Stated in his language, the question at first blush would seem to fall readily within the exception and not within the rule, but upon further reflection it will appear clear that the reverse is the case. There is no doubt but that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the written instrument. *But this is not a rule but an exception to the rule that the legal effect of a written instrument cannot be varied or defeated in whole or in part by parol evidence.* The exception can never be allowed to override the rule, for that would be to dispense with the rule entirely and preserve only the exception. The exception always loses its governing force when it comes in conflict with the rule which it qualifies, and must yield to its higher claims. *Hence the consideration cannot be contradicted or shown to be different from that expressed when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated.*" (Italics ours.) The rule announced in such case was again announced by the Supreme Court in Arnold v. Arnold, 137 Cal. 291, 70 P. 23, where that tribunal quotes with approval the last paragraph above taken from the Crowley Case.

[4] Nor would the fact that the $5,000 had already been paid some time before the release was executed necessarily mean that there was no consideration for its execution. Being a formal, express, written release of an obligation, no consideration is necessary to support it. Section 1541, Civ. Code; Upper, etc., Canal Co. v. Roach, 78 Cal. 552, 21 P. 304; Rogers v. Kimball, 121 Cal. 247, 253, 53 P. 648.

[5, 6] The release in question here was apparently drawn in plaintiff's office by some one representing plaintiff, and there executed. It is so clear and unequivocal in its terms that no resort to the circumstances surrounding its execution is necessary to ascertain the intention of the parties. Plaintiff seeks to evade the result of its plain terms by proof of a parol, unperformed agreement which is directly contrary to such clear meaning. It is well settled that a fraudulent representation as to a material matter inducing the execution of an agreement may be shown by parol evidence, even where the written instrument purports to contain the entire agreement between the parties. Hunt v. L. M. Field, Inc., 202 Cal. 701, 703, 262 P. 730. In our opinion, however, a distinction must be made between such a parol promise as the one here, which by its very nature is superseded by the final writing, inconsistent with it, and a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof. We think the former, being evidence of a preliminary agreement entirely superseded by the subsequent writing, is no evidence of the terms of the writing finally agreed upon (section 1856, Code Civ. Proc.), and cannot be relied upon as a fraudulent representation inducing the writing.

In the case of Yuba Mfg. Co. v. Stone, 39

Cal. App. 440, 179 P. 418, 419, defendant's answer and cross-complaint admitted the execution of the notes sued on, and set up as a defense and cause of action against plaintiff for rescission of the contract and damages certain alleged fraudulent representations inducing the contract for the purchase of a tractor, the payment of the purchase price of which was represented by said notes. The court refused to permit the introduction of evidence of such alleged fraudulent parol representations, made by the agent as to the capacity of said tractor, on the ground that it tended to vary the contract finally executed. The agreement contained a warranty that the tractor when delivered would be in good working order and free from any latent defect arising from poor workmanship or the use of improper or defective materials. The parol representations attempted to be shown and so excluded were representations "of any kind as to what the capacity of * * * the tractor * * * would be, or what it could do in the matter of driving rice threshers." The court said: "It is difficult, therefore, to resist the conclusion that appellant sought to add to the warranty contained in said written instrument. Of course, the significance of the said parol assurance was not changed by reason of the fact that it is claimed to have been fraudulently given. Whether the promise was made with or without a deceitful intent, its importance to appellant arose from the consideration that it related to the character of the tractor which was to be furnished. Its quality as a warranty would not be changed or affected in the least by alleging that the representation was fraudulently made." Further, the court in its opinion (page 445 of 39 Cal. App., 179 P. 418, 420) quoted with approval the following language from the case of Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 P. 906: "A person buying or agreeing to buy personal property, the terms of which purchase or agreement to purchase are put in writing, is bound as to the terms of the contract by such writing, into which all preliminary understandings and assurances are presumed to be merged, and such person cannot go behind such writing to avoid the agreement of purchase for the alleged breach of some oral understanding or guaranty not contained within its written terms." The court also said: "It must be apparent that the same rule applies whether the said oral representations be regarded as technically a 'warranty' or as simply a covenant or promise. In either event it must be entirely excluded because not contained in the final written agreement of the parties."

We agree that on principle there can be no difference between a promise which amounts to a warranty and one that does not, where both are obnoxious to the rule that the final written agreement of the parties cannot be changed by a prior parol agreement. On principle we see no similarity between the claim of fraud here and that involved in the case of Stewart v. Crowley, 213 Cal. 694, 3 P.(2d) 562. See, also, the case of Kullman, Salz & Co. v. Sugar, etc., Co., 153 Cal. 725, 96 P. 369, where it was held that the trial court erred in permitting evidence of parol representations preceding a written agreement inconsistent therewith and treated by the trial court as false representations inducing the agreement. The Supreme Court did not reverse that case because of such error, as the evidence showed a breach of the agreement as written. In the case of Rogers v. Atchison, etc., Ry. Co., 38 Cal. App. 343, 176 P. 176, 177, the judgment was reversed because the trial court erroneously admitted testimony that releases set up by defendant were signed by plaintiff on the assurance that they "were only receipts for wages or for lost time," where the objection to such testimony was that the terms of a written contract could not be thus varied.

There was nothing in the evidence in the case before us to show that plaintiff did not act freely in giving an absolute release to defendant, and in our opinion having so acted, when it could have made such release conditional on the failure of the optionee to complete the sale, it cannot now defeat its own written release by showing a prior parol agreement entirely inconsistent therewith.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

136 Cal.App. 746

PEOPLE v. DE VAUGHN.

Cr. 2466.

District Court of Appeal, Second District,
Division 1, California.

Feb. 19, 1934.

Rehearing Denied March 5, 1934.

Hearing Denied by Supreme Court March 19, 1934.

1. Criminal law 🔑876.

Consolidated informations charging that defendant received stolen property knowing it to have been stolen and verdicts that defendant was guilty as charged in informations *held* sufficient to sustain judgments (Pen. Code, § 496).

> By first information and second count of second amended information, offenses were charged to have been committed by defendant for his own gain and to prevent owner from again possessing his personal property, well knowing the same to have been stolen, and by count I of second information it was charged that defendant, to prevent the owner from again possessing his property, bought and received, etc., whereas Pen. Code, § 496, provides that offense of receiving stolen property exists when person for his own gain, or to prevent owner from again possessing his property, buys or receives any personal property knowing the same to have been stolen.

2. Criminal law 🔑737(1).

Whether receipt of stolen property twice on same day constituted single transaction or two separate transactions *held* for jury (Pen. Code, § 496).

3. Criminal law 🔑1059(1).

Mere remark after witness had answered question that testimony was hearsay *held* insufficient to save any question for review.

4. Criminal law 🔑370.

In prosecution for receiving stolen goods, thief's evidence concerning other transactions with defendant and other goods sold with those stolen for lump sum *held* admissible to show defendant's knowledge that goods were stolen and that he bought them for his own gain and to prevent owner from recovering them (Pen. Code, § 496).

5. Receiving stolen goods 🔑9(1).

Whether defendant was guilty of receiving stolen goods as charged in consolidated informations, charging three offenses, *held* for jury, notwithstanding contradictions in thief's testimony (Pen. Code, § 496).

6. Criminal law 🔑1160.

Whether new trial should have been granted for insufficiency of the evidence in prosecution for receiving stolen goods *held* for trial court (Pen. Code, § 496).

7. Criminal law 🔑1172(1).

Instruction in prosecution for receiving stolen goods that knowledge might be shown by purchase at price greatly below value *held* not prejudicial, where finding that defendant had knowledge was only one that could reasonably be made (Pen. Code, § 496).

Appeals from Superior Court, Los Angeles County; Percy Hight, Judge.

Herman De Vaughn was convicted of receiving stolen property, and he appeals.

Affirmed.

George W. Rochester, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

In action No. 53418 the defendant was accused of the crime of receiving stolen property, then and there the personal property of one Orlando, defendant well knowing the same to have been stolen. The alleged date of commission of this crime was July 11, 1933. In action No. 53640 the information contained two counts charging commission by defendant of the like crime of receiving stolen property, that is to say, that on July 7, 1933, he received into his possession certain stolen personal property of one Lindberg; and by count II that on July 11th he received into his possession stolen personal property of one Carl Brandin. The cases were consolidated for trial, and defendant was convicted on all of these counts and sentenced accordingly. He appeals from the judgments and from the order denying his motion for a new trial. Although we have concluded that the judgments and order must be affirmed, we pause to suggest that appellant's brief is a model for clarity in presentation of the grounds of appeal and in its compliance with the rules relating to briefs. Much time of the court, now wasted in attempting to understand the contents of briefs, could be saved by better briefing.

[1] Point 1 A: That "the consolidated informations and the separate general verdicts are not sufficient to sustain the judgments." The Penal Code, § 496, states the elements of the offense of receiving stolen property to be, when a person "for his own gain, or to prevent the owner from again possessing his property,

buys or receives any personal property, knowing the same to have been stolen." By the first information, and count II of the second amended information, the offenses were charged to have been committed by the defendant "for his own gain and to prevent the owner from again possessing his personal property, * * * well knowing the same to have been stolen." By count I of the second information it is charged that the defendant "to prevent the owner from again possessing his property" bought and received, etc. On each charge the verdict of the jury found the defendant guilty of receiving stolen property, a felony, as charged in the information. We do not agree with appellant in his claim that the decision in People v. Tilley, 135 Cal. 61, 67 P. 42, sustains his proposition that the verdicts in this case are insufficient to sustain the judgments. In the Tilley Case the verdict as rendered found the defendant "guilty of receiving stolen property." This was not equivalent to a verdict of guilty of such crime as charged in the information. The distinction which appellant seeks to make, founded upon the language of Penal Code, § 496, between the offenses therein described, as committed by an offender "for his own gain or to prevent the owner," etc., is not, in our opinion, weighted with the consequences for which appellant here contends.

[2] Point 2: That the defendant was convicted and sentenced for three offenses when only two were charged in the informations. It is true that the offense charged in the first information and the offense charged in count II of the second information both were said to have been committed on the 11th day of July. But the goods received, as stated in each count, were the property of a different person, and were not necessarily received at the same moment of time, or in the same transaction. There is evidence from which the jury might have inferred that they were not received either at the same time or in the same transaction.

[3, 4] Point 3: That the court erred in its decisions on questions of law arising out of objections made by defendant to introduction of testimony of distinct and separate offenses, offered by the prosecution, where such objections were overruled. The instance given under this heading occurred in the testimony of one Piper (who was the thief who sold the goods to defendant), and in the testimony of the officer, E. J. Henry, one of the officers who arrested the defendant. While Piper was giving testimony concerning his sale to defendant of a stolen suit of clothes, he was permitted to answer concerning other articles included in the same sale, and that for all of them together he received the single price of $9. Likewise, over objections that the questions were immaterial, the witness was permitted to state that before that time he had several other transactions wherein he had sold stolen articles to the defendant, and that on one occasion, when he brought to defendant a diamond ring, defendant asked him if it was "hot," and that witness told him he had got it about two hours ago. Also that on another of those occasions he brought to defendant a fur coat. "He asked me where it came from and I told him I thought he had better have the lining changed in it before he done anything with it." The other instances are of similar character. In the testimony of Officer Henry he made statements concerning various articles of clothing which he found in the defendant's house, but it does not appear that there was any objection made or any ruling by the court, except that, after the answers had been given, the attorney for defendant remarked that "what has happened to any other articles or what has been done with them is hearsay, if your Honor please. We are merely being tried for these articles here. The Court: Objection overruled." We think that the court did not err in its rulings upon the objections made by defendant's counsel. The transactions were part of a series, all conducted between defendant and one and the same thief. Even where the articles were not actually intermingled with those described in the informations, they were received under circumstances which had evidentiary value upon some elements of the crime charged, namely, that the defendant knew that the articles described in the informations were stolen, and that he bought them both for his own gain and to prevent the owner from recovering their possession.

We may accept without question the proposition stated by appellant, and contained in numerous decisions quoted by him, that, generally speaking, evidence of a separate and distinct offense is not admissible as the basis of inference and argument that the defendant may have committed the particular crime for which he is on trial. Testimony is not relevant simply because it tends to show that the defendant at some other time was guilty of a similar offense. In the case before us, if the court had allowed the prosecution to introduce testimony showing that the defendant had purchased stolen property from some thief other than the witness Piper, and entirely unconnected with the defendant's dealing with the witness Piper, he would have an illustration of the kind of objectionable evidence to which the rule refers.

[5] Point 4: That the evidence is insufficient to justify or sustain the verdicts of guilty on all or any of the three charges, and are contrary to the law and the evidence. The particular claim is that the evidence does not show specific guilty knowledge coupled with specific guilty intent of preventing the owner from again possessing the goods or a specific intent to hold the goods for his own gain. This point seems to be without merit. It is true that the evidence does not show that defendant was told in direct terms that the goods were stolen. Proof of his knowledge of that fact rests entirely upon the evidence of the circumstances under which he bought the property. We think that the evidence in this case justified the jury in its inference, to the effect that the defendant knew that the goods were stolen, and that, if he did not have that knowledge by direct evidence thereof, this must have been because he willfully refrained from making inquiries which under the circumstances should have been made by him. People v. Mercado, 59 Cal. App. 69, 209 P. 1035; People v. Clausen, 120 Cal. 381, 52 P. 658. The fact that there were contradictions in the testimony of the witness Piper, together with discrepancies and confusion therein, merely raises a question of conflict in the evidence, and is not sufficient to sustain a contention on appeal that the evidence is not sufficient to sustain the verdict.

[6] Point 5: This also relates to insufficiency of the evidence, and particularly its insufficiency "to stand against a motion for a new trial." This point goes merely to the exercise of discretion by the trial court in determining whether or not the alleged weakness of the evidence required the granting of a new trial. We find no reason for interfering with the trial court's decision on that question.

Point 6: That there is a material variance between the alleged charges in the information and the attempted proof introduced at the trial. This point is based upon the absence of evidence fixing the precise dates when the property was received by the defendant. This is especially related to appellant's claim that the two offenses charged as having been committed on July 11th, were in reality one single offense, if committed at all. The witness Piper directly testified that there were two of these July 11th transactions, and that one of them was "another occasion" from the other. The claimed discrepancy between the charge and the proof apparently does not exist.

[7] Point 7: That the court erred in giving an instruction which, standing alone, is a conclusion of law on the proof of guilt. This was an instruction relating to the proof required to establish commission of the offence of receiving stolen property. Appellant contends that this instruction is similar to an instruction which the Supreme Court ruled against in People v. Levison, 16 Cal. 99, 76 Am. Dec. 505. In that case the trial court in an instruction upon the question of guilty knowledge as an element of receiving stolen goods, knowing them to be stolen, said: "This may be shown either directly by the evidence of the principal offender, or circumstantially, by proving that the defendant bought them very much under their value, or denied their being in his possession, or the like." The Supreme Court, in commenting upon this instruction, said that it understood that the court asserted, as a conclusion of law, that "the purchase of goods, at a great under-value, by defendant, is sufficient proof of the knowledge by him that the goods were stolen." The court held that facts of the description given in the quoted instruction were facts which, in connection with other facts, might be sufficient to establish the guilt of the defendant; but, on the other hand, declared that "neither of these facts, standing alone, especially if there be rebutting proof, constitutes a legal conclusion of guilt." For these reasons the court held that the instruction as given was erroneous.

In the case now before us the challenged instruction reads as follows:

"In order to constitute the offense of receiving stolen property, it is not required that there be direct proof showing that the receiver was so informed by the person from whom the goods were received. The element of knowledge may be shown by the circumstances, such as buying at a price greatly below the value of the goods, or buying from irresponsible individuals, or buying under other circumstances which would indicate to the ordinarily prudent individual that the property was stolen.

"Knowledge may also be inferred by taking into consideration the surrounding circumstances in which the goods were received, such as the character of the vendor, the kind of goods and the time when they were received, and if it appears that the receiver suspected that the goods were stolen and abstained from inquiry lest he should know, knowledge may be inferred."

We think that by giving this instruction the court probably did not intend to assert as a conclusion of law that the buying for a price greatly below the value of the goods or the buying from an irresponsible individual would constitute sufficient proof of knowledge by the defendant that the goods were stolen. But the form in which the statement was made by the court is not to be commended, since it leaves the instruction open for argument about the intended meaning, and is not clear, whereas it easily might have been made clear and certain. Assuming that there was error, that is not in this instance a sufficient reason for reversal. The evidence so strongly proves defendant's knowledge of the fact that he was buying stolen property that a finding against him on that issue was the only reasonable finding that could have been made.

The judgments and orders are, and each of them is, affirmed.

We concur: HOUSER, J.; YORK, J.

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137 Cal.App. 109

PHIPPS et ux. v. SHACKLETT et al.

Civ. 8183.

District Court of Appeal, Second District, Division 2, California.

Feb. 26, 1934.

Hearing Denied by Supreme Court April 26, 1934.

1. Automobiles 🔑193(10).

Corporation furnishing automobile to president for his use *held* liable for president's negligence while on personal business (Civ. Code, § 1714¼).

2. Automobiles 🔑193(10).

Statute imputing liability to owner if giving "express" or "implied" permission *held* not limited to cases where owner knows beforehand that driver intends to use automobile for driver's personal business (Civ. Code, § 1714¼).

"Express" necessarily implies previous knowledge of intended personal use, and "implied" must mean without such previous knowledge but under circumstances from which consent to use automobile is necessarily implied.

[Ed. Note.—For other definitions of "Express" and "Implied Permission," see Words & Phrases.]

3. Automobiles 🔑172(9).

Evidence that motorist attempted to pass truck notwithstanding inability to see safe distance ahead, warranted finding of negligence (St. 1931, p. 2124, § 122).

4. Automobiles 🔑225.

Evidence warranted finding that motorists were not contributorily negligent when meeting on-coming automobile attempting to pass truck, rule of sudden emergency being applicable (St. 1931, p. 2124, § 122).

Appeal from Superior Court, Los Angeles County; Guy F. Bush, Judge.

Action by Edward C. Phipps and wife against Ernest E. Shacklett and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

George B. Webster, of Los Angeles, for appellant Calmin Mortgage Corporation.

Foster & Klinck, of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

From a judgment in favor of plaintiffs, defendants have appealed.

The evidence shows that defendant Shacklett was president and general manager of defendant Calmin Mortgage Corporation, and that after driving a car belonging to the corporation to Riverside on business of the latter, he proceeded on his own business, driving the same car; that when about 36 miles south of the town of Indio he attempted to pass a truck with trailer attached, at a place where the highway in front of said truck was not visible for a sufficient distance to enable him to pass before meeting the oncoming car of plaintiffs. The visibility of the highway was obstructed by a dip therein 750 feet in length and 35 feet deep, which obscured plaintiffs' approach. There is testimony that plaintiffs' car was not exceeding a speed of 30 or 35 miles per hour and that defendants' car was not exceeding 40 miles. When plaintiff Phipps' car came out of the "dip" he saw the truck about 100 feet away from him, and traveled about 25 feet when he saw defendants' car in front of him. He turned his machine to the right and ran off the pavement in an attempt to avoid a collision, and in the meantime defendants' car was turned to the left, running into the side of plaintiffs' car and causing the damage claimed. The court found that the accident was proximately caused by the negligence of defendant Shacklett, that such defendant was driving the car with the knowledge and consent of its owner, Calmin Mortgage Corporation, and that the negligence of the driver "is imputed to the owner." It was further found that plaintiffs were not guilty of any negligence contributing to the happening of the accident, but that the sole cause thereof was the negligence of defendant Shacklett.

Appellants urge: (1) That as Shacklett was not driving the car while engaged in the business of the corporation the latter is not responsible; (2) that as a matter of law Shacklett was not guilty of negligence; and (3) that under the undisputed evidence plaintiffs were guilty of contributory negligence.

[1, 2] (1) We think it was a fair conclusion from the evidence that the car was furnished by the corporation to its president for his own use, whether on personal or company business. Appellant corporation urges that section 1714¼ of the Civil Code was not intended to reach every case where the owner's car was negligently driven on the driver's own business, but only those cases where the owner knew in advance that the driver so intended to use the car. The driver here being the president and general manager of the corporation, it might well be urged that the corporation was charged with notice of what he intended to do; but as we have said, the court might well have concluded that he was driving the car on his own business with the express knowledge and consent of its owner. We are of the opinion, however, that the Code section referred to is not so limited. If under the facts of this case the operation of the car may be found to have been with the implied permission of the owner, the liability is imputed for any negligence in its operation. Prior knowledge that the driver intends to so use the car is not necessary. That seems to be necessarily implied from the use of the words "express or implied" in connection with the owner's "permission." "Express" necessarily implies previous knowledge of the intended private use. "Implied" must mean without such previous knowledge, but under circumstances from which consent to use the car is necessarily implied.

[3, 4] (2) Appellants urge that defendant Shacklett was suddenly confronted with an unknown danger and therefore is not held to the degree of care required of one of ordinary prudence not so confronted, and that it was an unavoidable accident as both drivers were in the same plight. The findings of the court include the negligence in attempting to pass the truck and trailer and driving on the left-hand side of the highway when such left side was not clearly visible far enough ahead so that the driver knew it was free from oncoming traffic a sufficient distance to permit him to overtake and pass the truck in safety. Section 122, California Vehicle Act (St. 1923, p. 557, as amended by St. 1931, p. 2124), then in effect. In our opinion the evidence supported such finding, as well as (3) the finding that plaintiffs were free from any negligence. The rule of sudden emergency applied in the case of plaintiffs, who were traveling at a lawful rate of speed on their own side of the highway, when suddenly confronted with danger.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 48

HUEY v. CITY OF LOS ANGELES.

Civ. 7927.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1934.

Hearing Denied by Supreme Court April 20, 1934.

1. Pleading 🔑36(2).

In action for death of boy killed on drawbridge, allegation admitted by defendant that city had adopted ordinance placing drawbridge under jurisdiction of board of harbor commissioners which had duty of operating bridge established that board was operating bridge (Code Civ. Proc. § 1963, subd. 15).

2. Bridges 🔑46(½).

Provision in Los Angeles charter that no suit shall be brought on claim against city until demand approved in writing by board authorized to make expenditure has been presented and rejected by city, *held* applicable to claim against city for wrongful death of boy killed on drawbridge operated by board of harbor commissioners.

3. Bridges 🔑45.

In action against city for death of boy killed on drawbridge operated by board of harbor commissioners of city, that plaintiff addressed letter to general manager of board and received reply, and that manager reported accident to board, *held* not presentation of demand within Los Angeles charter requirement that claim be presented to board authorized to make expenditure before bringing suit against city.

4. Bridges ⟹46(5).

In suit against city for death of boy killed on drawbridge operated by board of harbor commissioners, evidence that plaintiff presented formal and definite demand on city council which was rejected *held* inadmissible to prove demand on city authorizing suit where plaintiff did not comply with charter requirement that claim be presented to board authorized to make expenditure before being presented to city.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Lee Huey against the City of Los Angeles. Judgment of dismissal, and plaintiff appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

Irving P. Austin, of Compton, and Samuel A. Rosenthal, of Los Angeles, for appellant.

Erwin P. Werner, City Atty., of Los Angeles, for respondent.

CONREY, Presiding Justice.

On the 25th day of June, 1929, the city of Los Angeles was the owner and engaged in the operation of a drawbridge, spanning a channel used and maintained by the city for the purpose of ingress and egress of ships, and connecting with a public highway. On said day Joseph Huey, a thirteen year old boy, was accidentally killed on said bridge. This action was brought by the father of said minor child to recover damages for the wrongful death of said Joseph Huey, which the plaintiff claims was caused by negligence of the defendant in its management and operation of said bridge.

By the complaint it was alleged, and the fact is not denied, that at the time of said accident the board of harbor commissioners of the city was charged with the duty of operating, maintaining, and controlling the bridge, and that one Burt Edwards was the duly appointed and acting manager and chief administrative officer of said board, and that the defendant Hal Young was the person in charge of and engaged in the operation of said drawbridge at the time of the accident.

The trial of the action resulted in a judgment of dismissal, which, as recited in the judgment, came about in this way: "It having been stipulated that plaintiff would first present evidence of having made a proper and sufficient demand upon the defendant City of Los Angeles, as by statute in such case made and required, and the plaintiff having presented all of its evidence upon said point, and the defendant having objected to the sufficiency thereof, and the objection having been sustained, whereupon the defendant moved for a dismissal of the action upon the ground that the court had no jurisdiction to hear the cause, and said motion having been granted,—Now, therefore," etc.

[1] In opening his reply brief appellant makes the following statement of the question involved: "The question in this case is whether the drawbridge involved herein, located in the City of Long Beach, is not within the Harbor District, as designated and provided in Article XI, Section 138, of the Charter of the City of Los Angeles, and whether it was, therefore, not under the control, supervision or management of the Board of Harbor Commissioners, and further, whether it was not necessary to serve a demand upon or make a claim against the Board of Harbor Commissioners under said charter provisions."

It is an admitted fact that said drawbridge is located within the city of Long Beach, and not within the corporate limits of the city of Los Angeles. Nevertheless the city by its charter was authorized to maintain and operate the bridge, and in this action there is no contention to the contrary. Under section 139, subdivision (c), of the charter, the control, operation, and maintenance of such structures is under the jurisdiction of the board of harbor commissioners, where such structures are within the harbor district. The charter provides (sec. 138) not only for possession and control by the said board of the entire waterfront, etc., of the city within the city limits, northerly and easterly of the government breakwater, but it is further provided that, under stated conditions, the council shall have power to place other and additional territory under the control, etc., of the board; and that the lands and waters under such control shall be known as the harbor district. On the record before us it is an established fact that the drawbridge referred to in the complaint was within the harbor district. This fact has a vital effect upon appellant's "statement of question involved," by making his contention thereunder incorrect. While no direct evidence was produced showing the existence of any ordinance of the council placing the location of said bridge or the bridge itself under the jurisdiction of the board of harbor commissioners, the fact that such ordinance had been adopted must be inferred because the complaint alleged, and the defendant has not denied, that the board of harbor commissioners was charged with and was actually performing the duty of operating the drawbridge; and also because in the absence of evidence to the contrary it is always presumed that official duty has been regularly performed. Code Civ. Proc. § 1963, subd. 15; Los Angeles Athletic Club v. Long Beach, 128 Cal. App. 427, 430, 17 P.(2d) 1061.

[2] It is provided by the charter, section 376, that no suit shall be brought on any claim for money or damages against the city of Los Angeles, until a demand for the same has been presented "as herein provided, and rejected in whole or in part." It is also required by section 363 that "every claim and demand against the city * * * shall be first presented to and approved in writing by the board, officer or employee authorized by this charter to incur the expenditure or liability represented thereby." Also it is provided, section 368, that "no demand can be approved by any board, officer, or employee, or be audited, unless it specify each several item, with the date and amount thereof." It seems to be settled law that the provisions of section 363 of the charter apply to and include claims and demands such as the one in question here. Beeson v. City of Los Angeles, 115 Cal. App. 122, 129, 300 P. 993.

[3] The only evidence offered by the plaintiff for the purpose of proving a demand addressed to the board of harbor commissioners consisted of a letter addressed by the plaintiff to Mr. Edwards, the general manager, and a reply thereto, and a report of the accident made by Mr. Edwards to the harbor commission. The court rejected this evidence. We think the objection to the documents was properly sustained, as they were not in form sufficient to comply with the requirements of the charter to which we have referred. Even if the letter addressed to Mr. Edwards, together with the use which was made of it, might be construed to make of it a document presented to the board, it would not be a sufficient demand. Without adverting to other defects, it is sufficient to note that there was no specification of the amount demanded or claimed.

[4] The plaintiff also offered to introduce into evidence and to prove the presentation of another more formal and definite demand which he presented to the city council, and which was rejected by that body. To this evidence objection was made that the document offered did not tend to prove any issue presented by the case, and particularly that the presentation to the council of a claim or demand of the kind involved in this action is not proper or effective for any purpose. The court did not err in sustaining the objection. Under the provisions of the charter to which we have referred, the presentation to the board of harbor commissioners of a demand substantially complying with the provisions of the charter was essential to the plaintiff's right of action, and the failure to present such demand could not be cured by presenting a demand to the city council.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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220 Cal. 254

McPIKE v. SUPERIOR COURT OF SAN FRANCISCO COUNTY et al.

S. F. 14941.

Supreme Court of California.
March 1, 1934.

1. Certiorari 🔑64(1).
In certiorari proceeding, appellate court is not concerned with propriety of order attacked, but only with question whether trial court had jurisdiction to enter such order.

2. Executors and administrators 🔑87.
Probate court has power to authorize compromise of third party's adverse claim to property claimed by estate (Probate Code, § 578).

3. Executors and administrators 🔑435.
Ordinarily, a probate court has no jurisdiction over adverse claims of third persons to property in estate.

4. Courts 🔑198.
Though superior court, sitting in probate, is court of general jurisdiction, proceedings are statutory and court has no powers except those given by statute and incidental powers which enable court to exercise jurisdiction conferred upon it.

5. Executors and administrators 🔑435.
Superior court sitting in probate was without power to compel administrator to carry out compromise with person claiming entire estate theretofore authorized by court (Probate Code, § 578).

In Bank.

Certiorari to Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition for certiorari by H. W. McPike, administrator of the estate of Margaret A. Jennings, deceased, to annul an order entered by the Superior Court of the County of San Francisco, State of California, Frank H. Dunne, Judge, directing petitioner to pay Annie Gillespie $1,000 pursuant to an agreement of compromise and an order of the court approving such compromise.

Order annulled.

Prior opinion, 21 P.(2d) 627.

H. H. McPike, of San Francisco, for petitioner.

Cleveland R. Wright, of San Francisco, for respondent.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2. Upon further consideration, we are satisfied that the opinion of Mr. Justice pro tem. Dooling properly disposes of the issue, and we therefore adopt said opinion as the opinion of this court. It reads as follows:

The petitioner seeks by certiorari to have annulled an order of the Superior Court sitting as a probate court. From the return it appears that the petitioner is the duly appointed and qualified administrator of the estate of Margaret A. Jennings, deceased. On June 27, 1932, petitioner, as such administrator, filed in the respondent court a petition for permission to compromise certain litigation pending against the estate of his decedent. In such petition he alleged that an action had been commenced against him, as administrator, by one Annie Gillespie, claiming title to all the property of the estate, consisting of a sum of money slightly in excess of $4,000, which at the time of decedent's death had been on deposit in a certain bank, and seeking judgment against him, as administrator, adjudging that she was such owner and declaring that petitioner, as administrator, held such sum in trust for her; that such action was at issue and ready for trial; and "that a few days before the date of trial of said action counsel for defendant and counsel for plaintiff held a consultation and agreed that a reasonable and proper settlement of said action could and should be made by defendant, therein as administrator of the said estate, paying to plaintiff the sum of one thousand ($1,000.00) dollars." The petition asked that the court authorize petitioner as such administrator to settle said action for such sum. The court fixed a date for the hearing of the petition to compromise, and ordered a citation to issue to Kate Sidles, the sole heir of the decedent. The citation was regularly issued and served and notice of the hearing given by posting, and the court after hearing the petition made its order on July 25, 1932, by which petitioner herein was "authorized to pay to said Annie Gillespie the sum of one thousand ($1,000.00) dollars in full settlement of all claims and demands of Annie Gillespie against the said estate and said administrator" upon the receipt of a dismissal of her said action with prejudice and a signed satisfaction.

Thereafter, Cleveland R. Wright, an attorney at law, filed in the matter of such estate an affidavit reciting that he is the attorney for Annie Gillespie in the action against petitioner, as administrator of the estate of Margaret A. Jennings, deceased; the nature and purpose of said action; the fact that when said action was ready for trial he and counsel for petitioner had agreed to compromise it for the sum of $1,000; the proceedings had in the probate court terminating in the making of the order authorizing such compromise; repeated demands for the payment of such sum of $1,000, coupled with the tender of a dismissal with prejudice and a satisfaction as required by said order; and the failure and refusal of petitioner herein to pay the $1,000 or carry out the compromise. Affiant asked for the issuance of an order to show cause to petitioner herein, and for an order of the court directing him, as administrator, to pay to Annie Gillespie such sum of $1,000. A citation issued and petitioner herein appeared by demurrer attacking the jurisdiction of the court over the subject-matter. The order herein attacked followed, by which petitioner herein is "ordered and directed to pay to Annie Gillespie within five (5) days from date hereof the sum of one thousand dollars ($1,000.00) pursuant to his said agreement of compromise and the order of this court made on July 25, 1932, approving the same."

[1] Upon this proceeding we are not concerned with the propriety or impropriety of petitioner's conduct with regard to the compromise, nor with the correctness or incorrectness of the action of the trial court in making the order complained of, further than to determine the single question whether the respondent court had jurisdiction to make such order. 4 Cal. Jur. p. 1106.

[2] The probate court has the power to authorize the compromise of an adverse claim of a third party to the property of an estate. Probate Code, § 578, formerly Code Civ. Proc. § 1588, as construed in Merrill v. Bachelder, 123 Cal. 674, 676, 56 P. 618. The precise language of that Code section is: "A compromise may also be authorized by the court or judge when it appears to be just and for the best interest of the estate."

[3, 4] Nowhere in express terms is the probate court given the power, sought to be exercised by the order here under attack, of compelling the administrator to carry out and perform the provisions of a compromise so authorized. It is settled that ordinarily a probate court has no jurisdiction over the adverse claims of third persons to property in the estate (11 Cal. Jur. p. 262, § 42), and this for the reason "that either the person initiating the attack or the person resisting the attack is lacking in privity to the probate proceedings." Bauer v. Bauer, 201 Cal. 267, 271, 256 P. 820, 821. It is equally well settled that while the superior court, sitting in probate, is a court of general jurisdiction, "the proceedings being statutory in their nature, the court has no other powers than those given by statute and such incidental powers as pertain to it and enabling the court to exercise the jurisdiction conferred upon it, and can only determine those questions or matters arising in the estate which it is authorized to do. Thus, in the exercise of the powers conferred upon it, its jurisdiction is limited and special, or limited and statutory." 11 Cal. Jur. pp. 248, 249, § 34.

It is respondent's theory that the power to make the order under attack is incidental to and to be implied from, and necessary to carry out and make effective, the power of the court to authorize the administrator to make a compromise. It is the petitioner's contention that the jurisdiction of the court goes no further than the express language of the statute.

The language of the statute is permissive, and not mandatory: "A compromise *may* also be authorized by the court." In this connection it is worthy of note that in other proceedings where it was the purpose of the Legislature to make the action of the administrator mandatory and subject to the order of the court in dealings with strangers to the estate appropriate language is used to indicate that intention. Thus in the matter of the payment of approved claims the court is given the express power to order their payment (Probate Code, § 952); in the matter of carrying out a decedent's contracts to convey property the court is given a like express power (Probate Code, §§ 850–853); in the case of the mortgaging of property of the estate it is mandatory upon the administrator to execute the mortgage or deed of trust (Probate Code, § 833) which the court "shall make an order authorizing and directing" him to do (Probate Code, § 832); in the case of leases of property of the estate similar mandatory provisions are found (Probate Code, §§ 842, 843); and in the case of probate sales after the order confirming the sale is made "conveyances must thereupon be executed." Probate Code, § 786. See, also, Probate Code, §§ 802, 812.

It is thus apparent that in the several instances enumerated where the Legislature intended to give the court jurisdiction to compel action by the administrator in his dealings with strangers to the estate it used definite and appropriate language to expressly grant such power. In the case of compromises, however, no such language was used. The court is not given power to "direct" the making of compromises, but only to "authorize" them. It is not provided that compromises "shall" or "must" be made by the administrator when authorized by the court, but that they "may" be made. The internal evidence of the Probate Code indicates strongly that it was not the intention of the Legislature to confer upon courts sitting in probate the power or jurisdiction to compel action by the administrator in the case of compromises.

As petitioner well points out a compromise agreement, even though entered into, may be attacked for fraud in the inducement (5 Cal. Jur. p. 403, § 17) or may lack consideration where the claim which is the subject of the compromise is "wholly without foundation, and known to the claimant to be so." Union Collection Co. v. Buckman, 150 Cal. 159, 163, 88 P. 708, 710, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609; McClure v. McClure, 100 Cal. 339, 343, 34 P. 822. We are not called upon to speculate about the reasons which moved petitioner to refuse to carry out his compromise agreement. We are only concerned with the jurisdiction of the court in a probate proceeding to compel him to do so. If the court had jurisdiction to make such an order, it would necessarily have jurisdiction to try the issues raised by such defense as petitioner saw fit to make. But the jurisdiction to try purely collateral matters with strangers to the estate is not to be lightly inferred.

Respondent cites and strongly relies upon In re Davis' Estate, 27 Mont. 490, 71 P. 757. There a will contest was instituted over which the probate court had express statutory jurisdiction. A compromise was effected which was confirmed by decree of the court determining that the estate should be distributed to certain persons in designated proportions as determined by the compromise agreement. Thereafter the power of the court to order distribution in accordance with this decree was attacked on the ground that certain of the parties were strangers to the proceedings. The court very properly held that having jurisdiction of the parties and of the subject-matter it had jurisdiction to enter the consent decree pursuant to the agreement of compromise, and that such decree became the basis of administration so far as the distribution of the estate was concerned. This case is not apposite here. The respondent court had no jurisdiction of the person of Annie Gillespie, who was claiming adversely to the estate, nor of her action against petitioner as administrator, and could not acquire jurisdiction over either. It had only the limited jurisdiction to authorize petitioner to compromise with her.

[5] We conclude that a superior court sitting in probate has no jurisdiction over the matter of compromising a claim against an estate except that expressly given by the Probate Code, viz., to authorize the administrator to make a compromise.

The order of November 23, 1932, here under review, is accordingly annulled.

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220 Cal. 193

GORDON v. COHN et al.

COHN v. GORDON.

Sac. 4785.

Supreme Court of California.

Feb. 28, 1934.

1. Appeal and error 🔑1011(1).

Reviewing court cannot substitute its judgment for that of trial court's, where square conflict of evidence exists.

2. Fixtures 🔑7.

Linoleum supplied and cemented to floor by tenant, and awning for which tenant supplied fabric, *held* not "fixtures" which buyer of tenant's property could remove, where removal would necessitate removal of floor surface and other repairs to restore premises to normal condition.

[Ed. Note.—For other definitions of "Fixture," see Words & Phrases.]

In Bank.

Appeals from Superior Court, Napa County; Percy S. King, Judge.

Actions by Sam Gordon against Lewis W. Cohn and others and by Lewis W. Cohn against Sam Gordon. From judgments for plaintiff in first case and defendant in second case, defendants in first case and plaintiff in second case appeal.

Affirmed.

Frank M. Hultman, of San Francisco, for appellants.

Mervin C. Lernhart, of Napa, for respondent.

SEAWELL, Justice.

This appeal involves the ownership of property not exceeding in value the sum of $150.

Sam Gordon was the owner of a lot in the city of Napa upon which a one-story trade building was erected. Jack Fortney was a month-to-month tenant. During his occupancy for a period of something like a year, he covered the front area of the store with linoleum, amounting to fifty-two square yards, which was cemented to the pine floor, and he furnished the material for the awning which was attached to an iron frame set in the front of the building. Said iron frame was furnished by the owner of the building. It was fastened to the walls of the building by means of bolts and screws, and it was made to fit the particular space which it occupied. Fortney became insolvent in 1930, and assigned all his property to the secretary of the San Francisco Board of Trade for the benefit of his creditors. On August 5, 1930, said Board of Trade sold all of his said property, including the linoleum and awning, to Lewis W. Cohn. Fortney's lease expired on August 6. Cohn entered into possession on that day under a two weeks' lease which expired on August 20. The day before the lease expired Gordon filed an injunction suit temporarily restraining Cohn from removing said awning and linoleum from the building, which Cohn claimed the right to do on the ground that they were affixed to the premises for the purposes of trade and domestic use only, and could be removed without injury to the building. Cohn, in addition to his answer, filed a cross-complaint, alleging conversion. Said cross-complaint was thereafter stricken out. No complaint is made of the court's order striking out said cross-complaint. On September 19 Cohn filed a separate suit for conversion of said property, based on the same facts which would determine the question as to whether said property was movable, the solution of which was also determinative of the ownership of said property. The basic facts of the first case being conclusive as to the rights of the parties in the second action, it was stipulated that the two cases might be tried as one case and only one judgment need be entered. Judgment went for Gordon in both cases.

[1, 2] The question as to whether the linoleum and awning are movable fixtures is the only question in the case. Appellant Cohn (Haskins and Beier being merely agents of Cohn) bases his claim largely upon a letter written by Gordon's attorney to Cohn, dated August 7, in which said attorney notified Cohn that he was informed that he (Cohn) intended removing said fixtures from said premises upon the expiration of his two weeks' lease. In said letter Cohn's attention was called to the fact that the linoleum and awning were affixed to the real property, and, while Gordon had no objection to their removal, he insisted that "such removal be made without marring, or damaging his property in any way." The letter concluded with the following words: "The floor, walls and ceiling must be left in the same condition as before the fixtures were installed. In the event these premises are marred, or in any way damaged by removal of these fixtures, you will be held strictly accountable in damages." Cohn at no time gave the bond which plaintiff insisted he should give for the repair of any damage which would result from removing said awning and linoleum. It is apparent that Gordon was always of the belief that said linoleum and awning could not be removed without injury to the freehold. In fact, it was practically admitted by Cohn's expert witness that in some places the cement would probably have to be chipped from the floor by a sharp instrument. The question presented is solely one of fact. If the trial court believed the defendant and his witnesses, it would doubtless have decided the issue in defendant's favor. But, evidently being more impressed by plaintiff Gordon and his witnesses and with other matters which cannot be reproduced for our scrutiny, it decided for plaintiff. Where a square conflict of evidence exists, as in this case, we are not permitted to substitute our judgment for that of the trial court. There is ample evidence to sustain the finding that, in order to remove the cement and the stains which the laying of the cement upon the floor had caused, it would be necessary to remove the upper surface of the floor to the depth of a sixteenth or thirty-second fraction of an inch. While the removal of the surface of the floor was not great, it was nevertheless a reduction of the floor thickness, and the owner was not required to sacrifice any part of his building in an effort to restore it to its former use and attractiveness. As to the awning, defendant Cohn did not confine his claim to the fabric portion of the awning, but claimed the entire awning, the framework of which was furnished by the owner and fashioned to fit the

place it occupied. There was evidence to the effect that the bolts and screws, if removed, would make it difficult, if not impossible, to refasten another frame to the woodwork from which said screws and bolts were taken.

The judgment of the court, perpetually enjoining the defendant Cohn or his agents from removing said property from the premises of plaintiff Gordon and further decreeing that defendant Cohn take nothing against said Gordon, is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; LANGDON, J.; IRA F. THOMPSON, J.

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220 Cal. 220

PEOPLE v. HAYES et al.

Cr. 3713.

Supreme Court of California.

Feb. 28, 1934.

1. Criminal law 🔑1160.

Conviction, approved by trial judge in denying new trial, cannot be set aside for insufficiency of evidence unless it clearly appears that upon no hypothesis is there substantial evidence to support such conclusion.

2. Homicide 🔑253(1).

Evidence *held* to support conviction for first-degree murder.

3. Homicide 🔑305.

In murder prosecution, instruction that all persons concerned in commission of felony, whether they directly commit act or merely aid and abet its commission, can be prosecuted as principals, *held* not erroneous under evidence.

4. Criminal law 🔑778(1).

In murder prosecution, refusal of instruction that burden of proving defendant's presence at scene of murder devolved on prosecution *held* not error in view of statute relating to accessories (Pen. Code, §§ 31, 971).

5. Criminal law 🔑945(1).

In murder prosecution, denial of new trial for newly discovered evidence *held* not abuse of discretion, where result could not have been changed by such evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

William Dulin was convicted, with Fred Hayes, of murder of first degree, and he appeals.

Affirmed.

Prior opinion, 25 P.(2d) 995.

J. P. Guerin, of Los Angeles, and A. H. McConnell, of Long Beach, for appellant William Dulin.

Fred Hayes, pro. per.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

PER CURIAM.

A hearing was granted in this case, after decision by the District Court of Appeal, Second Appellate District, Division 2, in order to give full consideration to the contention of appellant Dulin that the verdict as to him was contrary to the evidence. Upon a careful examination of the whole record, we have reached the conclusion that the evidence was sufficient to sustain the verdict. We therefore adopt the opinion of Mr. Justice pro tem. ARCHBALD as the opinion of this court. It reads as follows:

Appellant and Fred Hayes were jointly charged with the murder of Mickey Erno, by an information filed on February 23, 1933. Both were found guilty of murder in the first degree, with recommendation of life imprisonment. From the judgments of conviction entered on said verdict and from the orders denying their respective motions for a new trial both defendants appealed. Subsequently, on motion of the Attorney General, the appeal of Hayes was dismissed and the judgment and order appealed from by him were affirmed under section 1253 of the Penal Code.

Appellant Dulin urges: (1) That the verdict is contrary to the evidence; (2) that the court misdirected the jury in matters of law; (3) that the court erred in giving as well as in refusing certain instructions; and (4) in refusing to grant him a new trial on the ground of newly discovered evidence.

The evidence shows that a body was found at about 9:50 p. m. of January 17, 1933, from five to ten feet from the north end of a bridge located on East Spring street, about one mile west of the town of Los Alamitos and three or four miles east of Long Beach. It was identified as the body of Mickey Erno and was still warm when found. Erno died as the result of gunshot wounds.

[1, 2] 1. Appellant contends that the evidence fails to connect him with the murder

charged. Without going into the evidence in detail, it is sufficient to say that the jury might well conclude therefrom that some time before the murder two men, one of whom was a friend of appellant for several years, brought a diamond ring to defendant Hayes to be disposed of; that Hayes gave it to Erno for disposition and that Erno and one "Socks" Brewer borrowed or raised a sum of money thereon and divided it between themselves; that Hayes thereafter spent some time looking for the ring and Brewer. That Dulin was interested with him appears from the testimony of the witness Mrs. Proctor, who went to Dulin's apartment the afternoon of the day of the murder to find Hayes, to see "if he had gotten Mickey's [Erno's] car." "Then," said she, "we drifted into a conversation about them using the car to find Socks, and they was trying to locate him on account of the ring." Dulin said he "didn't like the way things were going," and "I told him that I knew Mickey was trying to find him [Socks] * * * right away" and that Mickey "had been awful cross since this thing had come up"; that Dulin said there was "something crooked about the ring" and that "he didn't know what it was, didn't like the way Mickey was acting," and "asked me if I cared if he [Erno] went away." The evidence shows also that Hayes, Dulin, and Erno were together in Dulin's apartment from about 6:30 to about 8 o'clock the night of the murder, at which time one Josephine Bauer, who was there to meet a marine named Jess Holder, was taken by Hayes in Mrs. Proctor's car, which she brought over at the request of Hayes, to a street car, on which Mrs. Proctor and Miss Bauer went to the Ritz Hotel, conducted by Mrs. Proctor; that prior to that time a woman called "Nell," who lived with Dulin, was taken to the home of Dulin's mother; that Jess Holder found the three in Dulin's apartment when he arrived at about 7 o'clock p. m.; that he stayed twenty minutes or so and then left, Dulin giving him his key to the apartment, telling him to use it if he came back; that when Holder returned at about 9 o'clock p. m. he found a note telling him that Miss Bauer was at the Ritz Hotel. From the foregoing circumstances the jury could only conclude that the three men were left in the apartment and that Mrs. Proctor's car was in the street for their use. Hayes and Dulin appeared at the Ritz Hotel shortly after 10 o'clock. Hayes, a nervous individual and evidently more nervous than usual, came in first and then called Dulin in. Miss Bauer was taken by the two to Dulin's mother's home, where "Nell" put on her coat and went with the men to the Dulin apartment. The following Saturday evening Dulin came to Mrs. Proctor's and wanted to know if she was "for Shorty" (Hayes), who had been placed under arrest. He told her they were trying to get a car to go down to see Jess Holder at San Diego, to "prove an alibi"—prove that "Shorty" was with Jess, spending the evening in question at "speakeasies." At that time, Mrs. Proctor testified, she said to Dulin:

"Well, Bill, I would rather you told them that you boys had my car; and he said: 'No, don't tell them we had your car. Don't tell them about your car.' I said, 'Well, if Shorty pleads guilty he will tell them that he had my car,' and he said: 'Shorty will never plead guilty. He will never talk.' * * * I kept on insisting that they should tell them they had my car that night.

"Q. What night? A. On the night of the 17th"—the night of the murder.

In addition to the foregoing, some cartridges were found in a vest belonging to Dulin, which corresponded in caliber, and the lead bullets as to color and character of grease in the cannelures, with those taken from Erno's body.

Without going further into the evidence we will say that in our opinion it sufficiently connects appellant with Hayes and Erno at the time the murder must have been committed, and supports the conclusion that, believing Erno had "double crossed" them in the disposition of the ring they evened things up in their own way. The jury having determined the facts in the first instance by their verdict, which was approved by the trial judge when he denied the motion for a new trial, we cannot set it aside on appeal on the ground urged here, unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support such conclusion. People v. Tom Woo, 181 Cal. 315, 184 P. 389. We cannot so conclude, after a careful examination of all the evidence.

[3] 2. In view of the evidence in this case we see no error in giving the instruction to the effect that all persons concerned in the commission of a felony, whether they directly commit the act or merely aid and abet its commission, can be prosecuted, tried, and punished as principals. If there had been no evidence tending in the slightest degree to establish a confederation between Hayes and Dulin to do the act, it would have been error to give such instruction. People v. Silva, 48 Cal. App. 728, 192 P. 330.

[4] 3. Appellant complains of the refusal of the court to give a requested instruction to the effect that the burden of proving the presence of himself at the scene of the murder devolved upon the prosecution, and that the burden was not upon him to prove that he was not there. In our opinion such requested instruction conflicts with sections 31 and 971 of the Penal Code, stating (a) who are principals and (b) abrogating the distinction between an accessory before the fact and a principal in felony cases, respectively. The court properly instructed the jury as to the burden of proof, the presumption of innocence and reasonable doubt, and in our opinion the instruction requested was properly refused. And in view of what we have heretofore said, no error was committed in refusing to direct a verdict in favor of appellant.

[5] 4. On the motion for a new trial the affidavit of defendant Hayes was presented as newly discovered evidence. In this affidavit Hayes in effect assumed all responsibility for the perpetration of the murder, stating that he killed Erno on the bridge and then dropped the body over the side. There were counter affidavits from which the court could well conclude that this latter statement was impossible. The court also heard all the evidence, including that of Hayes, and was justified in ruling that the result of the trial could not have been changed if Hayes had so testified instead of telling the story he did. We see no abuse of discretion in denying the motion.

Judgment and order affirmed.

220 Cal. 166

PEOPLE v. HALL. *

Cr. 3652.

Supreme Court of California.
Feb. 28, 1934.

Rehearing Denied March 29, 1934.

1. Criminal law 🔑134(4).

Motion for change of venue in murder prosecution because of lynching threats *held* properly denied, where sheriff and district attorney filed affidavits averring that there had been no threats or demonstrations, and that accused would and could be assured of fair trial.

2. Criminal law 🔑590(1).

Denial of continuance in murder prosecution *held* not abuse of discretion, where accused was required to stand trial 18 days subsequent to his arraignment.

3. Criminal law 🔑286.

Where, upon arraignment, accused remained mute and court ordered plea of not guilty entered, rejecting plea of not guilty by reason of insanity at time of trial on ground that plea came too late *held* not error (St. 1927, p. 1148, amending Pen. Code, § 1016; Pen. Code, § 1024).

4. Criminal law 🔑286.

Accused, to avail himself of defense of insanity, must seasonably offer such plea.

5. Indictment and information 🔑161(9).

Where, on arraignment in murder prosecution, plea of not guilty was entered because accused remained mute, and thereafter amended information was filed also charging accused with prior felony conviction, which accused admitted, motion to dismiss prosecution on ground that no issue had been joined under amended information *held* properly denied, where homicide charge in amended information was identical with homicide charge in original information (St. 1927, p. 1148, amending Pen. Code, § 1016; Pen. Code, § 1024).

6. Jury 🔑103(6).

In murder prosecution, accused's challenges for cause as to certain jurors on ground that they entertained opinion requiring evidence to remove *held* properly denied where, upon court's subsequent examination of jurors, it appeared that they would be governed solely by evidence and instructions.

7. Homicide 🔑166(4).

In murder prosecution, federal officer's testimony that prior to homicide he was knocked unconscious, imprisoned, and unwillingly transported in automobile by accused and his confederate *held* properly admitted where limited to purpose of showing motive for murder.

8. Homicide 🔑171(3).

In murder prosecution, that evidence that accused had knocked unconscious, imprisoned, and unwillingly transported federal officer in automobile tended to show commission of separate offense, and prejudiced accused before jury, did not make evidence inadmissible for purpose of showing motive.

9. Criminal law 🔑778(11).

Instruction that jury might consider accused's flight after shooting in determining guilt *held* proper.

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*Rehearing denied 30 P.(2d) 996.

10. Criminal law ⚷829(5).

In prosecution for murder of state traffic officer, requested instructions dealing with authority of state traffic officers and of peace officers generally to arrest without warrant *held* properly refused, where entire subject was fully covered by instructions given (Pen. Code, §§ 834–837).

In Bank.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

George Hall was convicted of first degree murder, and he appeals.

Affirmed.

S. Luke Howe and O. F. Meldon, both of Sacramento, and William V. Cowan, of Yreka, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

WASTE, Chief Justice.

Defendant appeals from a judgment of conviction carrying the extreme penalty and from orders respectively denying motions for new trial and in arrest of judgment.

We have exhaustively examined the record in this case, and unhesitatingly declare that the evidence discloses a ruthless and cold-blooded homicide justifiably characterized by the jury in its verdict as murder in the first degree. On March 8, 1933, the witness Ballinger, a United States customs operator or patrol inspector, had occasion to search an automobile in Seattle Heights, which is approximately fifteen miles north of the city of Seattle in the state of Washington. Upon such search he discovered two Thompson submachine guns and six automatic pistols. These weapons were new and still in the factory cartons. As he was about to take the driver of the car into custody, he was approached from the rear by the defendant herein and rendered unconscious by several blows on the head. When he regained consciousness, he found himself handcuffed and locked in the luggage compartment of a moving automobile. Several hours later the car was stopped and the witness removed from his place of imprisonment. A conversation followed between defendant and his companion, referred to throughout the trial as John Doe, as to the disposition to be made of the witness, the defendant saying, "Let's 'bump' him." This suggestion was rejected and the witness again bundled into the luggage compartment of the car. After several more hours of driving, the car was again stopped, and, under cover of darkness and while blindfolded, the witness was removed to another car accompanied by John Doe. He was later left handcuffed to a tree. The defendant proceeded on alone. Later he picked up a hitch-hiker who was with him at the time of the homicide and who testified upon the trial for the prosecution. As the defendant's car entered the city of Yreka in Siskiyou county, shortly after 7 o'clock on the evening of March 10, 1933, it was pursued by two automobiles containing the decedent, a state traffic officer, the sheriff, and two of the latter's deputies, these officers having in the meantime received information over the teletype that defendant was approaching. The sheriff's car, with its siren screeching, raced alongside of the defendant's car, and defendant was commanded to stop. In disregard of this command, defendant increased the speed of his car in an effort to elude his pursuers. After several unsuccessful attempts to stop defendant's car by turning off the ignition, the hitch-hiker, who had previously innocently joined defendant, succeeded in bringing the car to a halt by pulling on the emergency brake. The decedent thereupon came alongside of defendant's car and informed him that the sheriff was approaching. At the time decedent was wearing his highway patrol officer's badge in plain view on the outside of his leather jacket and was also wearing his insignia on his cap. Without a moment's hesitation, and in the immediate view and presence of his hitch-hiker companion, the defendant pulled out an automatic pistol and shot the decedent. He died almost instantly. In the shooting affray that followed between defendant and the other officers, a deputy sheriff was also shot dead. The defendant was wounded, and after a short chase and struggle was taken into custody. Upon the trial of the cause, defendant took the stand in his own defense and admitted the shooting. He testified, however, that he did not know that decedent was an officer, and that he shot him because he thought decedent was reaching for a gun. The jury rejected this defense, and properly so, in view of the companion hitch-hiker's testimony that he had informed defendant prior to stopping the car that the pursuers were officers of the law. This witness also testified that the only movement made by the decedent at the time was to motion the defendant back into the car.

[1] We will now take up defendant's several assignments of error. It is first urged that the court below erred in denying his mo-

tion for change of venue. The motion was supported by two affidavits, signed, respectively, by the defendant and a resident of Siskiyou county, wherein it was averred that the decedent was well-known and exceedingly popular in the county, and that his demise had given rise to lynching threats against the offender. In opposition thereto, the sheriff and the district attorney filed affidavits wherein each averred that, while the homicide had caused some excitement in the county, there had been no threats or demonstrations against the defendant, each affiant giving it as his opinion that the defendant would and could be assured of a fair and impartial trial. Under the circumstances, and because of its proximity to and familiarity with conditions prevailing in the county, we are not prepared to say that the trial court abused the discretion vested in it when it denied the motion for change of venue. People v. Congleton, 44 Cal. 92, 95; People v. Goldenson, 76 Cal. 328, 337–339, 19 P. 161.

[2] Nor do we perceive any abuse of discretion in the denial of defendant's motion for a continuance of the trial. People v. Goldenson, supra. The record is silent as to the grounds urged for the requested continuance. It appears, however, that defendant was arraigned on March 16, 1933, and "by agreement of respective counsel the court fixed Monday, April 3rd, 1933 * * * as the time for trial." It was not unreasonable on the part of the court to require defendant to stand trial on the agreed date, eighteen days subsequent to his arraignment.

[3, 4] At the time of his arraignment, defendant, who was accompanied by counsel, remained mute, whereupon the court below directed the clerk to enter a plea of "not guilty" on behalf of defendant. Such a plea was entered. Subsequently, and at the inception of the trial, counsel for defendant tendered a plea of "not guilty by reason of insanity" in addition to the plea on the general issue entered at the time of defendant's arraignment, contending that, since the separation of these two pleas (St. 1927, p. 1148), it is incumbent on the court to direct the entry of both pleas when a defendant stands mute upon his arraignment. The court rejected the tendered plea on the ground it came too late. We find no error in this ruling. Had the Legislature intended the result contended for by defendant, it undoubtedly would have amended section 1024 of the Penal Code when in 1927 it provided for a separation of the two pleas above mentioned. Since 1880 the cited section has provided that: "If the defendant refuses to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered." The court below fully complied with this section. No provision is therein made for the entry of a plea of "not guilty by reason of insanity." Moreover, section 1016 of the same Code declares that: "A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged. * * *" In other words, for a defendant to avail himself of the defense of insanity, it is essential that he seasonably offer such a plea.

[5] As already stated, the defendant was arraigned on March 16, 1933, at which time the court, by reason of defendant remaining mute, directed the entry of a plea of "not guilty." Thereafter, and on March 28, 1933, an amended information was filed. So far as the homicide of which defendant stands convicted is concerned, the charging part of the amended information is identical with the original. There was added, however, a reference to the suffering by defendant of a prior felony conviction. On March 29, 1933, the defendant was arraigned on the amended information at which time he admitted having suffered the prior felony conviction. No other or additional plea was offered or received. At the conclusion of the prosecution's case, defendant moved for a dismissal on the ground that no issue had been joined under the amended information. The motion was properly denied. The homicide charge was identical in the original and amended informations. There was no necessity, therefore, for a repetition of the plea on the general issue. The cause proceeded to trial, and defendant at all times received the benefit of a plea of "not guilty." It follows that defendant's substantial rights suffered no detriment by reason of the failure to repeat the plea. People v. Thal, 61 Cal. App. 48, 51, 52, 214 P. 296; People v. White, 47 Cal. App. 400, 403, 190 P. 821; People v. Tomsky, 20 Cal. App. 672, 678–686, 130 P. 184.

[6] The point is made that the court erred in denying defendant's challenges for cause as to certain jurors. On this point the defendant's brief states that: "Inasmuch as the reporter's transcript omits the proceedings relating to the impanelment of the jury, appellant must reserve his presentation of this point until that part of the record is brought up under an order of this court and proceedings which are to be instituted for that purpose." Defendant has not instituted proceedings for diminution of the record, and consequently we have not now before us that

part of the record having to do with the selection of the jury. Inspection of the record discloses, however, that there has been included therein the voir dire examination of two of the jurors challenged for cause by the defendant. Each of said challenges was, in our opinion, properly denied. While it is true that the early portion of counsel's examination of these particular jurors tends to disclose some confusion in their respective minds and tends to indicate that each entertained an opinion requiring evidence to remove, the situation was materially clarified by the trial court's subsequent examination of said jurors at the conclusion of which it was immediately apparent that as veniremen they would enter upon a consideration of the cause with open minds, and would be governed solely by the evidence adduced and the court's instructions on the law. Nowhere does it appear that defendant was required to accept an objectionable juror. On the contrary, the transcript indicates that both sides were satisfied with the jury finally selected to try the cause.

[7, 8] It is next urged that the court erred in admitting the testimony of the witness Ballinger, the federal officer, who testified that shortly prior to the homicide he was knocked unconscious, imprisoned, and unwillingly transported in an automobile by the defendant and his confederate. Defendant objected to the introduction of this evidence as being too remote and as tending to establish the commission of a separate and independent offense. The evidence was offered by the prosecution and admitted by the court for the limited purpose of showing motive. The jury was instructed that it was to be considered for that purpose alone. It was admissible for the purpose designated, as it tended to establish that in perpetrating the homicide it was the defendant's desire to avoid arrest for the prior offense committed against the witness Ballinger. That the evidence complained of tended to show the commission of such prior and separate offense, or tended to prejudice the defendant before the jury, did not make it inadmissible. People v. Rocco, 209 Cal. 68, 71, 72, 285 P. 704; People v. Nakis, 184 Cal. 105, 114, 193 P. 92; People v. Walters, 98 Cal. 138, 141, 32 P. 864.

[9] Defendant complains of the instruction by which the jury was informed of the purpose for which this particular evidence was admitted. The instruction contains a correct statement of the law, and is not objectionable in the particulars urged by defendant. Nor do we find any error in the giving of the instruction on flight. As already related, the defendant immediately fled the scene of the shooting. He was captured only after a chase and physical encounter. Under the authorities, it was proper to inform the jury that it might consider this fact in determining defendant's guilt or innocence.

[10] Defendant next urges that the court below erred in refusing three requested instructions having to do with the authority of state traffic officers and with the authority, or lack of authority, of peace officers generally to arrest without a warrant. We find no error in the court's refusal to give the proposed instructions. The entire subject was fully and properly covered by five instructions given to the jury and appearing at pages 373–375 of the reporter's transcript. Sections 834–837, Pen. Code.

What has been said sufficiently answers defendant's contentions on appeal. It follows that the judgment and orders appealed from must be, and each is, affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; IRA F. THOMPSON, J.; SHENK, J.; SEAWELL, J.

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220 Cal. 185

CURTIS v. KASTNER.

L. A. 14552.

Supreme Court of California.

Feb. 28, 1934.

1. Municipal corporations 🔑667.

Eaves and rafters of garage, projecting into alley at height between five and six feet above ground, *held* to constitute obstruction in nature of "public nuisance" (Pen. Code, § 370; Civ. Code, § 3479; Pol. Code, §§ 2731–2735).

[Ed. Note.—For other definitions of "Public or Common Nuisance," see Words & Phrases.]

2. Municipal corporations 🔑669.

Statutory prohibition against unlawfully obstructing free passage or use of street or highway *held* applicable to public alleys (Civ. Code, § 3479; Pen. Code, § 370; Pol. Code, § 2618).

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Nuisance 🔑1.

Liability for personal injuries occasioned by nuisance may exist without negligence.

4. Municipal corporations 🔑667.

Where eaves and rafters of garage, projecting into alley, constituted public nuisance, fact that owner of garage could not have anticipated injuries therefrom *held* not to defeat liability for injuries, where nuisance existed irrespective of negligence (Pen. Code, § 370; Civ. Code, § 3479; Pol. Code, §§ 2731–2735).

5. Municipal corporations 🔑667.

Contributory negligence of person who sustained injuries when head struck rafter projecting from garage into alley, notwithstanding projecting eaves and rafters constituted public nuisance irrespective of negligence, *held* defense to action for injuries (Pen. Code, § 370; Civ. Code, § 3479; Pol. Code, §§ 2731–2735).

6. Municipal corporations 🔑698.

In action for injuries sustained through public nuisance consisting of eaves and rafters projecting from garage into alley and between five and six feet above ground, contributory negligence of plaintiff at time forehead struck projecting rafter *held* question for jury (Pen. Code, § 370; Civ. Code, § 3479; Pol. Code, §§ 2731–2735).

7. Negligence 🔑117.

Where plaintiff's contributory negligence appears from evidence offered in his behalf, plea is available to defense, although not pleaded in answer.

In Bank.

Appeal from Superior Court, San Diego County; Clarence Harden, Judge.

Action by Gladys Curtis against Ella I. Kastner. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

Prior opinion, 25 P.(2d) 270.

Edward T. Lannon, of San Diego, for appellant.

Chester C. Kempley, of Los Angeles, for respondent.

SEAWELL, Justice.

In this action the trial court, sitting without a jury, found that the injury for which plaintiff sought to recover damages was proximately caused by her negligence and failure to exercise ordinary care for her own safety. Plaintiff struck her head with great violence against a projecting rafter of defendant's garage, which rafter she failed to observe, and thereby sustained injuries to her neck and spine, including a chip fracture of the fifth cervical vertebra.

Both plaintiff and defendant reside in the block bounded by Torrey road, Prospect street, Virginia way, and Exchange street in La Jolla Park, city of San Diego, this state. Said block is bisected by a paved alley twenty feet in width, known as Bluebird lane, which runs from Prospect street to Exchange street. Plaintiff resides on Virginia way in the middle of the block. Defendant's residence is at the corner of Torrey road and Prospect street, and fronts on Torrey road. Defendant's garage, at the rear of her lot, faces Prospect street and is placed back some distance from the property line on said street. The side wall of the garage building is inside defendant's rear property line on said alley, but the sloping eaves and rafters of the garage, extending from a center ridge pole, project beyond the side wall of the garage and into the alley approximately fifteen inches at the front of the garage and seventeen inches at the rear. The edge of the roof is at a height of five feet seven and three-quarters inches above the pavement of Bluebird lane. The rafters which support the roof are plainly visible beneath it. The thirteen rafters, which are of six-inch lumber, are sawed off at a sharp angle as they reach the edge of the roof, with the result that each board terminates with a sharp point. This point is six inches lower than the roof, and projects slightly beyond the edge of the roof. The pointed end of the first rafter at the front of the garage is at a height of five feet one and three-quarters inches above the pavement of the alley.

Bluebird lane is used in the manner in which rear alleyways are ordinarily used. Residents of the block drive in and out of their garages via the alley, and it is generally used by tradesmen. Telephone poles are placed along the side lines and garbage containers commonly stand in the alley. It has no sidewalks.

Plaintiff had resided in the block approximately six weeks before she sustained the injury which gave rise to the present action. On July 15, 1928, at about 3:30 o'clock in the afternoon, she and her husband and niece had driven out through the alleyway onto Prospect street, with the intention of taking the niece, a visitor from the East, on a sightseeing drive. Plaintiff observed that their dog, a puppy, was following the car. She testified: "We stopped, I got out of the machine, went around and back of the machine to get the dog; we hadn't had him very long, he was quite a puppy. I was the only person he would follow, so I couldn't catch him, so I kept on following him along, and jollying him along, and I ran so he would run with me, and I ran along the alley with my head down, looking at him." As she was running along with her eyes focused on the puppy, who was playfully "jumping and prancing about," she failed to observe the sharp edge of the first projecting rafter and "crashed" into it with great force, causing the injuries complained of. Plaintiff was five feet nine inches in height and struck the rafter on her forehead. Her head and neck were jerked back suddenly with great force. A physician who treated her testified that the chip fracture of the fifth cervical vertebra was caused by a sudden hyperextension of the neck tearing the bone loose from strong ligaments.

The trial court denied defendant's motion for a nonsuit made on the ground that the injury was proximately caused by plaintiff's own negligence, but thereafter found against plaintiff on this issue. Although denying plaintiff recovery, the court found that she had expended $975 for nursing and medical attention, and that she was further damaged in the sum of $2,500. The court further found that defendant could not have anticipated that such an accident would result from the overhanging eaves.

[1, 2] The projecting eaves and rafters constituted an obstruction to the alleyway in the nature of a nuisance. By section 3479, Civil Code, and section 370, Penal Code, anything which unlawfully obstructs the free passage or use, in the customary manner, of any street or highway, is a nuisance. No contention is made that Bluebird lane is not an alley dedicated to public use. The prohibitions against unlawfully obstructing public streets and highways apply to public alleys. Section 2618, Pol. Code; Smith v. Smith, 21 Cal. App. 378, 131 P. 890. Eaves and rafters which project into a public street at a height between five and six feet above the street constitute a nuisance which the public authorities may abate as such. Sections 2731–2735, Pol. Code.

[3, 4] Although frequently negligence and nuisance coexist, as where negligent acts create a nuisance, a nuisance and liability for injuries occasioned thereby may exist without negligence. Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A. L. R. 833; Snow v. Marian Realty Co., 212 Cal. 622, 299 P. 720. The obstruction in the case herein is per se a wrongful encroachment on a public street. The court's finding that defendant could not have anticipated that an accident would result from the projecting eaves and rafters might relieve her were negligence the basis of plaintiff's right of recovery, but it does not defeat liability arising from a condition which constitutes a nuisance, irrespective of negligence in its creation or maintenance. In Stockton Automobile Co. v. Confer, 154 Cal. 402, 405, 97 P. 881, 883, it is declared that "an individual who erects an unlawful obstruction to the free use of a highway, in its nature a nuisance, by reason of his wrongful act, is charged in law as an insurer against accident to a person properly traveling the highway and meeting injury by reason of such unlawful obstruction"—citing Barry v. Terkildsen, 72 Cal. 254, 13 P. 657, 1 Am. St. Rep. 55; Colgrove v. Smith, 102 Cal. 220, 36 P. 411, 27 L. R. A. 590; Spence v. Schultz, 103 Cal. 208, 37 P. 220.

[5] In the case herein the court holds that the proximate cause of plaintiff's injury was her own negligence and failure to exercise due care for her safety. There are statements in the decisions of other jurisdictions that contributory negligence is not a defense to an action based on nuisance. This doctrine seems to have had its origin in certain early New York cases. As thus broadly stated, it has been repudiated by the New York Court of Appeals in McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1. See, also, O'Neill v. City of Port Jervis, 253 N. Y. 423, 171 N. E. 694. In the McFarlane Case the plaintiff stumbled and fell upon a projection from the curb of a public street, formed when the cement of the pavement melted and ran. The trial court instructed the jury that contributory negligence, though proved, would not avail as a defense. Mr. Justice Cardozo, in writing the opinion reversing the trial court, pointed out that, although the primary meaning of nuisance does not involve the element of negligence as one of its essential factors, situations arise where what was lawful in its origin may become a nuisance by negligence in maintenance, as where there is negligence in covering a coalhole built under license. Where the nuisance is of this type, that is, where it has its origin in negligence, a plaintiff may not avert the consequences of his own contributory negligence. The New York court held that the condition of the curb constituted a nuisance of this class. It had its origin in the negligent manner in which the pavement was constructed.

Although the New York court expressly confined its decision to nuisances having their origin in negligence, for the reason that nothing more was called for by the facts, the court was careful to make it plain that in thus limiting its ruling it did not hold by implication that, where the nuisance was absolute, as in the action brought by Mrs. Curtis, plaintiff herein, the negligence of the traveler on the street was of no account. By way of dictum the court suggests that as to all classes of nuisances the test may be whether plaintiff has exercised due care to avoid the consequences of the danger.

The question whether failure of the plaintiff to exercise due care to avoid injury is a defense in an action for personal injuries resulting from a street obstruction or excavation which constitutes a nuisance does not seem to have been decided in this state, although in several cases the availability of the defense is assumed. Western States, etc., Co. v. Bayside L. Co., 182 Cal. 140, 187 P. 735; Barry v. Terkildsen, supra, page 256 of 72 Cal., 13 P. 657, 1 Am. St. Rep. 55; Spence v. Schultz, supra, page 211 of 103 Cal., 37 P. 220; Williams v. S. F., etc., Ry. Co., 6 Cal. App. 715, 725, 93 P. 122; McKune v. Santa Clara, V. M. & L. Co., 110 Cal. 480, 42 P. 980; Michael v. Key System Transit Co., 98 Cal. App. 189, 194, 276 P. 591; Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078; County of Alameda v. Tieslau, 44 Cal. App. 332, 186 P. 398. Upon an analysis of the cases in other jurisdictions cited for the doctrine that contributory negligence is not a defense to actions based on nuisance, it will be found that in the main they do not bear out the proposition that a traveler may recover damages for injury arising from a street nuisance notwithstanding he has failed to exercise due care for his own safety.

The statement that contributory negligence is not a defense has frequently been made where acts of the plaintiff as well as acts of the defendant contributed to the creation or maintenance of the nuisance. Thus in Bowman v. Humphrey, 132 Iowa, 234, 109 N. W. 714, 6 L. R. A. (N. S.) 1111, 11 Ann. Cas. 131, the court's broad statement that the doctrine of contributory negligence has no proper application to an action to recover damages for nuisance was applied to a situation where plaintiff sued to recover damages from defendant for fouling a stream. The court held that the circumstance that plaintiff was also casting unwholesome material into the stream would not defeat his right to recover for so much of the damage as was fairly attributable to the defendant's wrong. If, wholly independent of plaintiff's acts or omissions, the effect of defendant's acts or omissions is to injure plaintiff, he may recover for such injury. A question of apportioning the damage is involved in these cases. See Correll v. City of Cedar Rapids, 110 Iowa, 333, 81 N. W. 724; Randolf v. Town of Bloomfield, 77 Iowa, 50, 41 N. W. 562, 14 Am. St. Rep. 268; Philadelphia & R. R. Co. v. Smith (C. C. A.) 64 F. 679, 27 L. R. A. 131. We do not herein approve the rule of said cases (see Carter v. Chotiner, 210 Cal. 288, 291, 291 P. 577), but merely cite them for the light they throw on the basis and extent of the doctrine that contributory negligence is not a defense in actions founded on nuisance.

The cases holding that plaintiff is not under a duty to minimize the nuisance, as by keeping his windows closed against noisome smells, or by filtering polluted water, have also been cited as involving an application of the rule that contributory negligence is not a defense, as have the cases which lay down the rule that a complainant is not barred from recovery where he purchases property or establishes his residence in the vicinity of a pre-existing nuisance. Bowman v. Humphrey, supra, and note in 11 Ann. Cas. 134, appended thereto.

In our own decision in Kafka v. Bozio, supra, it is held that, in an action to abate a nuisance, the fact that plaintiff has suffered property damage therefrom to which his own negligence contributed is no defense against the remedy by abatement, since plaintiff's negligence gives defendant no right to continue to maintain a nuisance. It was expressly stated in that case that this court was not to be understood as deciding that, if plaintiff's negligence proximately contributed to injure his building, it would not be a defense and bar to an action for damages for such injury.

Cases involving these several applications of the doctrine that contributory negligence is not a defense in nuisance actions are collected in a note in 57 A. L. R. 7, appended to the report of the decision of the New York Court of Appeals in McFarlane v. City of Niagara Falls, supra. From our examination of the cases therein cited and others, we are unable to find that there exists, either at common law or in modern jurisprudence, a well-defined rule that one who sustains injury from a street obstruction or excavation which constitutes a nuisance may recover notwithstanding his failure to exercise due care for his own safety. Where the nuisance has its origin in negligence, as where a street curb is constructed and maintained by a city with a dangerous projection, or where a pile of building materials or an excavation created under license is maintained in a negligent and improper manner, McFarlane v. City of Niagara Falls, supra, the leading case on the subject, expressly holds that one who sustains injury by reason of his own failure to exercise due care cannot recover. We are of the view that the same rule should prevail where the nuisance is absolute and exists without regard to negligent acts or omissions of the defendant. Indeed, there may be stronger reasons in a given case for relieving the defendant of liability for injuries to which the plaintiff's conduct proximately contributed in the case of an absolute nuisance, where defendant is liable, although he may have been free from negligence, than where the nuisance arises from negligent acts or omissions. In the case herein the garage was already built when defendant acquired the property. The court found that defendant could not have anticipated that an accident would result. She alleged in her answer that she did not know that the eaves projected beyond her property line, and this belief is reasonable, especially in view of the fact that the line of fences and curbs along the alley is broken and somewhat irregular.

[6] In the appeal in the instant case, plaintiff contends that contributory negligence, if available as a defense in the action herein, would not bar her recovery on the record presented. Her contention is that the evidence demonstrates, as a matter of law, her freedom from contributory negligence. On this issue the trial court found against her. The court found that there was no sufficient excuse or reason for her failure to observe the garage and to avoid striking her head against the roof thereof. There was testimony of one witness to the effect that plaintiff had admitted that she struck her head while in the driveway in front of defendant's garage and on defendant's property, rather than in the alleyway. But, in view of the court's finding that she struck her head "while walking and running along said alleyway," this testimony must be deemed to have been rejected. Nevertheless, we are of the view that, in the circumstances related, the question of whether plaintiff was guilty of contributory negligence was for the jury, or, in the absence of a jury, for the trial court, and that as an appellate court we cannot overturn the decision without usurping the function of the trial court.

[7] The pleadings were sufficient to raise the issue of contributory negligence. Hoffman v. S. P. Co., 84 Cal. App. 337, 344, 258 P. 397. Furthermore, where the plaintiff's contributory negligence appears from the evidence offered in his behalf, the plea is available to the defense, although not pleaded in the answer. Hoffman v. S. P. Co., supra; Hoy v. Tornich, 199 Cal. 545, 551, 250 P. 565; Queirolo v. P. G. & E. Co., 114 Cal. App. 610, 614, 300 P. 487; Gundry v. Atchison, T. & S. F. Ry. Co., 104 Cal. App. 753, 762, 286 P. 718.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; IRA F. THOMPSON, J.; SHENK, J.

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220 Cal. 295

CRUM et ux. v. MT. SHASTA POWER CORPORATION.

ALBAUGH v. SAME.

Sac. 4752.

Supreme Court of California.
March 1, 1934.

Rehearing Denied March 30, 1934.

1. Waters and water courses 🔑84.

Riparian owners cannot secure apportionment of waters of river, to entire flow of which public use has attached, because of power company's excessive use of waters in exercise of its riparian rights.

2. Waters and water courses 🔑39.

Lands beside pool above mouth of river flowing into it *held* riparian to such river during low-water times, when bulk of water therefrom remained in pool, though there was no current therein, but not during flood water season.

3. Appeal and error 🔑1099(3).

Appellate court's opinion on appeal from judgment awarding damages for diversion of water of river that plaintiffs' lands were riparian thereto in summer months *held* law of case on subsequent appeal.

4. Waters and water courses 🔑46.

Riparian owner may use water to propel machinery, subject to lower riparians' domestic uses, but cannot divert water entirely around land of opposite riparian owner, if resulting in substantial damage to latter.

5. Waters and water courses 🔑78.
Owners of lands beside pool above mouth of river flowing into it could recover damages for power company's diversion of waters of river during low water times when they remained impounded in pool.

6. Waters and water courses 🔑84.
Riparian owner cannot recover damages for diversion of water of stream even as against appropriator without showing substantial, actual, or prospective damage; mere interference with his usufructuary title to water being insufficient (Const. art. 14, § 3).

7. Waters and water courses 🔑87.
Hydro-electric power company's agreement, without railroad commission's consent, to maintain level of pool by releasing waters of river, substantially entire flow of which it had diverted and devoted to public use, was beyond its power to make and hence properly excluded from jury's consideration in action against it by owners of lands adjacent to pool for damages (St. 1927, p. 78, § 51).

8. Public service commissions 🔑6.
Public utility cannot convey its property, dedicated to public use, without railroad commission's consent (St. 1927, p. 78, § 51).

9. Waters and water courses 🔑87.
Guaranty by hydro-electric power company, diverting waters of river flowing into pool, to maintain dam below mouth thereof, *held* within its power to make and hence admissible as evidence in action by owners of lands adjacent to pool for damages.

10. Waters and water courses 🔑84.
Owners of lands beside pool could not recover damages for diminution in quantity of water therein because of power company's diversion of water of river flowing into pool, where it restored natural level thereof by constructing dam.

11. Waters and water courses 🔑64.
Riparian owner is entitled, even as against another riparian, to substantially unpolluted stream, as well as undiminished flow of water.

12. Waters and water courses 🔑87.
Evidence *held* to show that quality of water in pool was materially impaired by power company's diversion of water of river flowing into it, so as to entitle riparian owners to recover damages.

13. Appeal and error 🔑1099(7).
Appellate court's statement in opinion on appeal from judgments awarding damages for diversion of water of river flowing into pool that there was no substantial evidence of pollution of pool thereby *held* not law of case, in view of substantially stronger evidence of pollution on subsequent trial.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Consolidated actions by Merton Crum and wife and by William J. Albaugh against the Mt. Shasta Power Corporation. Judgments for plaintiffs, and defendant appeals.

Reversed and remanded for a new trial on the issue of damages.

For prior opinion, see 24 P.(2d) 801.

See, also, 124 Cal. App. 90, 779, 12 P.(2d) 134, 137.

Rehearing denied; PRESTON and LANGDON, JJ., disqualified.

William B. Bosley, Thomas J. Straub, Athearn, Chandler & Farmer, and Frank R. Devlin, all of San Francisco, and Chenoweth & Leininger, of Redding, for appellant.

Jesse W. Carter, of Redding, and Arthur C. Huston, of Woodland (Annette Abbott Adams, of San Francisco, of counsel), for respondents.

PER CURIAM.

[1] A rehearing was granted in this case to give further consideration to two points discussed in our former opinion. The first point has to do with the proper interpretation of the case of Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.(2d) 706, and the application of the rule of that case to the facts of this case. Upon further consideration we are of the opinion that the discussion of the Joerger Case was not necessary to the opinion and may be stricken therefrom without in any way affecting the result. The opinions of the District Courts of Appeal [124 Cal. App. 90, 779, 12 P.(2d) 134, 137] in these cases have clearly established the law of the case to be that the plaintiffs are entitled to damages. To the discussion contained in our former opinion on this point, we add the following observation: Assuming, but not deciding, that defendant's use of the water is in the exercise of its riparian rights, but constitutes an excessive use of the waters of Fall river, plaintiff could not, as contended by defendant, secure an apportionment of said waters. This is so for the reason that a public use has attached to the entire flow of Fall river. If plaintiffs should bring an action for apportionment, they would be immediately met with the defense that a public use had attached to the entire flow. The same reasons

that prevent the plaintiffs from securing an injunction in the present cases would prevent them from securing an apportionment.

The second point requiring further discussion is whether the stipulation offered by defendant should have been admitted into evidence. This point will be more fully discussed hereafter.

We are fully in accord with the other portions of our former opinion. We therefore adopt as part of our opinion on rehearing, the following portions of our former opinion [24 P.(2d) 801]:

"These two cases are now before the appellate courts for the second time. On the first appeals, the District Court of Appeal reversed judgments in favor of the respective plaintiffs. Crum v. Mt. Shasta Power Corp., 117 Cal. App. 586, 4 P.(2d) 564; Albaugh v. Mt. Shasta Power Corp., 117 Cal. App. 612, 4 P.(2d) 574. Petitions for hearing in this court were denied. After the reversals, the two above cases were consolidated for trial, and were retried before the court sitting with a jury. The jury brought in a verdict in favor of Crum in the sum of $32,100, and in favor of Albaugh in the sum of $96,300. Defendant has separately appealed from each judgment.

The controversy between these parties is of long standing, and grows out of the diversion by the defendant for power purposes of substantially all of the waters of Fall river above the confluence of that river with the Pit river. The Fall river empties into the Pit river in the northeastern section of Shasta county. The two streams come together at approximately right angles. The quantity of water flowing in Fall river in the summer time is much larger than the quantity flowing in the Pit river in those months. Pit river is a flashy stream with a maximum flow of 10,000 second feet in the winter months, and a minimum flow at Young's Falls of as little as 3 second feet in the summer months. The flow of Fall river, on the other hand, is much more uniform. It has a maximum flow of about 1,800 second feet, with a minimum of about 1,000 second feet.

[2] Plaintiffs' lands are located on opposite sides of the Pit river on what is referred to as Pitville pool, about 5 miles up stream from the confluence of the two rivers. Crum owns about 116 acres and Albaugh owns about 400 acres; both areas being adjacent to the pool on opposite sides thereof.

It is because of the physical characteristics of the Pitville pool that this action has arisen. About 500 feet downstream from the confluence of the two rivers, there is a natural rock reef or barrier extending nearly across the bed of the Pit river. This rock reef acted as a partial natural dam, and caused the waters of the two streams to back up, creating Pitville pool. About 8½ miles upstream from the rock reef, on the Pit river, is to be found Young's Falls, located at the town of Pittville. The stream from Young's Falls down to the rock reef is known as the Pitville pool. Plaintiffs' civil engineer, Mr. Mau, testified as to making a survey of the pool. He made a profile of the pool, which was introduced into evidence as Plaintiffs' Exhibit 3. From this exhibit and from the testimony of Mau interpreting it, it appears that the maximum depth of this pool opposite Albaugh's lands is over 27 feet lower than the top of the rock reef, and that the maximum depth of the pool opposite Crum's lands in over 19 feet lower than the top of the rock reef. This profile map demonstrates that the bed of the Pitville pool from the rock reef to Young's Falls is below the level of the top of the rock reef and runs slightly downhill from the reef. Stated another way, the bed of the pool from Young's Falls to the rock barrier runs slightly uphill, and at no place appears to be within about 7 feet of the height of the rock reef. This witness and others testified that the surface of the pool is practically level. Several of plaintiffs' witnesses testified that there was no noticeable current, and, in fact, no current in the pool in the summer months; that, in the absence of a wind, objects thrown into the pool would remain approximately stationary for many hours.

This physical condition, according to plaintiffs' theory, makes their lands riparian to Fall river in the summer months, although their lands are located more than 5 miles from where the Fall river empties into the Pit river. We agree with plaintiffs that the evidence introduced on this trial, as well as the law of the case, as established on the prior appeals, fully establishes that Pitville pool is a natural reservoir, which is filled with water in the summer months from both the Pit and Fall rivers, and that in those months plaintiffs' lands are riparian to both streams. We are of the opinion that the evidence establishes that Fall river, in the summer months, in a state of nature, contributed a large quantity of water to this pool, which water mingled with and became an inseparable part of the corpus of the water in the pool. In other words, Pitville pool is a miniature lake in the summer months, its waters in that period consisting of Pit and Fall river waters, mingled indiscriminately. We cannot add to what the District Court of Appeal said on this point on the prior appeal in the Crum Case. We adopt as a part of this opinion the following portions of the appellate court's decision [117 Cal. App. at page 596, 4 P.(2d) 564, 567]:

"It may seem like fiction to say that land which is located on a pond formed by a dam in the bed of one stream may still be riparian to another stream which is 5 miles distant from this land. While Fall river contributes a substantial quantity of water which mingles with and remains in Pitville pool, this pond may be deemed to be an inlet or arm of Fall river, in spite of the fact that there is no current in the pool by means of which the water of the last-mentioned stream may be actually traced to the locality of the land. It is not essential there shall be a current of the stream which actually washes the shores of plaintiff's land. It is sufficient if the waters of the respective streams mingle in the same reservoir to form the corpus of the same pool. The pond then becomes a basin which is tributary to both streams. This situation may then make plaintiff's land riparian to both rivers. The case of Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, 22 L. R. A. (N. S.) 401, 99 P. 520, 522, is authority for this exact conclusion. It is there said:

" 'The right of a riparian owner to the use of water bordering upon his land does not, as plaintiffs contend, arise from the fact that the water is flowing, and that any part thereof taken from the stream is immediately replaced by water from the current above it. It comes from the situation of the land with respect to the water, the opportunity afforded thereby to divert and use the water upon the land, the natural advantages and benefits resulting from the relative positions, and the presumption that the owner of the land acquired it with a view to the use and enjoyment of these opportunities, advantages, and benefits. Duckworth v. Watsonville, etc., Co., 150 Cal. 526, 89 P. 338. Out of regard to the equal rights of others whose lands may abut upon the same water, the law has declared, as will hereafter be more fully shown, that the use of the water for irrigation, so far as it affects the right of others similarly situated, must be reasonable, and must be confined to a reasonable share thereof; but, with this common limitation, the right to use water upon adjoining land applies as well to the water of a lake, pond, slough, or any natural body of water, by whatever name it may be called, as to a running stream. * * * We have never heard that riparian rights depended upon the character of the current in the water upon which these rights extend. They exist if the water be an artificial pond made by a dam in a water course, as well as when it is an unobstructed running stream.'

"So long as the bulk of water from Fall river remains impounded in Pitville pool, we may assume, upon the reasoning of the last-mentioned case, that plaintiff's land is riparian to Fall river.

"It must be conceded, however, that the same situation does not prevail in times of flood water during which these two rivers rush down over the dam with mighty velocity at a depth of many feet. It is apparent that under such conditions very little of the water of Fall river remains impounded in the pool. During the season when the flood water and current of Pit river carry Fall river water down over the dam, the plaintiff's land is not riparian to Fall river. It follows that, while the plaintiff's land may be riparian to Fall river during times of low water in the summer, it is not riparian to that stream during the season of flood water in the winter months.

"The appellant suggests upon rehearing that this court has misconstrued the application of the case of Turner v. James Canal Co., 155 Cal. 82, 132 Am. St. Rep. 59, 17 Ann. Cas. 823, 22 L. R. A. (N. S.) 401, 99 P. 520, 524, by holding that, because the Pit and Fall rivers both contribute to the supply of water in the Pitville pool, the land of plaintiff would become riparian to Fall river during the season when its water became an inseparable part of the corpus of that pond. It is pointed out that the Supreme Court held that the Fresno slough was an arm or inlet of the San Joaquin river only when the water from Kings river was not flowing into the slough; that the court did not hold that the land which was situated on the slough was riparian to both rivers at the same time. It is therefore argued that this court erred in holding that the plaintiff's land was riparian to both Fall and Pit rivers at the same time. We have re-examined that case with great care, and have concluded there is nothing therein contained which is in conflict with what was said in our former opinion [299 P. 822] *and which is herein adopted as the law of this case respecting that subject.*" (Italics ours.)

[3] Under the above reasoning, which has become the law of the case, we take it to be settled that plaintiffs' lands, in the summer

months, are riparian to both Pit and Fall rivers.

The defendant is a hydroelectric power company. It owns all the land on both sides of and riparian to Fall river, from where it empties into the Pit river, to a point about 2 miles up stream. It also owns all the land on both sides of Pit river and riparian thereto from a point about 600 feet above the juncture of that stream with the Fall river, down the Pit river for about 7 miles. At this lower point on Pit river is located defendant's power plant. In 1920, defendant started construction of a dam, penstock, and tunnel on the Fall river about one mile above its juncture with the Pit, for the purpose of diverting for power purposes substantially the entire flow of Fall river to the power plant on Pit river. By means of these diversion works, the entire flow of Fall river, with the exception of a small quantity allowed to remain for the use of certain lower claimants other than the plaintiffs, was diverted from a point above the confluence of the two streams to a point about 7 miles below. Thus the waters of Fall river were wholly and entirely diverted away from Pitville pool.

The diversion works and power plant were completed on September 30, 1922. The entire flow of Fall river was diverted on that day for a trial run. Immediately the level of the water in Pitville pool was lowered about 5 feet. The next day the water of Fall river was turned back by defendant into its natural channel, and the pool immediately was filled to its normal depth. To give an idea of the relative amounts of water contributed by each stream to the waters of the pool, plaintiffs' engineer Mau testified that in the summer months, if the pool were empty, it would take about 100 days for the flow of Pit river to fill the pool, while the normal flow of Fall river would fill the pool in one day.

As already mentioned, a short distance down stream from the confluence of the two rivers is located a natural rock reef, which serves as a natural dam and holds a portion of the waters of the two rivers in Pitville pool. This rock reef is on land owned by defendant. On the western end of this rock barrier was a large crevice some 8 feet in depth, which permitted a considerable quantity of water from the pool to escape down the Pit river. Some time between September, 1922, and January, 1923, the defendant constructed a concrete dam across the crevice in the natural rock dam; thus connecting the rock barrier with the western shore of Pit river. In January of 1923 defendant again diverted all of the waters of Fall river away from Pitville pool. The natural dam, as supplemented by the artificial dam, served to impound effectually the waters of Pit river, so that the level of Pitville pool was maintained at the same height as before the diversion. Sufficient water has always come down Pit river and its tributaries to keep the pool full, and to keep the water running over the dam. It is a conceded fact that, from the date of the diversion to the date of the last trial in 1932, the level of Pitville pool has thus been maintained as it was before the diversion. In other words, plaintiffs at all times since the diversion have had access to the same *quantity* of water as existed before the diversion.

Plaintiffs commenced the present actions in 1923; two causes of action being alleged. Plaintiffs alleged their ownership of lands on Pitville pool; that said lands were riparian to Fall river; that defendant had wrongfully diverted the entire flow of Fall river; that by reason thereof plaintiffs have been deprived of their riparian rights in and to the waters of Fall river. The first count of the complaint prayed for an injunction; the second count for damages. Defendant answered, denying that plaintiffs' lands were riparian to Fall river. This issue has been determined adversely to defendant. Defendant also alleged that it was diverting the water in the exercise of its riparian right; that it had constructed the dam at the rock reef; and that since its construction the level of the water had been maintained. As a separate defense, defendant set forth that it was using the waters of Fall river for the development of electric energy for the purpose of sale to the public; that plaintiffs knew of the construction of the power plant and permitted its construction without objection; that plaintiffs are estopped from preventing the diversion by reason of the fact that a public use had attached to the waters diverted. On the issues thus formed, the cases went to trial, resulting, as already stated, in judgments in favor of plaintiffs. While the appeals were still pending in the district court, plaintiffs abandoned their claim for an injunction. The appellate court reversed the judgments and sent the cases back for retrial. On the retrial, the pleadings were not amended, except as to the prayer of the answer. The original prayer was stricken, and, in lieu thereof, there was inserted a prayer asking for (1) a determination of the respective rights of the parties in and to the water, and (2) a determination that defendant's diversion and use of the waters was in the exercise of its riparian rights.

One other occurrence preceding the present trials must be referred to. After the first appeals had become final and the remittitur filed in the lower court, it was discovered that defendant as the successful party on appeal had been awarded its costs. Plaintiffs thereupon moved in the appellate court to recall and modify the remittitur to allow plaintiffs their costs, on the theory that the suits were inverse condemnation suits, and that therefore the condemnees were entitled to costs. The appellate court held the actions were not actions in eminent domain and that therefore plaintiffs were not entitled to costs. Crum v. Mt. Shasta Power Corp., 124 Cal. App. 90, 12 P.(2d) 134; Albaugh v. Mt. Shasta Power Corp., 124 Cal. App. 779, 12 P.(2d) 137. These last decisions were not rendered until the day after the jury brought in its verdict on the retrial of these cases, so that the trial court did not have the benefit thereof on the retrial.

[4, 5] One of the most perplexing problems presented on the present appeal is to determine just what the appellate court decided on the prior appeals, and to determine just what was there determined to be the law of the cases. From the quotation above, it appears that the appellate court clearly held that plaintiffs' lands were riparian to Fall river in the summer time. It was also held that defendant's use of the water of Fall river would not ripen into a right by adverse possession, evidently because defendant disclaimed any intent to appropriate the water and claimed to be diverting it in the exercise of its riparian right. The effect of the public use having attached to the water diverted was not discussed. The appellate court also pointed out that the action was not one for an apportionment of the waters between riparian owners, but an action by one riparian owner against the other for injury to the former's usufructuary title to the waters of Fall river. After pointing out that a riparian owner has the right to have the water flow past his land in its usual course, the court stated [117 Cal. App. 603, 4 P.(2d) 564, 570]: "It follows that a diversion of that river [Fall river] destroys the natural condition which makes the land bordering on Pitville pool riparian to that stream. If the contribution of Fall river water to Pitville pool is beneficial to the land of plaintiff, then he is afforded a remedy for its withdrawal, by means of a suit for damages or for injunctive relief. He has seen fit to rely upon a suit for damages. * * * Assuming the evidence does adequately show the water which is normally contributed to Pitville pool is beneficial to the land of the plaintiff which is located thereon, the plaintiff would be entitled under the pleadings in this case to whatever actual damages he has suffered from the diversion of the stream."

It is true that the appellate court also stated [117 Cal. App. at page 599, 4 P.(2d) 564, 569]: "The appellant, however, specifically disclaims title to this diverted water by adverse possession. It asserts the right to divert and use this water as a riparian owner thereof for the beneficial purpose of manufacturing hydroelectric power only to the extent that other riparian owners are not in need of the water. It has been specifically determined by the Supreme Court in the case of Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 56 A. L. R. 264, 269, 259 P. 444, that the appellant's use of the water of Fall river was for proper riparian and beneficial purposes."

Appellant strenuously contends that this language necessarily means that defendant's entire diversion of the waters of Fall river away from Pitville pool is a proper riparian use, and that plaintiffs' remedy, if any, is an action to apportion. In view of the direct and unequivocal holding of the appellate court that plaintiffs herein are entitled to damages caused by the diversion, we cannot interpret the last-quoted statement to mean that defendant's diversion of the entire stream constitutes a proper reasonable riparian use, and that therefore plaintiffs are precluded from recovering any damages caused by the diversion. Not only would such an interpretation be contrary to, and inconsistent with, the holding that plaintiffs are entitled to damages, but, if the appellate court had so intended, it would have directed judgment to be entered for defendant; there being no further issues to be determined. But this it did not do. A fair reading of the entire opinion clearly indicates that the appellate court reversed the trial court on the issue of damages alone, and intended a retrial on that issue. As we interpret the last-quoted statement, all that was intended thereby was that the use of water for power purposes under a proper state of facts is a proper riparian use. With that doctrine we have no quarrel. The courts of this state have long recognized that a riparian owner in the proper exercise of his riparian right may use the water as a motive power to propel machinery subject only to the domestic uses of lower riparians. However, this does not mean that the use of such waters for power purposes gives any riparian owner any greater right than any other riparian use would give him. The language above referred to does not mean that one riparian in the exercise of his riparian right can divert the water entirely around an opposite riparian owner when and if such diversion results in substantial damage to the opposite owner. We are clearly of the opinion that under the issues presented in this case, and under the law of this case as enunciated by the appellate court, plaintiffs are entitled to damages, if any substantial damage or diminution in the value of their lands has resulted from the diversion, to which a public use has attached. * * *

[6] Under the theory enunciated by this court in the recent case of Gin S. Chow v. City of Santa Barbara (Cal. Sup.) 22 P.(2d) 5, in interpreting article 14, section 3, of the state Constitution, a riparian is not entitled to damages, even as against an appropriator, simply because his usufructuary title to the water has been interfered with. It is incumbent upon him to show substantial actual or prospective damage therefrom.

We now turn to a discussion of the question as to whether the evidence here shows any substantial damage to or diminution in the value of plaintiffs' lands, caused by the diversion and the construction of the dam. Under the facts of this case, such damages could have arisen in one of two ways: First, the diversion might have *diminished the quantity* of water in Pitville pool to a level where plaintiffs' actual or prospective needs were interfered with; or, secondly, the diversion and construction of the dam might have *affected the quality of the water* in Pitville pool to such an extent that the value of plaintiffs' lands was adversely affected to a material degree.

We turn first to a discussion of the effect of the diversion on the quantity of water in the pool. The evidence shows that, when the waters of Fall river were first diverted on September 30, 1922, the level of Pitville pool was lowered from 4 to 5 feet. However, the level was restored by the construction of the dam at the rock reef below plaintiffs' lands. There is no dispute but that since the construction of the dam there has been exactly the same quantity of water in the pool as was there before the diversion. It must be remembered that under the facts and law of this case Pitville pool is in legal effect a lake or reservoir with two sources of supply—Pit river above the pool, and Fall river. The pool has one outlet—Pit river below the pool. One source of supply has been taken away by the diversion and by the public use attaching thereto. But, due to the construction of the dam, the level of the pool has been maintained exactly as it was before the diversion. The only difference is that now the pool is filled solely with Pit river water instead of a mixture of Pit and Fall river waters. This water, which is supplied in lieu of Fall river water, is not foreign water, but water from one of the natural sources of Pitville pool; namely, the Pit river.

[7, 8] During the course of the trial, defendant offered to stipulate as follows:

"Mt. Shasta Power Corporation, defendant herein, in view of the decision of the District Court of Appeal in the above entitled cause, hereby admits that said plaintiff, by virtue of his ownership of the lands described in his complaint and riparian to that part of Pit river known and designated as the Pitville pool, is entitled to the maintenance of the water in that pool, at all times, substantially at its natural level as such level would be if the waters of Fall river should continually flow into it at the natural confluence of said rivers.

"This defendant asserts that, by virtue of its ownership of the riparian rights and the riparian lands described in its answer, it has the right to continue to divert and use at all times the waters of Fall river as it is now doing for the operation of its Pit No. 1 Power Plant, provided only that its diversion and use of such water shall not actually result in substantially lowering the level of the water in said Pitville pool below its aforesaid natural level.

"This defendant declares that it does not now intend and never has intended or purposed to infringe or violate the right of said plaintiff to the maintenance of the aforesaid natural level of the water in said pool; and does hereby undertake and promise to maintain and operate the dam which it has heretofore constructed at the rock reef in the channel of said Pit river, a short distance below the natural confluence therewith of Fall river, and to maintain the level of the water in said Pitville pool substantially at its aforesaid natural level and not lower than the top of the aforesaid dam by means of its maintenance and operation of said dam and by discharging or causing to be discharged into said Pitville pool so much of the water naturally flowing in said Fall river and its tributary, Tule river, as may be required for that purpose from time to time, so long as this defendant shall continue to divert water from Fall river above its natural confluence with Pit river; and does hereby irrevocably consent that the judgment to be entered herein shall require this defendant to maintain and operate said dam and to maintain the natural level of the water in said Pitville pool as it has herein undertaken and promised to do.

"In witness whereof said Mt. Shasta Power Corporation has caused its corporate seal to be hereunto affixed and has caused its corporate name to be hereunto subscribed by its officers thereunto duly authorized on this 27th day of May, 1932."

During the course of the argument over this stipulation, counsel for defendant further agreed that, if the waters of Pitville pool ever became insufficient to maintain the level of the pool, defendant would agree that Fall river waters should be released sufficient to keep the level of the pool at the height existing before the diversion. The trial court refused to admit this stipulation into evidence, or to instruct the jury in reference thereto. The trial court's refusal was based on the theory that the stipulation was ineffectual for any purpose, unless the plaintiffs agreed thereto.

It is to be noted that this stipulation contains two very important concessions on the part of the defendant: First, it is agreed that defendant will maintain the level of the pool by a release of Fall river waters if necessary; and, second, it is agreed that the defendant will always maintain the dam and that the judgment may contain a provision to that effect.

As to the first concession, it is our opinion that it was beyond the power of the defendant to make without first securing the consent of the railroad commission. The evidence clearly shows that defendant is a public utility and that a public use has attached to all but an immaterial portion of the flow of Fall river. For the ten-year period immediately preceding the trial of this action substantially the entire flow of Fall river has been diverted by defendant and devoted to a public use. In effect the stipulation amounts to an offer to reconvey a portion of this water to plaintiffs. This, defendant cannot do without the consent of the railroad commission. A public utility cannot thus convey its property which has been dedicated to a public use without the consent of that commission. Section 51 of the Public Utilities Act (St. 1915, p. 115, § 51, as amended by Stats. 1927, pp. 77, 78) expressly provides: "No public utility shall henceforth sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant, system, *or other property necessary or useful in the performance of its duties to the public* * * * without first having secured from the railroad commission an order authorizing it so to do. Every such sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. * * *"

There are many cases holding, in accordance with that section, that a public utility cannot convey or transfer its property which has been dedicated to a public use without the consent of the railroad commission. Napa Valley Electric Co. v. Calistoga Electric Co., 38 Cal. App. 477, 176 P. 699; Water Users,' etc., Ass'n v. Railroad Commission, 188 Cal. 437, 205 P. 682; Baldwin v. Railroad Commission, 206 Cal. 581, 275 P. 425.

Appellant relies on Collier v. Merced Irr. District, 213 Cal. 554, 2 P.(2d) 790, and Colorado Power Company v. Pacific Gas & Electric Co. (Cal. Sup.) 24 P.(2d) 495, as establishing a contrary doctrine. It is true that those cases recognized that in water cases a defendant may minimize the damages by guaranteeing a water supply to the plaintiff, but that is as far as the rule established by those cases go. The Collier Case did not involve a public utility so that the consent of the railroad commission was not required. In the Colorado Power Company Case, although the defendant was a public utility, it does not appear that the point here involved was discussed or mentioned. That case cannot, for that reason, be considered as authority on the point. We emphasize the fact that the stipulation here involved was offered after the public use had attached. We therefore hold that the trial court properly excluded this part of the stipulation from consideration.

[9] However, this reasoning does not apply to the second concession contained in the stipulation, that is, the guaranty to maintain the dam. Such a guaranty was well within the powers of the company to make and in our opinion should have been admitted by the trial court. The gravity of this error in refusing to permit the jury to consider this guarantee becomes apparent when the peculiar facts of this case are considered. The evidence shows that since the construction of the dam the flow of Pit river at all times has been more than sufficient to keep Pitville pool at the level that existed before the diversion. A period of about ten years has elapsed since the construction of the dam, and during all that period the pool has been maintained at its old level. Plaintiff as far as quantity of

water is concerned has failed to show any damage actual or prospective by reason of the diversion, provided the dam is maintained. This the defendant offered to do and offered that the judgment should so provide. It was error of a most serious nature to exclude from the jury's consideration this portion of the stipulation.

The seriousness of the error is made evident when the form of the hypothetical question submitted to plaintiffs' value witnesses is considered. By that question the witnesses were told that after the diversion "the defendant constructed a concrete dam and works at the point known as the rock reef and that thereafter the Pit river pool was restored to its former level and that said level has since been maintained." The witnesses were not told that defendant had agreed to stipulate that it would continue to maintain the dam. The hypothetical question also told the witnesses that after the diversion and before the construction of the dam the level of Pitville pool had been lowered four to five feet. Without a guarantee of the future maintenance of the dam it is obvious that the value witnesses were forced to consider that plaintiffs' rights as to quantity of water were uncertain. The cross-examination of these value witnesses indicates that such was the fact. This was error and requires a reversal on the issue of damages alone.

On the other issues involved in this case the following portions of our former opinion are pertinent and are hereby adopted as a portion of the opinion of this court on rehearing [24 P.(2d) 801].

[10-12] However, although it is true that under the facts of this case plaintiffs have not or will not be damaged as to the quantity of water in the pool, it does not necessarily follow that they have not been damaged in other respects. Under the California authorities, and under the law of these cases as enunciated on the former appeals, a riparian owner, even as against another riparian, is entitled, not only to an undiminished flow of water, except as reduced by the reasonable use of other riparians and prior appropriators, but also to a substantially unpolluted stream. The riparian owner is entitled, not only to the same quantity of water, but also to the same quality of water, provided by nature in the stream. Crum v. Mt. Shasta Power Corp., 117 Cal. App. at page 606, 4 P.(2d) 564. We are of the opinion that the evidence in the present case offered on behalf of plaintiffs clearly shows that the quality of the water in Pitville pool has been materially impaired by the diversion and by the construction of the dam. The evidence shows, without conflict, that the waters of Fall river have always been clear and pure, while the waters of Pit river have always been dark and murky. The evidence likewise shows that before the diversion the waters of Fall river rushed down into Pitville pool with a minimum flow of 1,000 second feet. The Fall river waters, as we have already held, mingled with the dark murky waters of Pit river to form the pool. The jury could have reasonably inferred that the Fall river waters freshened the water in the pool. Since the diversion, the freshening effect of the Fall river waters has been lost. Moreover, by the construction of the dam, obviously the flow of water through the crevice in the rock reef has been stopped, resulting in the Pit river water backing up. There was ample evidence introduced on behalf of plaintiffs to show that since the diversion the waters of Pitville pool have become stagnant; that the pool in the summer months is now covered with weeds, slime, and moss; and that a very undesirable odor now emanates from the pool, which is obnoxious to the senses for a distance of one-half mile from the water. There is also some evidence that since the diversion cattle will not drink the polluted water. There is ample evidence from which the jury could have found that these conditions did not exist before the diversion, and from which the jury could have inferred that the changed conditions were caused by the diversion and by the construction of the dam. It hardly need be added that, if such changed conditions resulted in a material impairment of the value of plaintiffs' lands, plaintiffs may recover therefor.

[13] Appellant contends that the question of pollution cannot be considered, for the reason that the former appeals established as the law of the case that there was no pollution. We do not so interpret the appellate court opinion. All that the appellate court directly held was that there was no finding that the changed conditions were the result of the diversion. It is true that by way of dicta the court held that, even if a certain finding could be so construed, "there is no substantial evidence to support a judgment of damages based upon pollution of the water of Pitville pool caused by the diversion of Fall river." It is obvious that the above statement had reference to the facts as shown on the prior trial. On this trial the evidence was not the same as on the prior trials. On

the present trial, additional witnesses on the question of pollution were called, and their testimony, and the testimony of the witnesses called on both trials, was substantially stronger than was produced on the former trials. It is obvious, therefore, that the rule of the law of the case has no application.

However, from what has been said, we do not intend to foreclose the plaintiffs on a retrial from making a further showing, if they can do so, that the offer of the defendant to maintain the dam at the rock reef and the maintenance thereof as promised will not effectually maintain the natural level of the water in the Pitville pool without discharging therein a portion of the water of Fall river. It is obvious that no useful purpose would be served in retrying all the issues in this case. The only issue requiring a further trial is the issue of damages.

For the foregoing reasons the judgments appealed from are and each of them is hereby reversed and the cases remanded for a new trial on the issue of damages alone and in accordance with the views herein expressed; both sides to bear their own costs on this appeal.

PRESTON and LANGDON, JJ., deeming themselves disqualified, do not participate herein.

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220 Cal. 203

KIMBALL v. PACIFIC GAS & ELECTRIC CO. et al.

SAME v. GENERAL ELECTRIC CO. et al.

Sac. 4830.

Supreme Court of California.
Feb. 28, 1934.

Rehearing Denied March 30, 1934.

1. Master and servant ⇨193(1).

Corporation, making repairs, which borrowed from plaintiff's employer an employee whose negligence caused injury to plaintiff, *held* liable as special employer for such negligence.

2. Limitation of actions ⇨37(1).

Three-year period provided for in limitations statute respecting action for relief on ground of fraud or mistake applies only where fraud is gravamen of original action (Code Civ. Proc. § 338, subd. 4).

3. Limitation of actions ⇨100(1), 104(1).

Fraudulent concealment by defendant of facts on which existence of legal cause of action for personal injuries depends tolls statute of limitation and statute does not begin to run until plaintiff discovers or by reasonable diligence should have discovered the facts (Code Civ. Proc. § 340, subd. 3).

4. Limitation of actions ⇨179(2).

In action for injuries to employee from negligence of another employee loaned to defendant, complaint *held* to allege fraudulent concealment of fact that employee causing injury had been loaned to defendant, so as to make defendant liable, which concealment tolled statute of limitations (Code Civ. Proc. § 340, subd. 3).

> Complaint alleged in substance plaintiff's ignorance of his cause of action and his inability to have sooner ascertained facts regarding defendant's liability, that plaintiff's employer paid plaintiff compensation and advised him that it was responsible for accident, and alleged on information and belief that defendant fraudulently agreed with plaintiff's employer that if facts regarding defendant's liability were concealed from plaintiff, defendant would pay one-half of workmen's compensation, that as result of such fraudulent concealment plaintiff had no knowledge of his cause of action until discovery of certain letter which was pleaded in haec verba, that plaintiff made inquiries of an employee of defendant and others, and alleged that such persons fraudulently withheld from plaintiff information regarding defendant's responsibility.

5. Limitation of actions ⇨199(2).

Whether defendant corporation which borrowed employee from plaintiff's employer and was therefore liable for such employee's negligence causing injury to plaintiff, and which reimbursed plaintiff's employer for part of compensation paid, fraudulently concealed facts disclosing cause of action against defendant so as to toll statute of limitations *held* for jury (Code Civ. Proc. § 340, subd. 3; St. 1917, p. 854, as amended by St. 1931, p. 2370).

In Bank.

Appeal from Superior Court, Shasta County; W. E. Herzinger, Judge.

Action by Clarence B. Kimball against the Pacific Gas & Electric Company, General Electric Company, and others. From a judgment for plaintiff against the General Electric Company, that defendant appeals.

Affirmed.

Prior opinion, 23 P.(2d) 295, 1075.

Rehearing denied; PRESTON and LANGDON, JJ., disqualified.

Charles A. Christin, of San Francisco, and Carr & Kennedy, of Redding (John E. Manders, of San Francisco, of counsel), for appellant.

Jesse W. Carter and Glenn D. Newton, both of Redding, for respondent.

Thos. J. Straub and W. R. Dunn, both of San Francisco, amici curiæ for Pacific Gas & Electric Co.

Fitzgerald, Abbott & Beardsley, of Oakland, amici curiæ for Chevrolet Motor Co., of California.

PER CURIAM.

Plaintiff brings this action for personal injuries alleged to have been suffered by him while working for the Pacific Gas & Electric Company as the proximate result of the negligence of the defendant Dean Wilson, who at the time of the accident was working for the defendant and appellant, General Electric Company. In addition to Wilson and the last-named company, plaintiff joined as defendants the Pacific Gas & Electric Company and two of its employees, Milford and Dunwoody. A demurrer of the Pacific Gas & Electric Company and its employees was sustained without leave to amend, and a judgment of dismissal entered in their favor. The rights and liabilities of such dismissed parties are not involved on this appeal. At the close of the evidence, the trial court granted a directed verdict in favor of Dean Wilson on the ground that the action as to him was barred by the statute of limitations. The jury brought in a verdict against the sole remaining defendant, the General Electric Company, in the sum of $25,000, and that defendant has perfected this appeal.

[1] The facts as shown by the record are as follows: Prior to March 6, 1928, plaintiff was employed by the Pacific Gas & Electric Company as a patrolman and lineman in Shasta county, Cal. In connection with this work, plaintiff worked at the various power houses operated by that company in that district. Although there is a conflict in the evidence on this point, the plaintiff testified that for ten days to two weeks before March 6, 1928, he had been working at power houses other than the Pit Three power house. On that date he was ordered by his foreman to perform some work on a relief valve located at the Pit Three power house. This valve was situated in a pit in the floor of the power house. While plaintiff was in the pit, defendant Dean Wilson was working directly above the plaintiff on one of the large generators. He was carrying large bolts weighing about 20 pounds each from the generator to a platform nearby. One of these bolts was negligently placed on the platform by Wilson and, as a result, it rolled off, dropped about 20 feet, and hit plaintiff on the back of the head, inflicting the very severe injuries for which this action is brought. The extent and permanency of the injuries is conceded by the appellant, and no point is made that the verdict is excessive. Dean Wilson, for some time prior to the accident, had been employed by the Pacific Gas & Electric Company on work somewhat similar to that of plaintiff. Some time shortly before the accident, the General Electric Company had been engaged by the Pacific Gas & Electric Company to adjust and repair the generators at the Pit Three power house. An employee of the General Electric Company, L. A. Fitts, was in charge of this work. Pursuant to agreement between the two companies, certain Pacific Gas & Electric Company employees were loaned to Fitts to assist him in his work, the arrangement being that the Pacific Gas & Electric Company should pay these employees, and the General Electric Company agreed to and did reimburse the Pacific Gas & Electric Company for the sums so expended. Defendant Wilson was one of the loaned employees, and it is conceded that at the time of the accident Wilson was in fact working for and under the supervision of Fitts of the General Electric Company. It follows that the General Electric Company as special employer is chargeable with the negligence of Wilson.

Plaintiff, as already stated, was employed at the time of the accident by the Pacific Gas & Electric Company. He testified that he had known Wilson for some time prior to the accident and knew he was employed by the Pacific Gas & Electric Company; that he did not know Fitts, nor did he know that the General Electric Company was employed in working on the generators. The plaintiff in fact believed and, under the circumstances, reasonably believed that, at the time of the accident, Wilson was working for the Pacific Gas & Electric Company and that, since he had been injured by a fellow workman, he had no cause of action against a third party.

After the accident, plaintiff was taken to a hospital at Redding, where a skull operation was performed and where he remained until about June 1, 1928. During the first part of this period he was unconscious and during the entire period his mind was hazy. He was then sent to San Francisco, where a second operation was performed on his skull. He tried to return to work in October of 1928 as a watchman for the Pacific Gas & Electric Company, and did work at odd jobs requiring no physical exertion around the power plant until the fall of 1929. At that time the injury again caused him to become incapacitated and he again was compelled to undergo hospitalization. He was a patient in the hospital on several occasions until March of 1930 and, from that time until the commencement of this action on July 10, 1930, he has been convalescent. From the fall of 1929 to the trial of this action he has been unable to work and probably never will be able to do any work requiring physical effort.

Until June of 1930, plaintiff was totally ignorant of the fact that he had been injured by an employee of the General Electric Company. He accepted compensation under the Workmen's Compensation Act (St. 1917, p. 831, as amended), from the Pacific Gas & Electric Company and finally consummated a full settlement of his compensation claim against that company, which settlement was approved by the Industrial Accident Commission in complete ignorance of the fact that he had a cause of action against the General Electric Company. At no time did the Pacific Gas & Electric Company or the General Electric Company disclose to the plaintiff or to the Industrial Accident Commission the fact that plaintiff had been injured by an employee of the General Electric Company. At no time did these companies disclose to the plaintiff or to the Industrial Accident Commission the fact that there was an agreement between the two companies to the effect that the General Electric Company should reimburse the Pacific Gas & Electric Company for one-half the sums expended by that company for compensation paid to plaintiff. That this agreement existed is conceded by appellant and is amply shown by documentary evidence. That the General Electric Company had full notice of its legal responsibility towards plaintiff is amply shown by the record. Fitts, in charge of the repair work on the generators for the General Electric Company, within four days of the accident made a full written report of the circumstances surrounding the accident to his company. Shortly after the accident, Fitts came to San Francisco and made a full personal report of the accident and the surrounding circumstances to the officers of the General Electric Company. McCarthy, the claims adjuster of the Pacific Gas & Electric Company, advised the local manager of the General Electric Company in San Francisco of the accident and of the fact that Wilson was assisting Fitts at the time. McCarthy also informed the manager of the General Electric Company of the amount expended by his company for the care and treatment of the plaintiff. The appellant concedes that it entered into the agreement to reimburse the Pacific Gas & Electric Company for one-half the sums expended by it on plaintiff's behalf and concedes that it in fact did reimburse the Pacific Gas & Electric Company for one-half the sums expended by it on plaintiff's behalf, including one-half the amount of the final settlement. The record contains many letters between the officers of the two companies, setting forth the details of this arrangement.

From the facts already recited, it is apparent that during the year immediately following the accident plaintiff's physical condition was such that he could not make a full investigation of the facts of the accident. His wife, however, did make a determined effort to learn all of the surrounding circumstances. Shortly after the accident she wrote to Wilson, asking him to give her all the details. He replied under date of March 16, 1928, giving the details as to how he dropped the bolt, but entirely failed to mention the fact that at the time of the accident he was working for Fitts of the General Electric Company. Wilson testified at the trial that at the time of the accident he knew Fitts was working for the General Electric Company and that he at that time was working under Fitts' direction and control, but these facts he failed to disclose to plaintiff or his wife. Both Wilson and certain officers of the Pacific Gas & Electric Company called on plaintiff while he was in the hospital in Redding, but, although they fully discussed the accident, they remained entirely silent as to the General Electric Company's connection therewith. Shortly after the accident, Mrs. Kimball talked with the manager of the Shasta division of the Pacific Gas & Electric Company, and, although he freely discussed the details of the accident, he did not mention that Wilson was at the time of the accident employed by the General Electric Company. Mrs. Kimball had three or four talks with McCarthy, claims adjuster for the Pacific Gas & Electric Company, about the accident. McCarthy had full knowledge of the details of the accident and of the General Electric Company's legal responsibility therefor. It was he, in fact, who carried on the negotiations with the General Electric Company for a settlement of his company's claim against the General Electric Company. In spite of this fact, he at no time mentioned to Mrs. Kimball or to plaintiff, Wilson's relationship with the General Electric Company, or the arrangements between the General Electric Company and the Pacific Gas & Electric Company in reference to the accident.

Plaintiff first gained the information as to the true facts in reference to the accident early in June of 1930, under rather curious circumstances. At that time, he was visiting the Volta Club House of the Pacific Gas & Electric Company and, on a desk in that club house, found a letter from McCarthy to the auditor of the Pacific Gas & Electric Company, which letter fully set forth the facts as to the accident and the facts as to the agreement between the two companies for the sharing of the expenses. Plaintiff immediately took this letter to his attorney and this action was commenced about a month thereafter. The period between the date of the injury and the date of the commencement of the action was two years and four months. Appellant pleaded and on this appeal relies on the statute of limitations, section 340, subdivision 3, of the Code of Civil Procedure, providing a one-year period of limitations in such a case. Plaintiff's complaint is based on the theory that appellant fraudulently concealed the cause of action from him and he contends that such fraudulent concealment tolls the statute of limitations. It is to be noted that the action here involved is a simple one for personal injuries based on negligence and that fraud is no part of the original action. On the threshold of this appeal we are met by the question as to whether the fraudulent concealment of the facts upon the existence of which the cause of action depends tolls the statute of limitations in an action based on negligence. For the purposes of this part of the opinion we will assume that the complaint adequately alleges the fraudulent concealment and that the evidence supports the allegations.

[2] It is the contention of appellant that the statute of limitations in this state, in cases of fraudulent concealment, can be tolled only in actions in equity and those where fraud is the basis of the original cause of action. This last contingency is expressly provided for by section 338, subdivision 4, of the Code of Civil Procedure. Appellant strenuously contends that the fraudulent concealment by the defendant of the facts upon which a tort or negligence action depends does not toll the statute. We agree with appellant that the three-year period provided for in section 338, subdivision 4, of the Code of Civil Procedure, applies only where fraud is the gravamen of the original action. We are of the opinion, however, that independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until discovery, and that upon discovery the statute applicable to that particular action (in this case section 340, subd. 3, of Code Civ. Proc.) then commences to run. There are cases from other jurisdictions, many of which are cited by appellant, which hold that in the absence of a statutory exception, the fraudulent concealment of the fact upon which the cause of action accrues does not toll the statute, but, in our opinion, the cases in this state and the weight of authority elsewhere support the rule that under such circumstances the statute is tolled. See 37 Cor. Jur. 972, § 353, where many cases are collected.

The earliest case discussing the problem in this state is Kane v. Cook, 8 Cal. 449, decided in 1857. This was a legal action in assumpsit based on defendant's failure to remit to the plaintiff the proceeds of the sale of certain goods belonging to plaintiff and consigned to defendant. The defendant fraudulently concealed the fact of the sale from the plaintiff until after the statute of limitations' period provided for such actions had expired. Mr. Justice Field rendered the opinion of the court. He pointed out that defendant's action in failing to render an account of the sale to plaintiff kept the plaintiff in ignorance of his rights and that to hold that the statute of limitations runs under such circumstances would be to permit the defendant to take advantage of his own wrong. At page 458 of 8 Cal., the court states: "Statutes of Limitation are passed to prevent the production of stale claims, when, from the lapse of time, it has become difficult or impossible to furnish the requisite proof to defeat them. They proceed upon the theory that the delay, for a fixed period, to assert one's claim, raises a presumption of settlement, and that a party ought not to be afterwards harassed respecting it. They are not intended to protect a party who has by fraudulent concealment delayed the assertion of a right against him, until after the expiration of the period limited by the statute. * * *

"The question whether a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, would avoid the Statute of Limitations, has frequently arisen, and in its decision there is much conflict of opinion. In Courts of Equity it is the settled doctrine that such concealment will prevent the operation of the statute, and it is only in the application of the doctrine to suits at law that the diversity of opinion exists." The court then reviews many cases from other jurisdictions and then concludes its opinion with this observation: "In this diversity of opinion on the question, we are free to adopt that rule which will best tend to advance justice, and prevent the perpetration of fraud; and we therefore hold, that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations. * * * In the present case, the plaintiffs are residents of New York; they looked to their consignee in California to acquaint them of the sale of their goods; his delay of three years to impart any information, cannot be reconciled with honest intentions, but necessarily leads to the conclusion, that the sale was concealed for a fraudulent purpose." It is to be noted that in this case fraud was not the gravamen of the original action, but that the fraud consisted of the concealment of facts upon which the cause of action accrued. It is also to be noted that the statute of limitations then in effect was almost identical with the present statute, and that there was no statutory exception based on fraudulent concealment. The court, however, read into the statute such an exception.

Another very enlightening case is Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, 775, Ann. Cas. 1913C, 1093. This was an action for damages caused by an underground trespass. The court exhaustively cites the cases on both sides of the question here involved and expressly follows Kane v. Cook, supra. The court does hold that such a trespass by its very nature is secret and tinged with fraud and, therefore, did indicate that the original cause of action was tainted with fraud, but the court does not solely rest its decision on that ground. The court first concedes the rule to be that in actions at law the plaintiff's mere ignorance of the existence of the injury, or of the facts constituting such injury, or of the identity of the person liable therefor will not toll the statute. It is on this ground that the court distinguishes many of the very cases relied on by appellant in the present case. The court then cites almost a full page of authorities holding both ways on whether fraudulent concealment by the defendant tolls the statute and quotes with approval from Kane v. Cook, supra, and holds that said case decided that very point in this state in favor of tolling the statute. In discussing Kane v. Cook, the court stated: "The statute then in force contained the provision now found in subdivision 4 of section 338 concerning actions for relief against fraud, but the decision was not based upon that provision, nor was it referred to. It was put upon the general ground that the rule was applicable to any statute of limitations, although not containing any express exception in relation to fraudulent concealment. The statutes of limitation have been re-enacted without change since the decision was made. The familiar rule is that when there is a re-enactment of a statute in the same language, after a construction by the courts, the new statute is presumed to be intended to have the same effect as that previously given to its predecessor." Appellant contends that the rule of the Lightner Case is limited to cases where fraud is the gravamen of the original action. There is language in the opinion tending to uphold this contention. The court did emphasize that such an underground taking by its very nature is secret and tinged with fraud, but in our opinion the gravamen of the action was the taking, whether fraudulent or not, and the real fraud was in the concealment. As we read the opinion, the court did not base its opinion solely on the provisions of section 338, subdivision 4 of the Code of Civil Procedure, but, as an alternative ground of the opinion, held that fraudulent concealment constitutes an implied exception to the statute. The unequivocal approval of the holding in Kane v. Cook, supra, to the effect that "in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations," indicates what the real holding in the Lightner Case was. Moreover, it should be noted that in Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, at page 706, 16 P.(2d) 268, 271, this court recognized that in the Lightner Case "the gravamen of that action was an underground trespass upon plaintiff's mine," a purely legal action not necessarily tainted with fraud.

Appellant refers us to several California cases which it contends announce a contrary rule. Most of these cases simply hold that in actions at law plaintiff's mere ignorance of the existence of the injury, or of the facts constituting such injury, or of the identity of the wrongdoer, does not toll the statute. Such was the holding in Lambert v. McKenzie, 135 Cal. 100, 67 P. 6, Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 29 Am. St. Rep. 115, Gale v. McDaniel, 72 Cal. 334, 13 P. 871, and Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98, relied on by appellant. These cases are not in point, inasmuch as they did not involve a fraudulent concealment by the defendant of the facts giving rise to the cause of action. In fact the first three of these cases were distinguished on that very ground in the Lightner Case, supra, 161 Cal. at page 696, 120 P. 771, 774, Ann. Cas. 1913C, 1093. The only case from this state cited by appellant at all in point is Johnson v. Nolan, 105 Cal. App. 293, 288 P. 78, a case in which no hearing was asked in this court. This was a malpractice case. In his first complaint, the plaintiff had pleaded the date of the alleged injury, so that the complaint showed on its face that it was barred by the statute of limitations. In his fourth amended complaint, the plaintiff omitted the date. The defendant demurred generally and specially and such demurrer was sustained by the trial court. The appellate court held that with the date omitted the special demurrer was good and that if the date had been inserted the general demurrer would have been good. The court further held (page 294 of 105 Cal. App., 288 P. 78): "In a further attempt to avoid a plea of the statute of limitations the plaintiff inserted certain allegations pleading that the defendant concealed from him certain facts regarding the plaintiff's case. However, this is not an action in equity, but is an action in malpractice. The statute of limitations which is applicable is subdivision 3 of section 340 of the Code of Civil Procedure. Harding v. Liberty Hospital Corp., 177 Cal. 520, 522, 171 P. 98. Within the period of time so specified in that statute it was the plaintiff's duty to ascertain at his peril whether he desired to maintain this action. In Lattin v. Gillette, 95 Cal. 317, at page 320, 29 Am. St. Rep. 115, 30 P. 545, 546, the court quotes with approval from Wood on Limitations as follows: 'Where an attorney is sued for malpractice the cause of action arises from the time when such malpractice occurred, and that without any reference to the circumstance whether the client then knew the fact or not.' Continuing, the court cites many other authorities to the same effect. We find no error in the record." Of course, the rule is well settled that in a malpractice case the statute starts to run from the date of the injury and that mere ignorance of his injury on the part of the plaintiff is not sufficient to toll the statute. That is all that was held by the cases cited by the District Court of Appeal in its opinion. The District Court of Appeal apparently overlooked the cases heretofore cited in this opinion holding that a fraudulent concealment by the defendant of the facts upon which the action depends tolls the statute. It is not clear from the appellate court's opinion just what the facts were that were concealed by the defendant. If the facts alleged to have been fraudulently concealed were the facts upon which the cause of action accrued, and if those facts were properly alleged, then the decision is contrary to Kane v. Cook, supra, and contrary to the theory of the Lightner Case, supra, and is hereby disapproved.

[3] No good purpose would be served in reviewing the cases from other states. See, however, Texas & Pacific Ry. Co. v. Gay, 88 Tex. 111, 30 S. W. 543, and Waugh v. Guthrie Gas, Light, Fuel & Improvement Co., 37 Okl. 239, 131 P. 174, L. R. A. 1917B, 1253, where the courts there involved held that the statute was tolled in a personal injury action by a fraudulent concealment by the defendant, and where the cases are exhaustively collected. We, therefore, hold that the better view and the one supported by the cases in this state and by the weight of authority elsewhere is that as far as a legal action for personal injuries is concerned, the fraudulent concealment by the defendant of the facts upon the existence of which the cause of action depends tolls the statute, and such statute does not begin to run until the discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts.

[4] We turn now to a discussion of the second main point urged by appellant, and that is that the complaint herein does not allege such a fraudulent concealment as to state a case wherein the statute should be tolled. Although this is not a case falling within the provisions of section 338, subdivision 4, of the Code of Civil Procedure, we think that the same rules of pleading should apply and the same particularity should be required as is necessary to bring that section into operation. The cases under that section are quite numerous, and have firmly established the rules applicable to such cases. One of the leading cases on the subject is Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809. See, also, Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Original Min. & Mill. Co. v. Casad, 210 Cal. 71, 290 P. 456, 457; Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268. In Original Min. & Mill. Co. v. Casad, supra, the court, after citing and quoting from the leading cases on

the subject, summarized the rules applicable to such pleading as follows: "It will be discovered upon an analysis of the above cases that there are three major allegations that must be contained in the complaint before it will be held sufficient: (1) The complaint must allege when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) facts must be alleged to show that plaintiff is not at fault for failing to discover the fraud sooner, and that the plaintiff has no actual or presumptive knowledge of facts sufficient to put him on inquiry." There can be no doubt that plaintiff herein has adequately pleaded the necessary facts in reference to requirements 1 and 2 above enumerated. As to requirement number 3, it is our opinion that the complaint is sufficient. Paragraph VI of the amended complaint alleges plaintiff's ignorance of his cause of action and his inability to have sooner ascertained the true facts as to the liability of the General Electric Company. Paragraph VII alleges that the Pacific Gas & Electric Company furnished plaintiff with medical treatment and paid him compensation, and that at all times that company advised plaintiff that it was responsible for the accident and held itself out to plaintiff as responsible therefor, when, in truth, said company knew that the General Electric Company was responsible therefor. Paragraph IX alleges, on information and belief (the facts being peculiarly within the knowledge of appellant, such form of allegation is, of course, sufficient), that the General Electric Company, well knowing its responsibility to plaintiff, fraudulently and deceitfully agreed with the Pacific Gas & Electric Company that if the facts in reference to plaintiff's cause of action against the General Electric Company were concealed from plaintiff, so that plaintiff could not hold the General Electric Company responsible therefor, then the General Electric Company would pay one-half of the amount expended by the Pacific Gas & Electric Company on plaintiff's case; that thereafter the General Electric Company did pay that sum to the Pacific Gas & Electric Company. Paragraph X alleges that, as a result of such fraudulent concealment perpetrated by defendant, plaintiff had no knowledge of his cause of action until the discovery of the letter above referred to, which letter is pleaded in hæc verba in paragraph V of the amended complaint. The amended complaint, in some detail, alleges the inquiries made by plaintiff of the employees of the Pacific Gas & Electric Company, and of Dean Wilson, the employee of the General Electric Company, and alleges that such persons fraudulently withheld from plaintiff the information as to the General Electric Company's responsibility for the accident. In the very nature of the case that is all the plaintiff could plead. The facts were all within appellant's knowledge. We think that these allegations, when read as a whole, sufficiently comply with the rules of pleading applicable to such cases.

[5] The last important contention of appellant is that the evidence does not show fraudulent concealment of the character necessary to toll the statute. We think that the facts already recited in this opinion are a complete answer to appellant's contention that the evidence does not show a fraudulent concealment. In this connection, we are particularly impressed by the fact that appellant concedes agreeing to reimburse the Pacific Gas & Electric Company for one-half the sums expended by the latter company on plaintiff's behalf, and concedes that it actually did reimburse that company in that amount, and that all of the negotiations in reference thereto were kept strictly secret and not disclosed either to plaintiff or to the Industrial Accident Commission. We think that there was no duty on either company to volunteer the facts of the accident to plaintiff, but we think that when they began to negotiate between themselves as to the settlement of the claim, a positive duty existed to disclose those negotiations to plaintiff. Mere silence on the part of the two companies would not constitute, under well-settled principles, a fraudulent concealment, but when negotiations took place as to a settlement of the claim, a positive duty to disclose arose In this connection, the provisions of section 26 of the Workmen's Compensation Act (St. 1917, p. 854, as amended by St. 1931, p. 2370) are pertinent. By the terms of that section, under the circumstances disclosed in the record before us, the Pacific Gas & Electric Company, as plaintiff's employer, was entitled to recover by action from appellant, as the tortfeasor responsible for plaintiff's injuries, every dollar of expense incurred by it in caring for plaintiff. No such action was begun. If such an action had been begun, it would have fully disclosed to plaintiff appellant's connection with the accident. That section also provides that, if the employer in such an action shall recover in excess of the amount expended by it, such excess shall belong to the employee. The section expressly provides that "no release or settlement of any claim for damages under this section shall be valid without the written consent of both employer and employee." We think that under this

section, when the Pacific Gas & Electric Company started negotiations with the General Electric Company for a settlement of its claim, a positive duty existed on the part of the Pacific Gas & Electric Company to inform plaintiff of the negotiations. This it failed to do. It likewise failed to notify the Industrial Accident Commission of any of these facts when it compromised with the commission's approval, plaintiff's claim against it. In thus keeping concealed from plaintiff the facts as to the accident, under the circumstances here disclosed, we think the jury was justified in inferring that the two companies were acting in concert, and that a tacit agreement existed between them that the liability of the General Electric Company should be kept concealed. Moreover, the record shows that the General Electric Company was fully advised of what the Pacific Gas & Electric Company was doing, and, by reason of the privity of contract between them, it may be reasonably inferred that the General Electric Company ratified and approved what the Pacific Gas & Electric Company was doing.

On the oral argument, appellant referred us to the case of Maryland Casualty Co. v. Fidelity, etc., Co., 71 Cal. App. 492, 236 P. 210. It is appellant's contention that, if the rules of law enunciated in that case be applied to the facts of the instant case, the judgment must be reversed. In that case, plaintiff was the insurance carrier of a certain employer. One of the employees of that company was injured in the course of his employment and he was thereupon sent to a hospital at plaintiff's expense. While there, the hospital attendants negligently aggravated the injury, resulting in delaying the employee's recovery and resulting in the plaintiff expending an additional thousand dollars on the employee's behalf. The defendant is the insurance carrier of the hospital. The defendant agreed with the plaintiff that it would reimburse plaintiff for this extra expenditure if plaintiff would not inform the injured employee of the injury caused by the negligence of the hospital attendants. The plaintiff agreed to this arrangement. This action was brought upon that promise of reimbursement. The injured employee was not a party to the action and was not complaining. The defendant's defense was that the agreement was illegal and void, being against public policy. The appellate court held it was not and this court, two of its justices dissenting, denied a hearing. The basis of the appellate court's opinion was that the insurance carrier of the employee's employer was not in a position of trust towards the employee. The appellate court emphasized the fact that the employee was not before the court and not complaining. The appellate court was evidently of the opinion that neither the employer nor his insurance carrier was liable to the employee for the extra expense caused by the negligence of the hospital attendants, and for that additional reason no duty to disclose the facts to the employee existed on the part of the insurance carrier. All of these factors serve to distinguish clearly that case from the instant one. Here the employer and not his insurance carrier was a party to the concealment; here the employee is the complaining party and here the employer was clearly responsible for caring for the plaintiff. Moreover, the appellate court did not mention section 26 of the Workmen's Compensation Act (as amended by St. 1931, p. 2370). An additional reason why the Maryland Casualty Case, supra, is not in point is that in that case there was no misleading of the employee by the telling to him of half truths, as is the fact in the instant case. In the present case, although Wilson, a General Electric Company employee, McCarthy, Milford, and other Pacific Gas & Electric Company employees talked freely with the plaintiff and his wife about the accident, every one of them carefully concealed the fact, which they well know, that Wilson was working for the General Electric Company at the time of the accident. In this connection, it is well to keep in mind the elementary principle set forth in 12 Ruling Case Law 310, § 71, as follows: "Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure. To tell half a truth has been declared to be equivalent to the concealment of the other half. A partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect it is. Therefore, if one wilfully conceals and suppresses such facts, and thereby leads the other party to believe that the matters to which the statements made relate are different from what they actually are, he is guilty of a fraudulent concealment."

We think that the evidence clearly supports the inference that the appellant agreed with the Pacific Gas & Electric Company to keep the facts from plaintiff, and we are further of the view that such an agreement, under the facts of this case, constituted a fraud on plaintiff.

The other contentions made by appellant are so unsubstantial as not to require further comment.

The judgment appealed from is affirmed.

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220 Cal. 152

ORIGINAL MIN. & MILL. CO. v. SAN JOAQUIN LIGHT & POWER CORPORATION.

Sac. 4622.

Supreme Court of California.
Feb. 27, 1934.

Rehearing Denied March 29, 1934.

1. Appeal and error 🔑1010(1).

Where jury found for plaintiff in action for fraud, implied finding that defendant's agent acted within scope of authority cannot be disturbed if supported by any substantial evidence.

2. Corporations 🔑429.

That electric company's district manager had no authority to act in major matters connected with contract with mining company constituted notice to mining company that his position clothed him with only limited or special powers.

> While such district manager solicited business, the final contracts between the parties for extension of power line to mine were executed on behalf of electric company by regular officers, and not by district manager, although agreement to perform labor of digging holes for poles to be used in extension was signed by district manager.

3. Principal and agent 🔑147(3).

Where agent acts under special or limited authority, party dealing with him is bound to know at his peril what power of agent is, and to understand its legal effect.

4. Corporations 🔑432(12).

In action for fraud by mining corporation against electric company, based on fraudulent stock transactions by corporation's officer, evidence showed electric company's district manager was not acting within scope of employment when participating in stock transactions, so that company could not be held liable for his acts.

5. Corporations 🔑423.

Corporation could not shift loss due to officer's dishonest management onto third persons without showing some fraudulent conspiracy between officer and person to be charged.

6. Fraud 🔑58(1).

In action for fraud by mining corporation against electric company, based on fraudulent stock transactions by corporation's officer, evidence *held* not to show fraudulent conspiracy between corporation's officer and electric company's district manager.

7. Evidence 🔑60.

Where proved facts justify two inferences equally reasonable, that favoring fair dealing must be drawn rather than one favoring corrupt practice.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by original Mining & Milling Company against San Joaquin Light & Power Corporation, to recover damages for fraud and deceit. From an adverse judgment, defendant appeals.

Reversed, with directions.

For prior opinion, see 19 P.(2d) 985.

F. H. Pearson, of Fresno, and Thos. J. Straub and W. R. Dunn, both of San Francisco, for appellant.

Conley, Conley & Conley, W. M. Conley, Philip Conley, and Matthew Conley, all of Fresno, for respondent.

PER CURIAM.

Plaintiff is a corporation organized under the laws of this state. It is the owner of the Clearing House Mine situated in Mariposa county some considerable distance from the city of Merced, where the principal place of business of the company is located. Since its organization in 1911, until his death in 1926, J. B. Hart was its secretary and treasurer. Hart was also cashier of the Farmers' & Merchants' National Bank of Merced. Hart resided in Merced, where the principal place of business of the bank was located and where he carried on his duties as an officer of the two corporations. At the times herein mentioned up to the time of his death, Hart's reputation for honesty and integrity was of the very highest. He undoubtedly had the implicit confidence of his business associates, including the members of the board of directors of the plaintiff mining company. He was given much broader powers than those usually appertaining to the two offices held by him in the mining company. In fact, the president of the company testified that Hart had entire charge of the business affairs of the mining company. The defendant was engaged in the business of manufacturing, distributing, and selling electricity to be used for light and power purposes. Its principal place of business had been Los Angeles, but some time in the year 1925 it was removed to Fresno, Cal., about fifty miles south of the city of Merced. The representative of the defendant power company in the city of Merced was R. Casad, who held the title of district manager. His district covered practically all the county of Merced and a portion of Mariposa county. He and Hart were lifelong friends. His duties were those usually performed by a district manager of a light and power company, and included the solicitation of business for his employer, the collection of the bills of the consumers, and he also solicited on behalf of his company the sale of prior preferred stock issued by his company under authority of the railroad commission of the state. Casad approached the officers of the mining company, Mr. Kocher, its president, and Mr. Hart, its secretary and treasurer, regarding the supplying of electricity to operate the mining operations of the plaintiff company, and as a result of his efforts a written agreement was entered into by the plaintiff mining company and the defendant power company, on August 27, 1921, whereby the latter company agreed to extend its power line to the Clearing House Mine and to furnish the mining company with electric energy to operate said mine. It was estimated that the cost of making this extension would be in the neighborhood of $40,000. The mining company in this agreement was to pay to the power company $13,200 in cash, and was also to purchase from the power company, on or before September 1, 1921, 274 shares of its prior preferred stock at $98.50 per share, amounting in the aggregate to the sum of $26,989. One of the terms of this agreement was that the mining company should not sell or dispose of this stock for five years from that date. This agreement was executed by Mr. Kocher, as president, and Mr. Hart, as the secretary, of the mining company, and by Mr. Wishon, the general manager, and Mr. Durfey, the assistant secretary, of the power company. Another written agreement was entered into at the same time between the same parties, whereby the power company agreed to furnish and the mining company agreed to pay for electrical energy to operate the mining machinery at the mine of the plaintiff. This agreement was executed by Kocher and Hart, as officers of the mining company, and by M. E. Newlin, manager of the commercial department of the power company. A third written agreement was also entered into between the same parties, dated August 31, 1921, whereby the mining company agreed to dig all holes for the poles to be used in the construction of the power line which the power company had agreed to extend to the mine of plaintiff, and the power company agreed to pay the mining company a certain sum of money for said service. This agreement was executed by R. Casad on behalf of the power company and by J. B. Hart on behalf of the mining company. A day or two after this agreement of August 27, 1921, was executed, Hart came to Casad and said that the mining company did not have the money to buy the 274 shares of stock from the power company, and asked Casad to have the stock issued in his (Casad's) name and then to borrow from Geo. H. Bloss $17,000, giving the stock as security, and he, as treasurer of the mining company, would put up the balance needed to pay for the stock in full. At first Casad objected to this proposal, and stated that he did not wish to use his credit on behalf of the mining company. Hart assured him that it would be all right as he (Hart) had full authority from the mining company to handle the purchase of said stock. Casad then agreed to the plan. He signed a stock purchaser's agreement for the 274 shares, and forwarded the same to the power company. In the meantime, he had talked with Mr. Alexander, stock sales manager of the power company, regarding the stock being issued in his (Casad's) name, and Alexander assented to the plan. Casad then contacted Bloss, and the latter agreed to loan him $17,000 on 200 shares of the stock for one year at 7 per cent. interest. The note for $17,000 was drawn up by Hart at his office in the bank, and Casad and Bloss went to the bank, where Casad executed the note and Bloss gave him his check for $17,000. The stock a few days later was sent to Hart, and two of the certificates for 100 shares each were delivered to Bloss as security for the $17,000 note. The other certificate for 74 shares was left with Hart. The $17,000 received on Bloss' check was deposited by Casad to his credit in the bank. Hart from the funds of the mining company deposited $9,989 to Casad's credit, who then drew his check for $26,989 in favor of the power company and sent the same to the company in payment of said stock. At the time Hart suggested to Casad that he borrow this money from Bloss, he stated to Casad that he did not want anybody to know that the mining company was borrowing money, and requested Casad not to mention the matter to anybody. This request was assented to by Casad, and he did not mention the matter of the loan to any other persons, not even to the directors of the mining company. We must except from this statement the conversation between Casad and Alexander mentioned above. The mining company paid to the power company the cash payment of $13,200 provided for in the contract of August 27, 1921. In the latter part of the following June, Hart requested Casad to ascertain from the power company whether it would buy back the stock. Casad did so, and the company agreed to buy back the stock at $95 per share. Thereupon, and under the direction of Hart, the stock was transferred to the company at that price. Casad paid off the loan to Bloss, and the balance of the money received from the sale, amounting to $8,837.75, together with a small amount advanced by Hart, was paid by Casad to Hart, the treasurer of the mining company. The exact amount of this payment was $9,030. Nothing further was heard of this matter until after the death of Hart, which occurred in September, 1926. Just prior to his death a federal bank examiner had ordered the Farmers' & Merchants' National Bank, of which Hart was cashier, to suspend business, for the reason that it was found that Hart had embezzled the funds of the bank. Upon hearing of said order, Hart committed suicide. It was found upon an investigation of his affairs that he had embezzled funds belonging to the plaintiff mining company and to other persons, as well as the funds of the bank. The papers and records of the Original Mining & Milling Company, which up to that time had been in the possession of Hart, were turned over to the directors of said company. The entire transaction regarding the purchase and resale of said 274 shares of stock was then brought to light, with the result that the mining company brought this action against the power company to compel the power company to issue to the plaintiff 274 shares of the prior preferred shares of stock of the defendant corporation as of the date of September 1, 1921, together with all dividends accruing thereon from said date; or pay and return to the plaintiff the sum of $26,989, with interest; or for damages in the sum of $42,011. The action was tried by the court with a jury, and a verdict was rendered in plaintiff's favor in the amount of $42,011, from which the defendant has perfected an appeal upon a bill of exceptions.

In plaintiff's complaint are set forth the facts attending the purchase of said 274 shares of stock of the defendant company, followed by an allegation: "That after the payment to said defendant of said sum of $26,989, in payment for said shares of stock, the said J. B. Hart, as such secretary and treasurer of plaintiff, without the knowledge or consent of plaintiff, and in order to cheat and defraud plaintiff, fraudulently conspired with defendant, and the said defendant and said J. B. Hart fraudulently devised and contrived a plan whereby plaintiff should be cheated and defrauded of the said sum of $26,989 so paid for said shares of stock, and should be cheated and defrauded of said shares of stock. In pursuance of said conspiracy so entered into by said defendant and said J. B. Hart, and in order to carry out the fraudulent plan and scheme devised by said Hart and said defendant, it was arranged that when said shares of stock were issued, the same should be issued not in the name of the plaintiff but in the name of said R. Casad, and that said shares of stock should not be delivered to the plaintiff, but should be delivered to the said R. Casad. That thereafter, pursuant to said conspiracy and pursuant to said plan and scheme so devised by said defendant and said J. B. Hart for the purpose of so cheating and defrauding plaintiff, the said shares of stock, to-wit, 274 shares of the prior preferred stock of said San Joaquin Light and Power Corporation, were issued by said defendant in the name of said R. Casad, and were thereafter delivered to said R. Casad. That said San Joaquin Light and Power Corporation has at no time since making and entering into said agreement in writing with plaintiff, a copy of which is hereunto annexed and marked 'Exhibit A,' issued or delivered to the plaintiff herein said 274 shares of its prior preferred stock, or any shares thereof, or any other shares of stock whatsoever; nor has said San Joaquin Light and Power Corporation at any time returned or repaid to plaintiff the said sum of $26,989, or any part thereof, so paid by it, as the purchase price of said stock, to said San Joaquin Light and Power Corporation." Similar charges of fraud are made regarding each and every act involved in the entire transaction which culminated in the resale of said stock by Casad to the defendant and the application of the proceeds of such sale in the manner and to the persons hereinbefore related. Following these allegations, the plaintiff sets forth the reasons why the alleged fraud was not discovered by the board of directors of the plaintiff until after the death of Hart. These latter allegations were designed to meet the plea of the statute of limitations should such a plea be made upon the ground that the action had not been brought within three years after the alleged fraud was committed.

If the foregoing were all the facts involved in this case, this action would in all probability never have been begun. For it appears from these facts that plaintiff, even if the charge of fraud could be proven, sustained but slight damage. In the first place, all that plaintiff invested in said 274 shares of stock was the sum of $9,989, and on a resale thereof plaintiff was paid $9,030, which would bring plaintiff's actual damage down to $959. This amount is further reduced by applying certain dividends accruing on this stock while it was in Casad's name and which were paid by Casad to Hart. But it appeared after the death of Hart that he had, not only embezzled the sum of $9,030 paid to him by Casad on the resale of the stock, but also and some time in January, 1922, he had apparently embezzled the further sum of $17,000 and charged this sum against the purchase price of said stock. Plaintiff's loss, therefore, from Hart's embezzlement amounted practically to the entire purchase price of the stock. The defendant cannot, of course, be held liable for the money embezzled by the plaintiff's treasurer, Hart, unless it aided or abetted, or at least connived at, Hart's illegal acts in appropriating plaintiff's money, or unless the defendant had put it in the power of Hart to wrong plaintiff which he could not have done except for the acts of the defendant. There is not a word of evidence in the whole record in this case that Casad, assuming that in his dealings with Hart he acted within the scope of his authority as the agent of defendant, had any knowledge, or even suspicion, that Hart was misappropriating the money of his employer, or that he was intending or planning to embezzle any of the funds involved in the sale and resale of said 274 shares of stock. Nor is there any evidence that this transaction aided or abetted Hart, or furnished him any opportunity that he did not otherwise have, to commit said embezzlement. The $9,030 which he embezzled after the resale of the stock simply replaced in part the $9,989 which he, as treasurer of the company, furnished for the purchase of the stock in the first instance. Therefore, this transaction furnished no additional money for Hart to operate upon than that which had already been in his possession. As to the sum of $17,000, appropriated by Hart in January, 1922, the evidence conclusively shows that it had no connection whatever with any transaction between Hart and Casad, except that Hart attempted to show by fraudulent entries in the records of the mining company that it was paid out for the purchase of the stock. Where this money came from the evidence does not purport to show, but it was conclusively shown that no part of it came from the sale of the 274 shares of stock, nor was it, or any part of it, paid to the defendant company in payment of the stock, or for any purpose whatever. The stock had been paid for in September, 1921, by the $9,989 advanced by the mining company and the $17,000 borrowed from Bloss. It was, therefore, impossible for any part of this $17,000, which Hart fraudulently represented as paid on this stock, to have been used for that purpose.

Coming now to plaintiff's theory of the case, it is, as we understand it, that plaintiff paid in full for the 274 shares of stock at the time of its purchase in September, 1921, and that, as it never parted with said stock, it is now entitled to its return as of the date of its purchase, together with all dividends declared thereon since its purchase up to the time of the judgment, or in case said stock cannot be delivered, to the value of said stock at the time of its purchase, together with the amount of all dividends thereon. Plaintiff alleged that it had paid for said stock the sum of $26,989 on the 1st day of September, 1921, and defendant in its answer admits this allegation, but further alleges that upon the resale of the stock it was repaid the sum of $26,030, as well as certain dividends that had accrued upon said shares of stock. As we have seen, plaintiff and defendant are agreed that plaintiff paid the sum of $26,989 for said stock, but when they come to show how the payment was made they disagree. Plaintiff claims that it paid $9,989 at the time of the purchase of the stock and $17,000 in January, 1922, no part of which has ever been repaid to it. As we have shown, there is absolutely no foundation supporting plaintiff's claim that this $17,000, noted by Hart as paid on this stock in January, 1922, was ever paid on said stock, or that any part thereof was ever paid to defendant for any purpose whatever. Eliminating this item, there would only be left the said sum of $9,989 which was actually paid by the plaintiff on the purchase price of said stock, and which, as we have shown, was practically all repaid to plaintiff. On the other hand, defendant contends that plaintiff paid for said stock by advancing said sum of $9,989 and by Casad, either as the agent of the plaintiff, or as the holder of said stock in trust for plaintiff, borrowing the sum of $17,000, which, together with the amount advanced by plaintiff, paid for said stock in full. Without committing ourselves as to the legal relation of Casad at the time in question, as we have already stated, the evidence conclusively shows that the stock was paid for in the manner outlined in defendant's contention. Therefore, if the plaintiff is entitled to recover in this action, it can only recover the purchase price of said stock, less the amount borrowed from Bloss to pay on said purchase price, and also less the amount paid plaintiff after a resale of said stock. This leaves, as we have seen, the sum of $959, which was further reduced by certain dividends paid to plaintiff during the time said stock stood in Casad's name. This amount, however, can be recovered against the defendant only in case Casad in the transactions involved in the purchase and resale of said stock was acting within the scope of his authority, as district manager of the defendant in the Merced district, or that defendant ratified the acts of Casad in said transaction.

[1-4] We are mindful of the fact that the verdict of the jury in favor of the plaintiff is tantamount to an implied finding upon all issues made by the pleadings which would include the issue as to whether Casad in the transactions involving the sale and resale of said stock was acting within the scope of his authority, as the district manager of the defendant. Therefore, if there is any substantial evidence supporting plaintiff's claim that Casad in the transaction was so acting, the implied findings of the jury cannot be disturbed on appeal.

The evidence showed that Casad was district manager of the defendant. As such he had only limited powers. While he was authorized to solicit business for his principal, that is, to sell electrical energy to residents of his district to be used for light and power purposes, to collect the bills due the company for that service, and also to solicit the sale of an issue of stock known as prior preferred stock of the kind involved in this action, when his action involved matters outside of these just mentioned, his authority was subject to approval by the regular officers of the company. This was apparent and particularly so to the plaintiff from the limited part taken by Casad in the transactions between the plaintiff and defendant herein which culminated in the agreements whereby the defendant agreed to extend its power line to plaintiff's mine and the latter agreed to purchase and pay for electrical energy to operate the mine. While Casad solicited this business the final contracts between the parties were executed on behalf of the defendant by regular officers of the company, and not by Casad, either in the capacity of district manager, or otherwise. It is true that the agreement to perform the labor of digging the holes for the poles to be used in the extension of the pole line was signed by Casad as district manager of the company. But this contract was of minor importance in comparison with the other two contracts, and the fact that Casad had no authority to act in these major matters was direct and positive notice to plaintiff that Casad's position as district manager clothed him with only limited or special powers. In such a case the legal principle is applicable that, where an agent acts under a special or limited authority, the party dealing with him is bound to know at his peril what the power of the agent is, and to understand its legal effect. 1 Cal. Jur. p. 715. This principle is more fully but aptly stated as follows: "It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a general or special one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency but the nature and extent of the authority, and in case either is controverted, the burden of proof is upon them to establish it." Mechem on Agency [2d Ed.] vol. 1, p. 527.

The part taken by Casad in having the 274 shares of stock issued in his name and in borrowing money thereon to be applied on their purchase price was not done at the instance of or in the interest of the power company, but as an accommodation to Hart, as a representative of the mining company, in order to enable the mining company to fulfill its contract to purchase said shares of stock. And when Mr. Alexander, the stock sales manager of defendant, assented to this plan he did so, not for the purpose of gaining any advantage for his own company, but to enable the mining company to secure the necessary funds to pay for said stock. It must be borne in mind that this whole transaction, of which the mining company complains, took place entirely after the mining company had bound itself by written agreement to buy said stock at the agreed price of $98.50 per share, and whatever Casad did independently, or with the consent of Mr. Alexander, in connection with this transaction, was done for the purpose of assisting the mining company to carry out the terms of said written agreement. The evidence fails to show that in these matters Casad was acting within the scope of his employment. On the other hand, the evidence shows that in so acting he stepped outside the course of his duties and powers as the district manager of the defendant, and performed acts wholly foreign to and inconsistent with his employment, and for the purpose of accommodating and assisting his friend, Hart, who, Casad had every reason to believe, was not only acting for the plaintiff mining company, but was also looking after its interest. It follows, therefore, that the defendant cannot be held liable for the acts of Casad, which were not within the scope of his authority as the district manager of the defendant, and that the judgment herein against the defendant predicated upon the acts of Casad cannot be maintained.

[5-7] As we view this unfortunate affair, whatever loss has been sustained by the plaintiff in this action was entirely due to the dishonest actions of its trusted employee and officer, Hart. While the directors of the plaintiff testified that Hart was not given any specific authority to take the certificates of stock in the name of Casad, or to borrow money thereon, either in the name of the company or in Casad's name, they also testified that Hart had entire charge of the business affairs of the mining company, and the president of the company, Mr. Kocher, stated in regard to this stock transaction: "I had entire confidence in Mr. Hart. The board of directors with myself included gave Mr. Hart full authority to buy this stock for the mining company. I did not tell him how to do it, nor as to the manner in which he should handle it. I had enough confidence in him to believe that he would handle it in the proper way, he had full charge of the matter." With the evidence showing that Hart possessed these broad powers, it is difficult to perceive how the company can shift the loss due to his dishonest management of its affairs onto the defendant or onto anybody else without showing some fraudulent conspiracy between Hart and the person to be charged. Even if Casad fraudulently conspired with Hart to defraud the mining company out of said stock or of any money connected with the purchase or resale of said stock, as such acts of Casad were wholly outside the scope of his authority as the agent of the defendant, any loss sustained by the plaintiff by reason of this fraudulent conspiracy cannot be recovered from the defendant. We are not satisfied, however, that the evidence shows any fraudulent conspiracy existed between Hart and Casad. Whatever Hart's intention and purpose were in this transaction, there is no evidence that Casad was party to any fraudulent or dishonest act, committed by Hart, or that he had knowledge of any fact that would put him upon notice of Hart's fraudulent purposes. Casad in this whole transaction acted upon the suggestion and under the direction of Hart. When it was first suggested to him by Hart that the stock be placed in his name, and that he borrow money thereon to be applied on its purchase price, he objected to the suggestion, for the reason, as stated by him at the time, that he did not want to use his credit in that manner. But at the earnest and persistent solicitation of Hart, and upon the assurance of Hart that he had full authority from the mining company to handle the transaction as he wanted to, Casad finally agreed to the plan suggested by Hart. Casad trusted Hart implicitly, as did the directors of the mining company, the officials of the bank, and the people generally in that community. There is not one word of evidence that would justify the inference that Casad had any knowledge or even suspicion that Hart was dealing falsely with his company. There is also the further fact that Casad did not in any manner profit by any of Hart's dishonest conduct. The evidence does not show that one dollar of Hart's ill-gotten gains found its way into Casad's pockets. Casad was simply deceived by Hart, as were the many others who had so implicitly trusted him. The inference of fair dealing on the part of Casad to be drawn from the evidence in this case is exceedingly strong, and we think greatly outweighs any inference of fraud. "If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of court or jury to draw the inference favorable to fair dealing. (Citing authorities.) For fraud must always be proved, so that when the plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed

to establish his charge by a preponderance of the evidence, and it becomes the duty of court or jury, as has been said, to find in favor of innocence and uprightness." Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753, 756. Other authorities might be cited to the same effect, but the rule announced above is so well established that further reference to the adjudicated cases of this state is unnecessary. This rule goes further than the necessities of this case, as it is most difficult for us to draw any inference of fraud from the conduct of Casad in his dealings with Hart in reference to the purchase and resale of said stock. As Hart was the agent of the plaintiff, invested with broad powers, and as it was solely through his dishonest dealings that plaintiff has been caused to lose its money and property, no recourse for this loss can be had in this action against defendant. Defendant at the close of plaintiff's evidence made a motion for a nonsuit. It should have been granted, and the court erred in denying said motion.

In view of our determination of the questions stated above, it is unnecessary for us to pass upon the question of the statute of limitation or that the action is one in equity, and the judgment should be reversed by reason of the failure of the trial court to make findings.

The judgment is reversed, with directions to the trial court to set aside the verdict rendered herein, and render judgment in favor of the defendant.

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136 Cal.App. 755

M. KANTER SILK CORPORATION v. CRAMER.

Civ. 9311.

District Court of Appeal, First District, Division 2, California.
Feb. 20, 1934.

1. Guaranty 🔑27.

Absence of demand for payment of sum past due and continued sale of merchandise on same terms *held* evidence of contemporaneous construction by parties of guaranty as regards whether existing indebtedness was included.

2. Contracts 🔑170(1).

Contemporaneous construction of contracts by parties is of weight as regards proper interpretation.

3. Guaranty 🔑36(2).

Stockholder's written promise to pay any indebtedness contracted or to be contracted by corporation included existing indebtedness (Civ. Code, § 1641).

4. Guaranty 🔑27.

Where there were no uncertainties in guaranty, preparation by creditor was unimportant.

5. Guaranty 🔑16(1).

Written guaranty reciting receipt of valuable consideration and further consideration of extension of credit *held* supported by valuable consideration as regards guarantor's liability for existing indebtedness (Civ. Code, § 1614).

6. Evidence 🔑354(19).

In action on guaranty, formal statements of sales made from memoranda prepared at time of sales and approved by salesman, entries in sales book from such statements, and ledger entries prepared from sales book *held* admissible where identified by salesman.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the M. Kanter Silk Corporation against L. H. Cramer. From a judgment for plaintiff, defendant appeals.

Affirmed.

Charles A. Bank, of Los Angeles, for appellant.

Sparling & Teel and Courtney A. Teel, all of Los Angeles, for respondent.

STURTEVANT, Justice.

From a judgment in favor of the plaintiff, the defendant L. H. Cramer has appealed. In its complaint the plaintiff pleaded a written guaranty and prayed for a judgment based thereon. On the calling of the case counsel made an opening statement. That statement and the reply thereto took the form of stipulations, from which it appeared that the plaintiff is a silk merchant. The defendant Cramer and one Goldstein owned two businesses—Varsity Frocks and Patsy Frocks. Both were incorporated, and the stock was owned jointly by Cramer and Goldstein. Varsity Frocks was a manufacturing organization. Patsy Frocks was a retailing organization. The plaintiff had been selling goods to the Varsity Frocks. The latter manufactured the goods, and Patsy Frocks retailed them. Commencing in March, 1930, the plaintiff sold to Varsity Frocks, Limited, large quantities of dry goods. Each invoice had indorsed on it "terms." Prior to the execution of the guaranty on some of the invoices, the terms were 6 per cent. in 60 days, some 7 per cent. in 10 days, some 8 per cent. in 10 days, etc. After the date of the guaranty the credit given was 6 per cent. in 60 days. On December 31, 1930, there was a balance due and payable of $3,012.45. The larger part of that balance was long past due. On that date plaintiff prepared, and the defendant signed, an instrument in writing which, so far as material to this appeal, provided as follows: "For a valuable consideration, receipt whereof is hereby acknowledged and in further consideration of your extending credit to Varsity Frocks Ltd., Ninth and Broadway Bldg., Los Angeles, Cal. (hereinafter called the customer) the undersigned, Louis Cramer agrees to pay to you when due or at any time thereafter, any indebtedness contracted by the customer, that may exist at any time hereafter, or to be contracted for by said customer any amount not exceeding $5,000.00 (Five Thousand Dollars), if not paid promptly at maturity by said customer for purchases made from M. Kanter Silk Corporation, 819 Santee St., Los Angeles, Cal." Thereafter the plaintiff sold the Varsity company other goods in the sum of $435.68. It sued this defendant for the total, $3,448.14. The defendant paid $435.68 and contested his liability for the balance. Except as we have noted, no evidence was introduced showing the circumstances under which the guaranty was made.

[1, 2] In several points the defendant contends that the contract by its terms imposes no liability for past indebtedness. It must be conceded that it is not expressly so limited. On December 31, 1930, when the guaranty was signed there was owing to the plaintiff $3,012.45. A large part was past due. As the evidence does not show to the contrary, we must assume that, after the guaranty was executed, immediate payment was neither demanded nor threatened. Credit was extended thereon by the acts of the plaintiff until after the Varsity Frocks went into bankruptcy. In the meantime additional purchases were made. Terms no better than on previous purchases were given, and such terms, so far as the record discloses, were accepted without objection. These acts of the parties were some evidence of the contemporaneous construction by the parties, and such construction is of weight in the interpretation of contracts. Keith v. Electrical Engineering Co., 136 Cal. 178, 181, 68 P. 598.

[3, 4] It is provided in the guaranty: "* * * Louis Cramer agrees to pay * * * when due, or at any time thereafter, any indebtedness contracted by the customer, that may exist at any time hereafter. * * *" When that language was written, the parties did not limit it to either future debts or past debts, but stated any indebtedness. Knowing that some of the debts existed when they were writing, and, at least for a time, would continue to exist in the future, nevertheless their covenant extended to debts that "may exist at any time hereafter." If, at the time the instrument was written, the parties had in mind only debts arising on future invoices, it was a simple matter to express, but it was not done.

If the document is interpreted as contended by the defendant then it reads as follows: "Louis Cramer agrees to pay to you ~~when due or at any time thereafter,~~ any indebtedness ~~contracted by the customer, that may exist at any time hereafter, or~~ to be contracted for by said customer any amount not exceeding $5000.00 (Five Thousand Dollars), if not paid promptly at maturity by said customer for purchases made from M. Kanter Silk Corporation." That is, no effect whatever is given to the words deleted. But section 1641, Civil Code, is as follows: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." From what has been said we think it is clear that the contract was not limited to debts incurred in the future. The uncertainties, if any, having been removed by the rules discussed, there is no occasion for resorting to the fact that the document was prepared by the plaintiff. 6 Cal. Jur. 309.

[5] The defendant contends that the guaranty to be sufficient must contain written words to definitely identify the past indebtedness, to the end that the recovery, if any, may be based on the terms of the written instrument without reference to parol testimony. However, he does not call our attention to any specific word, or words, that are omitted. From what has been said above, we think it is quite clear that the instrument in effect referred to all indebtedness whether incurred in the past or in the future. Under this same point the defendant asserts that the instrument does not disclose the existence of any consideration to support the claim of liability for prior indebtedness. The point is without merit. It is presumed that for a written promise there was a consideration. Civ. Code, § 1614. Furthermore, the instrument before us recites that it was made "for a valuable consideration receipt whereof is hereby acknowledged and in further consideration of your extending credit. * * *" There is no evidence contradicting or limiting the words quoted from the written instrument.

[6] Again, it is asserted by the defendant that there was no proof of any principal indebtedness by competent testimony. The defendant quotes with approval: "In order to be admitted in evidence the book must appear to contain the party's original entries or the first permanent records of the transactions, and when the contrary is discoverable upon the face of the books, or comes out upon the examination of the party, or otherwise, the book should be rejected." 22 C. J. p. 873. However, he does not show wherein the plaintiff's proof failed to comply with the rule contended for. The plaintiff's manager, Mr. Kanter, testified that he made the sales. While on the floor he made certain memoranda, which were later made into a formal statement which was then submitted to him for his approval. Thereafter the statement thus approved was copied in the sales book, and the statement was mailed to the purchaser. Entries in the sales book were carried into the ledger. In proof of its case, the plaintiff introduced the sworn testimony of Mr. Kanter and corroborated it by also introducing the statements, entries in sales book, and its ledger account. From these facts it appears that the plaintiff introduced its "original entries" and its "first permanent records of the transactions" and not otherwise. Speaking of the question involved, in Chan Kiu Sing v. Gordon, 171 Cal. 28, at page 31, 151 P. 657, Mr. Justice Shaw, speaking for the court, said: "In order to lay the foundation for the admission of such evidence it must be shown that the books in question are books of account kept in the regular course of the business; that the business is of a character in which it is proper or customary to keep such books; that the entries were either original entries or the first permanent entries of the transactions; that they were made at the time, or within reasonable proximity to the time, of the respective transactions; and that the persons making them had personal knowledge of the transactions, or obtained such knowledge from a report regularly made to him by some other person employed in the business whose duty it was to make the same in the regular course of business." We do not see wherein, if at all, the rule as stated was not followed by the trial court.

The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

NEARY v. PETERSON et al.*

Civ. 8948.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1934.

Hearing Granted by Supreme Court
April 26, 1934.

1. Taxation ⟹509.

In absence of statutory or constitutional provisions, distinct priority exists in favor of general taxes over special assessments of every kind.

2. Taxation ⟹785.

Lien of street improvement bond issued and assigned prior to issuance of tax deed to premises *held* equal in priority with tax deed lien, where all taxes and assessments were imposed under state authority and for public purposes (Pol. Code, § 3787, as amended by St. 1927, p. 1666).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by J. J. Neary against Carrie W. Peterson and others. From an adverse judgment, plaintiff appeals.

Reversed.

Horace L. Cook, of Los Angeles, for appellant.

R. Dechter, of Los Angeles, for respondent G. M. Brown.

J. Everett Brown, of Los Angeles, for respondents Grace P. Warden and C. W. Peterson.

JAMISON, Justice pro tem.

Plaintiff brought this action to foreclose the lien of a street improvement bond issued

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 37 P.2d 82.

by the city of Culver City under the Street Improvement Act of April 7, 1911, and acts amendatory thereof, alleging that at the time said bond was issued defendant Carrie W. Peterson was, and still is, the owner of the land upon which the said bond is a lien. Defendant Brown answered, denying that Carrie W. Peterson was the owner of said land named in said bond, and setting up the claim of ownership thereof by virtue of a tax deed issued to him by the tax collector of Los Angeles county. Judgment was rendered in favor of Brown; plaintiff moved for a new trial, and, the same being denied, prosecutes this appeal.

The facts of the case are as follows: Appellant is the owner of a street improvement bond issued by said city to the Gatzert Company on September 23, 1927, and by said company assigned to appellant. On August 5, 1929, a tax deed to the land in controversy was issued by the tax collector of Los Angeles county to respondent G. M. Brown; the said tax deed being based on a lien for the state and county taxes for the year 1923. The sole question to be determined on this appeal is as to these two liens, which of them is paramount or conveys a superior title.

[1] It is well settled that, in the absence of statutory or constitutional provisions, a distinct priority exists in favor of general taxes over special assessments of every kind. La Mesa, etc., Irrigation Dist. v. Hornbeck, 216 Cal. 730, 17 P.(2d) 143, 146. In this case the court quoted with approval the following language from In re Dancy Drainage District, 199 Wis. 85, 225 N. W. 873, 876: "We shall not attempt to review the authorities bearing upon this question, because in our view the lien for general taxes is of a distinctly higher order than the lien of any special assessment, and we should not construe any statute as giving precedence to the lien of any special assessment over the lien of general taxes in the absence of a plain legislative command." It also quoted with approval similar language in the cases of Robinson v. Hanson, 75 Utah, 30, 282 P. 782, 784, and Missouri Real Estate, etc., v. Burri, 202 Mo. App. 242, 216 S. W. 570, 571. The question then before us is whether or not there is any statutory provision that gives a special assessment precedence over general taxes.

[2] La Mesa, etc., Irrigation Dist. v. Hornbeck, supra, was an action to compel the cancellation of certain taxes, assessments, tax sales, and tax deeds. Plaintiff had acquired title to certain parcels of land pursuant to sales for delinquent assessments. At the time same was acquired, various county taxes and special assessments had been levied against these parcels of land and had not been paid. It was the contention of the irrigation district that it was entitled to have all of these taxes, tax sales, and tax deeds canceled under section 3804a of the Political Code. The defendants contended that said district was not entitled to have the said taxes canceled under said section or under any other statutory or constitutional provisions. In the course of its opinion, in passing upon this case, the court said: "At a glance it will be seen that petitioners' position assumes precedence over all other public corporations as well as counties and municipalities, and moreover it impairs to some extent at least the functions of all these other agencies. It takes from one and gives to another. Counties and municipal corporations in particular have in charge the property, the liberty and the general welfare of the citizens, and are supported solely by taxation." Later on in this opinion attention is called to section 3787 of the Political Code as amended in 1927 (St. 1927, p. 1666), which provides that the tax deed conveys to the state absolute title to the property described therein, free of all incumbrance except any lien for taxes levied for municipal, or for irrigation, reclamation, protection, flood control, public utility, or other district purposes, or for special assessments which are collected on the tax rolls, and in this connection the court says: "This section has been construed by our own appellate court and by the Supreme Court of at least one other state which has enacted it into their law, from which it is concluded that the legislative intent is to place all taxes, both for county, municipal, and other governmental agency purposes and taxes in the form of assessments in favor of special agencies of the state upon an equal footing before the law. Bolton v. Terra Bella Irr. Dist., 106 Cal. App. 313, 289 P. 678;" State ex rel. Malott v. Board of Com'rs, 89 Mont. 37, 296 P. 1. And again in this same case the court said: "From the above authority and upon our construction of the section we may now safely conclude that under our system of taxation liens in favor of county and municipal corporations and special assessments, under the authority of state agencies for public purposes are all on an equality. By this is meant that in case of delinquency a deed to any one of these agencies for such taxes will not obliterate the existing liens on the property in favor of any or all of the others unless, indeed, said section 3804a compels a different conclusion."

Section 3804a of the Political Code has no bearing upon the matters involved in the instant case. All of the taxes and assessments imposed upon this tract of land were imposed under the authority of the state and were for public purposes. Therefore they must be adjudged to stand upon an equality.

The judgment is reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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137 Cal.App. 143

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SCHUH.

Civ. 8108.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1934.

1. Bills and notes 🔑518(1).

Evidence sustained finding that indorser's name was stricken from note before delivery thereof to payee, and that defendant knew facts when he took assignment of note as consideration for note executed by him.

2. Bills and notes 🔑518(1).

Evidence sustained finding that payee, agreeing to assign note in consideration for note sued on, did not agree to assign general guaranty securing obligation of maker of note assigned.

Appeal from Superior Court, Los Angeles County; Wilbur F. Downs, Judge.

Action by the Security-First National Bank of Los Angeles against John E. Schuh. From an adverse judgment, and from an order denying a new trial, defendant appeals.

Appeal from order denying new trial dismissed, and judgment affirmed.

Swaffield & Swaffield, Chris Wilson, Kenneth Sperry, and Joseph E. Madden, all of Long Beach, for appellant.

Denio, Hart, Taubman & Simpson, of Long Beach, for respondent.

CRAIG, Justice.

In an action for the principal sum of a promissory note, together with interest and attorneys' fees, findings of fact, conclusions of law, and judgment were made and entered in favor of the plaintiff. The defendant having admitted execution of the note and interposed an affirmative defense thereto, motion for a new trial was made upon the ground that findings adverse to said defense were not supported by the evidence, which motion was denied. He appealed from the judgment and from the order denying a new trial. There being no right of appeal from such an order, it must to that extent be dismissed. Kircher v. Hunter, 101 Cal. App. 548, 281 P. 1047.

There is no conflict as to the following transaction: Prior to August 7, 1930, the Urmi Oil Company was indebted to the respondent bank in the sum of $5,000, which note had been executed by defendant John E. Schuh, as president and Edgar D. Brown as secretary, respectively, of said company, and bore the indorsement: "For value received, I hereby * * * guarantee payment of the same, and of all expenses of collection thereof, * * * and also all expenses * * * in enforcing this guaranty, * * *" signed by defendant Schuh and B. N. Belyea. After its maturity and upon the date mentioned, a promissory note for the same amount and containing a pledge of certain specified corporate stocks, by which it was agreed that "the undersigned (jointly and severally) promise[s] to pay," and that upon nonperformance of said promise the plaintiff and respondent was "given power and authority to collect, or to sell, assign and deliver the whole or any part of the pledged property, * * * at either public or private sale, and at the best price offered," and to satisfy said obligation, was executed by the appellant herein. Said latter note was also indorsed, "For value received, I hereby * * * do guarantee payment of the same * * * and of all expenses of collection thereof, * * * and also all expenses, including attorneys' fees, incurred in enforcing this guaranty," by the maker. Contemporaneously with the execution of the first note, there was executed by J. N. McFate, I. B. Rankin, Edgar D. Brown, and O. M. Paddleford a "guarantee" to respondent bank of any and all indebtedness "for the present forbearance of said bank to sue upon any of the past due debt of the debtor" company. A vice president of the bank testified, and there was introduced his statement in writing under date of the original loan: "I have approved today a $5,000 loan for 90 days to the above company, with the endorsements of John E.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Schuh and B. W. Belyea. The company itself is not entitled to secure credit, but the endorsements made it good." The second note was given in lieu of the first note and guaranty, was delivered to the bank with said collateral securities, and became the subject-matter of the present suit, both of the latter being in turn delivered to the appellant.

By said affirmative defense it was alleged that there was a delivery of appellant's note "for the consideration of the assignment of said note executed by the Urmi Oil Company and said guarantee to the defendant; that the sole and only consideration for the execution of said note by the defendant was the assignment of said note of the Urmi Oil Company and the said guarantee," but that the plaintiff failed and refused to deliver either thereof until demanded; that it canceled the name of B. W. Belyea from the indorsement upon said note, and that of I. B. Rankin from said guaranty, and delivered them to the defendant as altered, without his knowledge or consent; that he had been informed and believed that the same bore the signatures of all of said parties and would not have executed his note of August 7, 1930, had he known that the plaintiff had released them; that he signed his said note under a mistake of fact.

In so far as the determination of this appeal is concerned, the sole issue is, Was Belyea's name canceled from the note or Rankin's from the guaranty without the knowledge and consent of the defendant? There is substantial evidence to support the trial court's finding against appellant upon this issue.

Mr. Gibbs, vice president of respondent bank, testified that prior to the date of the Urmi note an arrangement was made for the loan of $5,000, and that Mr. Schuh and Mr. Balyea were to guaranty the note; that when the note was brought in "Mr. Schuh brought them, or sent them in. I think Schuh brought them in." Later he said: "Schuh brought the note in and said that Belyea's name would not be available, and that he would support the loan himself," and that the name of Belyea had two red lines drawn through it "prior to the time that the note was brought to the bank"; that at that time it was discussed what security Schuh would furnish; that in September he brought in some securities not as much as he had agreed, but that, at that time they took such securities, a special letter of guaranty, and his check for $2,000. On cross-examination, the witness was not positive Schuh brought the note in, but stated that "it was Mr. Schuh, I think, that brought them in." Schuh himself testified that he was present when the Urmi note was delivered to the bank, although he thinks it was Mr. Brown or a Mr. Warmbold who took it in. A memorandum made by Gibbs, dated August 28, 1929, stated that he had that day approved a loan to the Urmi Company for $5,000 for ninety days, with the indorsements of Schuh and Belyea, and that in addition they were to have the side guaranty of Rankin, Paddleford, Brown, and McFate. Again, on cross-examination he testified that Belyea's name was stricken off before delivery to the bank. A memorandum by Gibbs dated August 20, 1929, referring to the Urmi loan, stated: "The note was brought in today with the request that Mr. Belyea be excluded from the endorsement, and that in place of Mr. Belyea's name that we secure from John E. Schuh the pledge of certain collateral, which has a market value of around $7,000, with the definite pledge from him that we are to use such collateral to support the $5,000 note of the Urmi Oil Company," and later memos showed the stock brought in by Schuh. On redirect examination Gibbs again testified that, when the note was delivered to him, the name of Belyea had the red lines through it, and that it was at that time he had the conversation relative to Schuh depositing security "in lieu of the endorsement of Belyea." On cross-examination, again, he said he saw Belyea's signature on the note, but "didn't consider that of any use, because it was canceled." Schuh's letter of guaranty, dated September 6, 1929, refers to his check of $2,000, "to be used by you as additional collateral to support my endorsement" on the Urmi note, and states: "It is distinctly understood that you are not to necessarily look to the Urmi Oil Company to pay this note, but may look to me exclusively."

[1] It would seem to be a fair conclusion that Belyea never guaranteed the Urmi note and that Schuh knew all about it, supporting his sole signature with a check, collateral security, and a side guaranty in lieu of the guaranty of Belyea which was not furnished. In view of this and other evidence which might be quoted, certainly such a conclusion reached by a trial court cannot be disturbed on appeal.

[2] So far as the guaranty is concerned, Mr. Dawson, who represented the bank at the time the note sued on was executed, tes-

tified that the Urmi note was delivered to Schuh the day the note sued on was executed; that nothing was said about the general guaranty; that he did not tell Schuh anything about recovery from the general guarantors; and that Schuh talked about recovering from the Urmi Oil Company. He further said that Rankin and Schuh were both present, and that, when the note was delivered to Schuh, Rankin said: "Well, I don't want to have that guarantee lying around here with my name on it, and since you are not going to do any further business with the Urmi Oil Company it is possible that someone might bring the note to the bank some day and my guarantee would be in existence on it, and I would like to have my guarantee taken off of there." To this the witness said: "It is going in our files merely as a part of our permanent file" —"and I took it off there" in Mr. Schuh's presence, and he (Schuh) "heard the conversation and he said nothing about the guarantee." The witness saw the Urmi note in October, 1929, for the first time, and the two red lines were then through Belyea's name.

On January 17, 1931, Schuh's attorneys wrote plaintiff bank, saying: "Mr. Schuh advises that at the time he made his $5,000 note in your favor that the original note bearing signature of Urmi Oil Company and John E. Schuh and B. U. Belyea was delivered to him, but that the guarantee bearing signatures of J. N. McFate, Edgar E. Brown, J. B. Rankin and O. M. Paddleford was not delivered to him and must still be in your possession. If you are able to find this guarantee in your files will you forward it to Mr. Schuh or to this office for him, at your first convenience." Apparently the general guaranty was sent to the attorneys in response to this letter, although the evidence justified the conclusion that it was no part of the agreement to execute the note sued on. This letter also corroborates the statement of Dawson that the note was delivered to Schuh at the time he executed the instrument sued on, and disputes that of Schuh that he did not get it until some time later; and a fair conclusion would be that he knew then, if not before, that Belyea's name was scratched off, but made no complaint until after suit was brought against him. On cross-examination Dawson was asked if it was not a fact that the execution of the note sued on did not contemplate that both the guaranty and the Urmi note were to be assigned to Schuh to which he replied: "Not at all. We were not to give that to them at that time. The guarantee belonged to us; it was a continuing guarantee for our files."

Of course, it is of no importance that there may be testimony contradicting that which we have quoted. It is sufficient that there is substantial evidence in support of the lower court's findings.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

We concur: **STEPHENS, P. J.; ARCHBALD, Justice pro tem.**

137 Cal.App. 193

BOULLESTER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9504.

District Court of Appeal, Second District, Division 1, California.
March 2, 1934.

Rehearing Denied March 31, 1934.

Divorce 🔑255.

Divorce decree adopting parties' community property settlement *held* not res judicata of former husband's right to accounting in regard to community assets allegedly concealed by former wife during course of settlement.

Petition for injunction by Lillie M. Boullester against the Superior Court in and for Los Angeles County and others.

Writ denied.

Vinetz & Gitelson, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Fred M. Cross, Deputy Co. Counsel, and Sherman & Sherman, all of Los Angeles, for respondents.

HOUSER, Justice.

From the petition herein it appears that by the terms of a written instrument petitioner and one who was then her husband agreed upon a settlement or division of their community property, and in the same instrument provided that "it is mutually agreed that should either party hereto obtain a decree of divorce, this agreement shall be offered to the court by the party so obtaining the same and it shall be approved by the court and become part of the decree or judgment." Thereafter, in a complaint that was filed in a suit by the husband for divorce from his said wife (the petitioner herein), the following allegation was made: "That a property settlement agreement, dated November 18, 1929, was executed and entered into between plaintiff and defendant, which said agreement settles and adjusts satisfactorily the property interests of the respective parties, which said agreement the plaintiff hereby asks the court to approve and confirm." The wife did not appear in said suit.

Included within the interlocutory decree of divorce granted therein, was the following provision: "It is further ordered, adjudged and decreed that the property settlement heretofore entered into by and between the parties hereto on November 18th, 1929, and filed in evidence herein as plaintiff's exhibit A and the same is hereby approved and by reference thereto is adopted and made a part of this judgment." And such provision purportedly was carried into the final decree of divorce in said suit in the following language: "It is further ordered and decreed * * * that wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto."

Some years later, the former husband filed a complaint in an action against his former wife, wherein, in substance, the foregoing facts were alleged, and in addition thereto that, in the course of the said settlement of the property rights of the parties, the wife fraudulently had concealed from the husband the existence of certain assets of the community which were in the possession of the wife; and the husband then prayed for an "accounting" between the parties, both in regard to certain of his unfulfilled obligations as created by the said agreement and in regard to the alleged undisclosed assets of the community that were in the possession of the said wife. In the course of proceedings in said action, the trial court denied a motion interposed by the defendant wife to abate the said action or to dismiss the same on the ground of lack of jurisdiction of the court, which assertedly ensued from the allegation that the judgment theretofore rendered in the divorce suit between the parties was res adjudicata as to the cause of action or subject-matter of the action then before the trial court.

In the proceeding before this court, the wife seeks an order by which the lower court will be restrained from proceeding further in the said action for an "accounting" brought against her by her former husband. The respondent herein has demurred to said petition.

Although it may be that in accord with general principles of law announced in authorities emanating from the appellate tribunals of this state the situation presented by the facts hereinbefore set forth would warrant the conclusion not only that the doctrine of res adjudicata may be applicable, but also that the trial court may lack jurisdiction to hear and determine the action which is the basis for the instant petition, nevertheless by precedents which are directly in point and by which in substance it is declared that in circumstances such as here are present, the general rule to which reference has been had should not be applied, this court is led to the conclusion that the prayer of the petition should be denied. Milekovich v. Quinn, 40 Cal. App. 537, 181 P. 256; Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A. L. R. 1074; Vragnizan v. Savings Union, etc., Co., 31 Cal. App. 709, 161 P. 507; Senter v. Senter, 70 Cal. 619, 11 P. 782; In re Estate of Sloan, 179 Cal. 393, 177 P. 150; Murray v. Murray, 28 Cal. App. 533, 153 P. 248; Bridger v. Goldsmith, 143 N. Y. 424, 38 N. E. 458. See, also, Reidy v. Superior Court (Cal. Sup.) 29 P. (2d) 780; United Security B. & T. Co. v. Superior Court, 205 Cal. 167, 270 P. 184; Baird v. Superior Court, 204 Cal. 408, 268 P. 640; Granger v. Superior Court, 159 Cal. 1, 112 P. 854; and authorities therein respectively cited.

It is ordered that the demurrer be and it is sustained; furthermore, that the alternative writ heretofore issued herein be and it is discharged.

We concur: CONREY, P. J.; YORK, J.

McGUIRE v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9621.

District Court of Appeal, Second District, Division 2, California.

March 9, 1934.

Rehearing Denied March 28, 1934.

1. Habeas corpus 🔑46.

District Court of Appeal has power to entertain petition for habeas corpus, where married parents of child are separated and one desires to secure custody of child in possession of other.

2. Parent and child 🔑2(3).

In habeas corpus proceeding to determine custody of child as between father and mother, question is as to which parent should be awarded custody, having in mind welfare of child.

3. Habeas corpus 🔑46.

Superior court is without jurisdiction to award possession of child as between parents without legal hearing, with single exception.

4. Habeas corpus 🔑46.

Where no legal hearing was had in superior court in proceeding to determine custody of child as between parents, leaving superior court without jurisdiction to award custody, habeas corpus proceeding in District Court of Appeal to determine custody *held* proper.

5. Parent and child 🔑2(4).

Order of superior court awarding custody of child to mother, based on investigator's report alone and without permitting father to introduce additional evidence offered, *held* beyond jurisdiction of superior court as having been made without legal hearing.

> Stipulation entered into by father and mother of child, before entry of order of superior court awarding custody of child to mother, provided that the matter of the custody of the child may be referred to a court investigator, and that the report of the court investigator may be considered by the court as evidence at the hearing, together with any additional evidence the parties may desire to present.

6. Habeas corpus 🔑3.

Where superior court indicated that full hearing might be had to determine issue of custody of child as between parents upon application of either party, and immediate safety and welfare of child were not involved, District Court of Appeal declined to take evidence and conduct hearing upon question of custody of child in habeas corpus proceeding.

7. Parent and child 🔑2(3).

Mother is entitled to custody of child, two years of age, as against father, in absence of proof that mother is improper person, or awarding of custody to mother is not for best interests of child.

Original application by Robert Earl McGuire, for a writ of habeas corpus prayed to be directed to the Superior Court in and for Los Angeles County to secure control of Elsa Jeanne McGuire, a minor child, and original application for a writ of mandate to compel award of custody of such minor child.

Writ of habeas corpus denied, and alternative writ of mandate discharged.

George Acret, of Los Angeles, for petitioner.

Richard K. Gandy and Milan E. Ryan, both of Santa Monica, for respondent Elsa Jeanne McGuire.

CRAIG, Justice.

A suit for divorce is pending between petitioner and his wife, Elsa Jeanne McGuire. The petition here is for the writ of habeas corpus and for an alternative writ of mandate, each of which was issued by this court.

[1-4] We have reached the following conclusions: We have no doubt as to our power to entertain a petition for habeas corpus, where married parents of a child are separated and one desires to secure the custody of their child in possession of the other. 12 R. C. L. § 34; 29 Cor. Jur. 110. In such a proceeding the question of first importance to be determined by the court is as to which parent should be awarded custody, having in mind the welfare of the child. This proposition needs no authority. That a superior court has no jurisdiction to award the possession of the child, under such circumstances, even temporarily, to either parent without a legal hearing, except under a certain provision of the Civil Code not here involved; that in the instant proceeding it appears that no legal hearing was held by the superior court as a basis for the order which was made awarding the temporary custody to the mother; and that consequently this proceeding is legal and proper and it is incumbent upon this court to make an appropriate order concerning the temporary custody of the child herein involved.

[5] The petition recites that while the infant, Elsa Jeanne McGuire, was in the custody

of petitioner, its father, by reason of an order issued by the superior court, he relinquished its possession to the mother; that the order of the superior court was rendered after said court had received the report of an investigator of said court, and that at the time of receiving said report petitioner requested permission to introduce evidence supporting his claim to the award of said child; that the court refused to permit any evidence, and based its order solely upon the investigator's report. Previous to the making of said order a stipulation had been entered into by the petitioner and the mother of the child as follows: "The plaintiff's order to show cause re alimony, custody, etc., pendente lite, being returnable in department 46 of the above entitled court on the 24th day of January, 1934, commencing at the hour of 2:00 o'clock p. m., it is hereby stipulated that at the said time that said order to show cause is called for hearing the matter of the custody of the minor child of the parties may be referred to the court investigator. It is further stipulated that the hearing of said order to show cause may be continued for a period of three weeks. It is further stipulated that the report of said court investigator may be considered by the court as evidence at said hearing, together with any additional evidence said parties may desire to present."

It is urged by counsel for respondent that since under the terms of this stipulation the investigator's report might be received as evidence, a legal hearing was conducted and evidence was introduced, and that if the trial court was wrong in refusing the evidence which petitioner herein requested it to receive, error only was committed, but that the court in no way exceeded its jurisdiction. With this contention we are unable to agree. The stipulation must be read as a whole. This petitioner did not thereby consent that the investigator's report should be received in evidence alone, but only as the plain and unambiguous language of the stipulation specifies, "together with any additional evidence said parties may desire to present." If this language required construction, reasons which would impel parties to refuse consent to an investigator's report being received as the sole basis for a court's order are so obvious that we need not set them forth here. But the language of the stipulation admits of no question as to its meaning. We conclude, therefore, as above indicated, that the order itself was made without jurisdiction and is void.

[6] It appears that the trial court has indicated that a full hearing may be had to determine the issue as to which parent shall be the infant's custodian upon application of either party and within five days after such request is made. In our opinion, also, the allegations of the petition are insufficient to put the issue of the immediate safety and welfare of the child before us. Under these circumstances we do not ourselves desire to take evidence and conduct a hearing upon that question, nor do we think the ends of justice would be best subserved by such a proceeding in this court.

[7] It is represented that this child is two years of age. This being so, in the absence of proof that the mother is an improper person, or for any reason cannot to the best interests of the child have its custody, she is entitled to an order giving her its possession and control.

It is therefore our order that under the writ of habeas corpus the child be remanded to the temporary custody of the mother, pending the trial of the issue as to the custody and maintenance in the superior court.

The alternative writ of mandate is discharged.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

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137 Cal.App. 208

PEOPLE v. DYSON.

Cr. 1306.

District Court of Appeal, Third District, California.

March 5, 1934.

Criminal law ⚷1182.

Conviction of murder in first degree must be affirmed where no brief was filed in behalf of appellant and no appearance was made for him at time case was called for hearing (Pen. Code, § 1253).

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Richard Dyson was convicted of murder of the first degree, and he appeals.

Affirmed.

R. C. Pardoe and Paul E. Gehres, both of Stockton, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

PER CURIAM.

The appellant was convicted in the superior court of San Joaquin county of a felony, to wit, murder of the first degree.

The transcript on appeal was filed in this court November 2, 1933. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on March 5, 1934. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

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137 Cal.App. 250

SELVESTER v. KENNEDY.

Civ. 4762.

District Court of Appeal, Third District, California.

March 8, 1934.

Hearing Denied by Supreme Court May 7, 1934.

1. Malicious prosecution 🔑64(2).

In action for malicious prosecution of plaintiff for setting a forest fire, facts *held* to show probable cause for apprehension of plaintiff.

Facts disclosed that forest fire had started under the circumstances indicating that it must have been set, and that near scene of fire horse tracks similar to tracks made by plaintiff's horse were discovered leading from point of fire to plaintiff's residence, which facts were not denied and that the only controverting testimony was that one could not pass over intervening country between plaintiff's residence and scene of the fire, but there was also evidence that defendant had been advised that such trip could be made without trouble. "Probable cause" is defined as a suspicion founded on circumstances sufficiently strong to warrant reasonable man in belief that charge is true.

[Ed. Note.—For other definitions of "Probable Cause," see Words & Phrases.]

2. Malicious prosecution 🔑64(2).

To constitute defense in malicious prosecution action, person filing complaint need not have had sufficient evidence to establish guilt beyond reasonable doubt; it being sufficient if facts establish in mind of reasonable person belief that one charged is guilty.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Joe Selvester against Horace Kennedy and another. From a judgment for plaintiff against defendant named, the defendant named appeals.

Reversed.

U. S. Webb, Atty. Gen., Jess Hession, Deputy Atty. Gen., and Albert F. Ross, Dist. Atty., of Redding, for appellant.

L. C. Smith, of Redding, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiff against the defendant Horace Kennedy and one J. K. Miller, to recover damages in the sum of $6,600 for and on account of alleged malicious prosecution. Judgment was entered against the appellant in this action for the sum of $1,600 and costs. From this judgment the defendant Kennedy appeals.

The record shows that the plaintiff, at the time of the beginning of this action, was and prior thereto had been a rancher and stockman residing in the western part of Shasta county, a region but sparsely settled. The plaintiff's home or residence is situate on the southerly side of the main county road running northeasterly and southwesterly from the city of Redding. This place is also just west of the north fork of Cottonwood creek, which runs in a northerly and southerly direction. Four or five miles further east is Duncan creek, running about parallel with the north fork of Cottonwood creek. Between the two streams there are a couple of ridges or mountains. This country is uninhabited. A branch of the North fork of Cottonwood creek is known as "Long gulch."

On September 3, 1931, a fire was discovered in Long gulch. The defendant Miller and a crew of fire-fighting men went to the scene late in the afternoon and put the fire out. There had been no lightning nor storms of any kind, nor any known way that the fire could have started except by being set. Near the scene of the fire some horse tracks were discovered leading down from the point of the fire to the county road, near the place where the North fork of Cottonwood creek

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

crosses the road. The horse tracks passed through two closed gates, which would have to be opened to permit the passage of animals. These tracks led down along the county road to a gate belonging to the plaintiff, and then into and on his property. The investigators or trackers found similar tracks leading up Duncan creek three or four miles to the east of a place known as the "Graves" place.

On the morning of September 3, 1931, the plaintiff had stopped at the Graves place on his way up Duncan creek, borrowed some salt, stating that he was going up the creek to salt some cattle. These tracks were followed a mile or two up Duncan creek. No returning tracks were found. On the morning in question the testimony shows that the plaintiff was riding a gray horse at the time he stopped at the Graves place. A short time after the tracks had been traced from the scene of the fire to the Selvester home, some of the witnesses hereinafter mentioned called at the home of the plaintiff, found him riding a gray horse making tracks similar to those which had been followed from the scene of the fire to the home of the plaintiff, and which tracks, as we have stated, passed through three closed gates. The record shows that the plaintiff called at the Graves place at about 8:30 in the morning, and that he was seen at his mail box at a point between three and four miles from the scene of the fire, about 1 o'clock, or shortly thereafter in the afternoon.

The appellant in this action was called to Shasta county for the purpose of investigating the fire. Following the discovery of the tracks, as we have stated, the appellant, accompanied by J. A. Miller and W. J. Hufford, went to the home of the plaintiff and had a conversation with him relative to the fire. The testimony in relation thereto will be set out later.

After having been told by the various witnesses who followed the tracks of the horse from the scene of the fire to the home of the plaintiff, and after the interview which we have just mentioned, had with the plaintiff, the appellant went to the district attorney of Shasta county and related to him and to his deputy the facts and circumstances that had been brought to his attention, whereupon there was delivered to him a warrant for the arrest of the plaintiff. A complaint charging the plaintiff with setting the fire just referred to was sworn to by the appellant before a justice of the peace, and a warrant was issued for the arrest of the plaintiff. Following this the plaintiff was arrested, released on bail, and it being discovered that the fire had started and burned over land belonging to the United States government, this action was dismissed and proceedings were instituted before the United States commissioner at Redding, a new complaint was filed, and a warrant of arrest was issued for the apprehension of the plaintiff. Upon hearing, the plaintiff was discharged. Subsequent to the proceedings which we have just stated, this action was begun to recover damages for alleged malicious prosecution.

Three questions are presented upon this appeal, to wit:

1. Was the action begun without probable cause?

2. Was the action of the appellant malicious?

3. Are the damages awarded excessive?

The answer to question No. 1 is determinative upon this appeal if it is found that probable cause existed for the apprehension of the plaintiff.

The record shows that a distance of some four and one-half miles intervened between the point on the Duncan trail (to which the plaintiff stated he was going on the morning of September 3, 1931), and the place where the fire started; the argument being made by the respondent that the intervening territory is such that no horse or rider could negotiate that strip of territory. However, there is some testimony in the record by a witness to the effect that he passed over that section of country at least once a year for several years. The distance from what is called the "Baker" place on the Duncan trail (to which the plaintiff stated he was going on the morning of September 3, 1931), back to the county road, down to the scene of the fire and back to the mail box, at which the plaintiff was seen shortly after 1 o'clock of the same day, is given as thirteen and one-half miles by some of the witnesses, and that the trip could be made in four and one-half hours. So far as we have been able to discover, the record shows no explanation of the tracks from the scene of the fire, along the county road up to the mail box belonging to the plaintiff, and from there to his residence, or that there was any other horse entering the plaintiff's premises, making tracks similar to those made by the gray animal on which the plaintiff was riding on the day of the fire, and was subsequently seen riding by the investigators or trackers. It may also be stated that the record discloses no tracks leading down the county road to the scene of the fire. The tracks which we have mentioned were followed out of the field leading to the fire, and then down the county road away from the fire up to the mail box which we have mentioned, and then to the appellant's home. Accepting the testimony of plaintiff's own witnesses, at least four and one-half hours elapsed from the time he was seen at the Graves place until he was later seen at his mail box.

[1] The circumstances surrounding this case, which were presented to the appellant prior to the swearing of any complaints by him, are best shown by the testimony of the witnesses contained in the record of this case, and will establish, we think, beyond controversy, probable cause.

The witness Maupin testified that the distance between the Baker place and the scene of the fire was about four and one-half miles; that it was about three miles from the fire to the Selvester place; that he had ridden over that country a great many times; that it would take about two hours with a good horse to ride from the Baker place to Long gulch where the fire occurred; that it would take about one and one-half hours to ride from the Graves place to the Baker place; that it would take about one and one-quarter hours to ride from the scene of the fire on Long gulch to the plaintiff's mail box, which would bring the plaintiff back to his mail box on the 3d day of September, 1931, within an elapsed time of only about fifteen or thirty minutes difference from the admitted time when the plaintiff was seen at the mail box.

The witness Maxey testified that he was familiar with the territory between the Baker place and the scene of the fire; that he had had occasion to go from the Baker place across the country to where the fire occurred at Long gulch, many times; that one could go through without much trouble; that the distance from the Graves place to the Baker place was six miles; that it would ordinarily take one and one-half hours or an hour and three-quarters to ride from the Baker place to the Graves place; that it would take about two hours from the Baker place to Long gulch; that it would take three-quarters of an hour to ride from the fire to the Selvester gate. This testimony is to the effect that it would take from four and one-quarter to four and one-half hours to ride from the Graves place to the Baker place. then, to Long gulch, the scene of the fire, and back to the Selvester gate or mail box. The tracks of the horse in question were stated by the trackers to show a peculiar skid, and were readily traceable along the county road from the scene of the fire to the plaintiff's residence; that they were traced from the Graves place up the Duncan trail, which would lead to the Baker place, but no returning tracks were found, which would indicate, as claimed by the appellant, that the rider of the horse in question proceeded from the Baker place across the intervening country to the scene of the fire at Long gulch, and then back through the enclosed field, passing through two gates onto the county road, and then to the Selvester place.

The witness Miller testified that he had lived in Shasta county some forty years; occupied the position of state fire warden; that the investigation was made by himself and officer Hufford, and later, with the appellant; that when he first saw the horse tracks they were right in the gulch inside the fire line; that the tracks led in the direction of the county road; that he followed these tracks to the county road, and up the county road to Selvester's mail box, and then they turned back and went through Selvester's gate into a field belonging to the appellant; that a horse had come out of that gate, and made a track identically the same as the one that had gone in; that the tracks went through two wire gates that were shut; that the tracks went about twenty-five steps to the county road in a southwesterly direction, and turned west to the Selvester mail box, and from the mail box twenty-five steps, and went through a gate belonging to the plaintiff; that this gate was closed, and made of panel boards; that a peculiarity of the horse tracks at the place of the fire was that he picked his feet up like he took the dirt out of his toe tracks, and he probably slid that far with his hind heels in the dust, and would not go down until he slanted his foot, both hind feet, and that that was characteristic of the tracks from the place on the burned area up along through the entire course down to the Selvester gate; that he was aware these tracks had gone up the road towards Mr. Graves' place and then up where the Duncan trail leaves the county road, they had gone up that trail; that he followed the tracks up along Duncan trail probably a mile; and could see the tracks; noticed the same characteristics about the tracks; that when he went down to the Selvester place with Kennedy and Hufford, he saw the horse that Selvester was riding that day, saw him ride in that evening on a gray horse, noticed the kind of tracks the horse made; that they were the same kind of tracks that he had traced; that he saw no other horses in the vicinity of the fire the day he traced the tracks down on that range; that there were no tracks coming back from the Duncan trail or by the Graves place.

The witness Forschler, who occupied a lookout watching for fires, testified that he could not see the location of the fire at Long gulch from his lookout station. The witness Ferguson testified as follows: "We followed the tracks from somewhere about the point of the fire down to what they call Cottonwood creek, a gate, I should judge about two miles, between two and three miles from the fire, and from there through to the county road, the gate there, and from that gate we tracked it across to another gate on the opposite side of the highway where the Harrison gulch road is, and from there to Mr. Selvester's mail box and from there to Mr. Selvester's gate."

The witness Woodfill testified: "We followed it [tracks] down what they call Long gulch into the middle fork of Cottonwood creek and then down Cottonwood to the first gate that led into the Graves pasture and then down to the second gate on the county road and then along the county road to Mr. Selvester's mail box and then from the mail box back to his gate and then inside his field about 25 yards." Several witnesses testified to the peculiarity of the horse tracks in question.

The witness Hufford further testified: That he noticed the tracks were heavy behind; that the horse apparently picked up the dirt with his toes and slid the hind feet forward. On September 9th he saw the horse that Selvester was riding at Selvester's place; that he observed the tracks that the horse made at that time; that the horse came around the barn and went into the barn. He compared the tracks and they were similar to those that he had previously followed.

The record shows that the appellant went with this witness and had pointed out to him some of the tracks referred to herein. This witness testified that he went with Kennedy to the Selvester place; that the appellant said to the plaintiff: "I am a special investigator for the State Forest Service. I came up here to investigate these fires." That plaintiff said, "I don't know anything about any fires." That Kennedy said, "I didn't ask you that." Kennedy then asked, "Where were you on September 3d?" The plaintiff replied, "I went up Duncan Creek." The appellant said, "Well, you didn't come back down Duncan Creek." The plaintiff replied, "I did." Appellant stated, "The tracks don't show it." The plaintiff then said: "I won't talk to you; I don't want to talk to you." The appellant replied: "I don't believe we will talk to you in this frame of mind. Will you be home tomorrow?" The plaintiff said he would. This witness testified that he went with the appellant to the district attorney's office the next day; had an interview with the deputy district attorney; that Kennedy told the deputy district attorney that they had tracked a horse off the hills, and he outlined the case and asked for a warrant, which was issued; that the deputy district attorney prepared and gave Mr. Kennedy a complaint and warrant, and wrote out some instructions for the justice of the peace.

The witness Miller further testified that he showed Kennedy the tracks leading from the fire, and also had discovered the way the tracks led from the Graves place going up the Duncan trail. Miller further testified that he told Kennedy that he could make the trip up the prong of the creek (Duncan trail); that the plaintiff had probably not gone up very far, and Miller said he could make the trip in a day; that he probably went up to what is known as "Ditch fork," and then crossed over the ridge and came down by way of the fire.

All of the circumstances which we have detailed, as testified by the various witnesses, the record shows to have been made known to the appellant prior to the swearing to the complaints by him which led to the apprehension of the plaintiff. There is testimony in the record to the effect that one could not very well make the trip from the Baker place across the country to Long gulch, the scene of the fire, but the truth of that statement is not material. The appellant in this case was advised that such a trip could be made. He was also informed of tracks which led from the Graves place up the Duncan trail, and that there were no returning similar tracks, and therefore, that the horse making such tracks must have taken a course across the country to the scene of the fire because from the scene of the fire the plaintiff was informed that there were similar tracks leading from the very vicinity of the fire through two gates, then on to the county road, along the county road up to a mail box belonging to the plaintiff, and then from there to the plaintiff's residence; then, upon going to the plaintiff's residence, a light colored horse was found making similar tracks, being ridden by the plaintiff. The interview which followed exhibited a disinclination on the part of the plaintiff to have any conversation with his visitors upon the subject of the fire.

The facts and circumstances in this case are strikingly similar to the case of Moore v. Durrer, 127 Cal. App. 759, 16 P.(2d) 676, 679, where a horse making a peculiar track was traced from near the scene of the fire to the residence of the plaintiff, who was subsequently sued for damages resulting from the fire, and also a case where the district attorney refused to issue a warrant. The action was begun by Moore against Durrer for malicious prosecution. This court, in reviewing the facts set forth in that case relative to the horse tracks which were followed, and which were shown to be similar to the tracks made by a horse belonging to the plaintiff, in that action came to the conclusion that the trial court was correct in directing a verdict for the defendant on the ground that probable cause had been shown. In that case this court said: "Probable cause does not depend upon the possession of facts which satisfactorily prove the guilt of an accused person. It is adequate proof of the existence of probable cause that one is possessed of information or facts which are sufficient to cause a reasonable person to honestly believe the charge is true." (Citing a number of cases.) It is further said: "Where the circumstances are admitted, or clearly proved by uncontradicted testimony, it is the province of the court to determine the question of probable cause and the Court may order a nonsuit." (Citing a number of cases.) "Probable cause" is further defined in the opinion in that case as follows: "It is defined as 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" (Citing a number of cases.)

[2] It is not a question of whether the person filing the complaint has sufficient evidence before him to establish the fact of guilt beyond reasonable doubt. It is only necessary that the facts within the possession of the one swearing to the complaint, either by his own acquisition of knowledge, or the information brought to him by witnesses, to establish in the mind of a reasonable person a belief that the one charged is guilty of the offense.

In 16 California Jurisprudence, p. 737, the text reads: "To make out a cause of action for malicious prosecution one must show that the proceedings complained of were prosecuted without probable cause. Actions for malicious prosecution have never been favored in law. The interests of society demand that private wrongs be redressed and crimes brought to light, and, to that end, that whoever believes on reasonable grounds that a civil wrong has been done or a crime committed may institute appropriate legal proceedings without danger. For the purpose of protecting him in so doing, it is the established rule that if he have reasonable grounds for his belief, and act thereon in good faith, he shall not be subjected to damages merely because the accused is not convicted or the action is unsuccessful."

In 18 Ruling Case Law, p. 36, "probable cause" is thus dealt with: "The question of the presence or absence of probable cause for a criminal prosecution does not depend upon the guilt or innocence of the accused or upon the fact whether or not a crime has been committed. If a person acts upon appearances in making a criminal charge, and the apparent facts are such as to lead a discreet and prudent person to believe that a crime has been committed by the party charged, although it turns out that he was deceived, and the party accused was innocent, yet he will be justified."

There is nothing in the record which indicates that the information brought to the appellant came from unreliable sources, or from any persons other than those desirous of calling to his attention the exact facts and the circumstances which had come to their own knowledge. The facts of the existence of the tracks to which we have referred, the course traveled by the horse making the tracks, and the ownership of the gray horse, stand undenied in the record. All the denial of the plaintiff in the record is to the effect, or that could be construed as controverting any of the testimony which we have set forth, is the statement of the plaintiff that he returned from the Baker place down along the Duncan trail. There is no denial that a horse making similar tracks from the scene of the fire, could be traced directly along the highway through the fields and through the gates, past the mail box to the residence of the plaintiff. The only controverting testimony is, as we have stated, that one could not pass over the intervening country between the Baker place and Long gulch, the scene of the fire. On the other hand, the appellant had been advised that that country could be negotiated without trouble, just as the witnesses testified at the trial.

In view of what we have stated, the conclusion seems to us unescapable that the appellant had probable cause for swearing to a complaint charging the plaintiff with setting the fire which occurred on the 3d day of September, 1931. This renders it unnecessary for us to consider the question of malice, or that the court erred in the admission of testimony concerning a telephone conversation.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

* * *

137 Cal.App. 163

PATTERSON et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9462.

District Court of Appeal, Second District, Division 1, California.

March 1, 1934.

Hearing Denied by Supreme Court April 20, 1934.

Wills ⟹259.

Second will contest filed five days after actual trial to court of proceeding for probate was completed and after first contestants had been nonsuited, could not be maintained since not filed "before hearing of petition for probate" (Probate Code, § 370).

> Facts disclosed that when second will contest was filed, evidence had been fully presented in hearing on petition for probate, that arguments of counsel had been presented, that no briefs were to be filed, that actual trial had been completed, and that by express order contestants in first contest, which was heard at same time as petition for probate, had been nonsuited and that respective parties had departed from courtroom, and that under these facts the submission of the cause to the court had been made. Probate Code, § 370, provides that any person interested may contest will by filing written grounds of opposition to probate at any time before hearing of petition for probate.

Petition by Daisy Renoe Patterson and others against the Superior Court of California, in and for Los Angeles County, for a writ of prohibition, in which an alternative writ was issued.

Alternative writ made mandatory and permanent.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (Timon E. Owens, of Los Angeles, of counsel), for petitioners.

Everett W. Mattoon, Co. Counsel, Harold W. Kennedy, Deputy Co. Counsel, Joseph Scott, A. G. Ritter, Leo B. Ward, and Theodore C. Heyl, all of Los Angeles, for respondent.

HOUSER, Justice.

In this proceeding, the essential facts are that, following the filing in the superior court of a petition for the probate of a will, a contest of such will was filed. Thereupon a hearing of the said petition and the said contest were set for hearing on the same date; at which time, and continuing thereafter for a space of two days, evidence was received in support of "proof of the will." Thereafter, intermittently for a period of two weeks next ensuing, evidence was introduced by the contestants relative to the issue tendered by their said contest. Whereupon, the contestants having rested their case, on motion of the proponents of the will, the court granted an order of nonsuit of the contest. Five days thereafter, a second contest was filed by another contestant, and two days after such second contest was filed, and while it was still pending and undetermined, the court made an order by which the will was admitted to probate. Thereafter, each of two successive demurrers to the second contest was overruled. Likewise each of two successive motions to strike the second contest from the files, also each of several motions to dismiss and vacate the said second contest, and a motion to vacate and set aside an order setting the second contest for trial, were, and each of them was, denied.

Pursuant to an alternative writ of prohibition that was issued out of this court, by which the respondent court was directed to show cause why it should not desist and be restrained from further proceeding in the matter of said second contest other than to make an order of dismissal of the same, the question of whether such alternative writ should be made mandatory and permanent is now before this court.

By respective counsel herein it is conceded that a proper interpretation of the pertinent provisions of section 370 of the Probate Code is conclusive of the question here presented. As far as it affects the present inquiry, the language of that section is as follows: "Any person interested may contest the will by filing written grounds of opposition to the probate thereof at any time before the hearing of the petition for probate. * * *" As applied to the facts of the instant case, the question is narrowed to a decision as to whether the second contest to the will was filed "before the hearing of the petition" for its probate. It thus appears that the import of the words "before the hearing" is determinative. In that connection, as far as they relate to a matter of the character of that here under consideration, no authorities either of this state or of any other jurisdiction appear to be available. However, analogous decisions that bear upon a construction of the similar phrase of "before the trial," that appears in section 581 of the Code of Civil Procedure and which relates to the time when an action may be dismissed on a written request of the plaintiff therein, have been presented to this court for its consideration; and as a summary thereof it appears that, as applied to the right of a plaintiff in an action to dismiss the same "at any time before the trial," such right continues up to the time when the cause is submitted to the court or to the jury for its determination. Hancock Ditch Co. v. Bradford, 13 Cal. 637; Brown v. Harter, 18 Cal. 76; Heinlin v. Castro, 22 Cal. 100; Casey v. Jordan, 68 Cal. 246, 9 P. 92, 305; Westbay v. Gray, 116 Cal. 660, 48 P. 800; MacDermot v. Grant, 181 Cal. 332, 184 P. 396; Kershaw v. Hogan, 127 Cal. App. 89, 15 P.(2d) 535.

Assuming that the same interpretation should be given to the phrase "before the hearing" as has been judicially applied in each of the foregoing cases to the phrase "before the trial," the question then arises regarding the application of the rule to the facts herein; from which it appears that the evidence had been fully presented; the arguments of respective counsel had been presented; no briefs were to be filed; the actual trial had been completed; by express order of the court the contestants had been nonsuited; the respective parties to the litigation had departed from the courtroom. Excepting from the standpoint of a motion for a new trial, or an appeal from the ensuing order in the premises, the contestants were completely out of court. Thereafter, with respect to the issue that was tried before the court, nothing was done by any of the litigants, nor was any act by them, or by either of them, in connection with the trial that had taken place, either necessary or anticipated by the court, or apparently by any other person. The question whether the evidence which had been introduced two weeks prior to the time when the motion for nonsuit had been granted, which related exclusively to the proof of the execution of the will, was such as to warrant its admission to probate was all that remained for action by the trial court. The question as to the disposition of the matter was as fully and completely under advisement or submission as though such an order expressly had been made. Neither statute nor any other authority has been cited to the effect that either on the conclusion of argument, or on the filing of a final or closing brief, an order of submission of the cause must be made by the trial court. However, especially when a case is tried before the court, sitting without a jury, no doubt exists but that such a course is customary; but we know of no compelling reason for its necessity. Certainly, where the case is tried with a jury, the practice does not require any formal order of submission; and yet in each of the cases of Hancock Ditch Co. v. Bradford, 13 Cal. 637, and Brown v. Harter, 18 Cal. 76, in effect it was ruled that the retirement of the jury to consider as to its verdict constituted a submission of the cause. In MacDermot v. Grant, 181 Cal. 332, 334, 184 P. 396, it is said that "a case is submitted after the court, trying the case without a jury, has taken the case under advisement, at the close of the evidence and argument." (Citing authorities.) And in the case of Ætna Life Ins. Co. v. Board of Commissioners of Hamilton County (C. C. A.) 79 F. 575, 576, the following occurs in the language of the opinion:

> "The transcript shows * * * that the evidence was presented to the court, the arguments made, and the case taken under advisement by the court on December 13, 1894. This was a submission of the case to the court, and the right of the plaintiff to have the action dismissed without prejudice then ceased. * * *"

To this court, it seems that in proper circumstances the submission of the cause may be implied; and that the facts of the instant case as hereinbefore set forth present a condition or situation from which it should result that a submission of the question before the trial court was intended. It follows that, since the said second contest of the will before the court was not filed "before the hearing of the petition for probate" thereof, it was not filed within the time limit prescribed by the provisions of section 370 of the Probate Code.

It is ordered that the demurrer to the petition filed herein be and it is overruled. Furthermore, that the alternative writ heretofore issued herein be and the same is made mandatory and permanent.

We concur: CONREY, P. J.; YORK, J.

GIBSON et ux. v. EASLEY.*

Civ. 9112.

District Court of Appeal, First District, Division 2, California.

Feb. 26, 1934.

Rehearing Granted March 28, 1934.

1. Appeal and error 🔑882(12).

In automobile guests' action, defendant requesting instruction stating substantially same rule as plaintiffs' instruction could not complain on appeal that plaintiffs' instruction made defendant's acts of driving too fast and swerving her automobile, if done intentionally, willful misconduct, where such objection was not made in trial court.

2. Appeal and error 🔑1170(9).

Where, if correct instructions had been given, evidence was sufficient to support verdict for plaintiffs, and erroneous instruction did not result in miscarriage of justice, Court of Appeal would not reverse (Const. art. 6, § 4½).

3. Trial 🔑296(3).

In automobile accident case, instruction not adding words "if any" after "willful misconduct" was not erroneous as instructing that defendant was guilty of willful misconduct, where instruction immediately following stated, if jury did not find any willful misconduct from evidence, to find for defendant.

4. Automobiles 🔑245(50).

In action for injuries to guests in automobile colliding with pole, defendant driver's willful misconduct as proximate cause of accident *held* for jury.

5. Automobiles 🔑238(1).

In action for injuries to guests in automobile colliding with pole, amended complaint *held* to state cause of action against driver.

> Complaint alleged, in substance, that defendant willfully and recklessly drove automobile in such manner as to be guilty of willful misconduct, in that she so propelled automobile as to cause it to swerve from one side of highway to the other, and willfully drove automobile at high and excessive rate of speed of 50 to 60 miles per hour, and that while so driving defendant willfully caused automobile to run off left side of pavement and then drove back onto right-hand side of pavement and off right-hand side so as to cause automobile to collide and overturn against certain pole, violently hurling plaintiff from automobile and onto ground.

6. Automobiles 🔑238(7).

In action for injuries to automobile guests, it is sufficient to allege that certain act by defendant was done willfully.

7. Appeal and error 🔑193(1).

Where parties went to trial and treated pleadings as containing proper allegation of willful misconduct of defendant, defendant could not, in reviewing court for first time, claim that complaint was insufficient in such respect.

SPENCE, J., dissenting.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by O. B. Gibson and wife against Mame C. Easley. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Bohnett, Hill & Cottrell, of San Jose, and Charles V. Barfield, of San Francisco, for appellant.

Holstein Jensen, of San Jose, for respondents.

STURTEVANT, Justice.

The plaintiffs, O. B. Gibson and Nell Gibson, his wife, commenced an action to recover damages for personal injuries suffered by them in an automobile accident while they were riding as the guests of the defendant, Mame C. Easley, and Richard Easley, her husband. The action was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs, and the defendant has appealed.

At about 3:30 a. m. on the 8th day of May, 1932, the defendant and her husband called at the residence of the plaintiffs, awakened them, and induced them to accompany them on an automobile ride. The defendant did the driving. There was evidence that commencing at a time soon after they entered the automobile the defendant commenced to drive, and continued to drive, at a speed of from 50 to 60 miles an hour over the streets of San Jose, over intersecting streets, and passing numerous arterial stop signs without pausing. There was evidence that while so driving the defendant swerved from right to left and back again on several occasions. There was also evidence that at different times one or the other of the passengers riding with the defendant earnestly admonished her to drive more slowly and with greater care, but that the defendant replied she knew what she was doing and continued to drive in the same manner until the accident happened. Finally, when on the right-hand side of the highway and while so swerving to

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*For subsequent opinion see 32 P.2d 983.

avoid hitting an electric light pole, the defendant attempted to swerve to the left, but the car skidded, ran into the light pole, breaking it in two, greatly damaging her car, and severely injuring all of the passengers.

[1, 2] In her first point the defendant attacks several instructions as being incorrect and prejudicial to her interests. Those instructions were as follows:

"V. I instruct you that by wilful misconduct is meant the voluntary or self-determined or intentional mismanagement or unlawful behavior.

"VI. I hereby charge you that if the defendant, Mame C. Easley, at the time of the accident in question, was traveling upon a public highway, and if at said time she was wilfully driving and operating her automobile at a high and excessive rate of speed in excess of the speed limit allowed by law, and if you find that such conduct on the part of said defendant was the proximate cause of the accident, then said defendant was guilty of wilful misconduct.

"VII. I instruct you that if the defendant, Mame C. Easley, at the time of the accident and immediately prior thereto, was either wilfully driving and operating her automobile at a high and excessive rate of speed, in excess of the speed limit allowed by law, or was wilfully causing said automobile to swerve from one side of the highway to the other side, that she was guilty of wilful misconduct in either event, and it is not necessary for the plaintiffs to show that said defendant intended to or wilfully caused the collision in this case.

"IX. I hereby charge you that if you find by the preponderance of the evidence that the defendant, Mame C. Easley, at the time of the accident either wilfully drove and operated her automobile at a high and excessive rate of speed, in excess of the speed limit allowed by law, or that she wilfully caused said automobile to swerve from one side of the highway to the other side, and that either said swerving or said speed was the proximate cause of the accident, then in either event said defendant was guilty of wilful misconduct, and it is not necessary for the plaintiffs to make any further showing of wilful misconduct to be entitled to recover."

The defendant asserts that the instructions, by their general scope, made the acts of driving too fast and of swerving her car, if done intentionally, willful misconduct. But, as she asserts, further elements should have been inserted in the instructions. She cites, among other cases, Howard v. Howard (Cal. App.) 22 P.(2d) 279, in which the Supreme Court denied a rehearing. It was decided several months after the trial in the instant case. In the Howard Case, supra, at page 281 of 22 P.(2d), the court said: "But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. *Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional* doing of an act with a wanton and reckless disregard of its *possible* result." (Italics ours.) Whatever merit there may be in the point, the defendant is in no position to present it. She asked and the trial court gave two instructions on the same subjects:

"XVIII. You are instructed that the term 'wilful misconduct' is synonymous with 'intentional misconduct' and therefore, if you find from the evidence in this case that the defendant, Mame C. Easley, did not intentionally commit any act of omission or commission which proximately caused injury to the plaintiffs, then if you so find, I instruct you that she would not be guilty of wilful misconduct and in which case your verdict must be for the defendant, Mame C. Easley.

"XIX. Wilful misconduct arises from the spontaneous action of the will, and cannot exist without purpose or design. You should not confuse wilful misconduct with negligence or gross negligence, as there is a clear distinction between the two terms. Wilful misconduct means something different from, and more than, negligence however gross, and if you should find from the evidence in this case that the defendant was not guilty of wilful misconduct, as alleged in the complaint, your verdict must be in her favor, even though you may find from the evidence that she may have been guilty of negligence, or even gross negligence."

It is patent that those instructions stated substantially the same rule as the instructions complained of. Both sets omitted the factor which we have italicized. The defendant did not ask for any other instruction on the meaning of the expression "wilful misconduct." She made a motion for a nonsuit, but she did not therein make the contention she now makes. The proceedings were as follows:

"By Mr. Barfield: May it please the court, the defendant at this time moves for a nonsuit upon the ground that the plaintiffs have failed to prove by any evidence, inference or otherwise, that the defendant in this case committed any act whatsoever intentionally or wilfully; there is no evidence of any wilful misconduct in this case * * * and further, our ground of motion is that it appears from the evidence of the plaintiffs themselves that they had been drinking liquor before this accident. It further appears that by any reasonable view that can be taken of this situation here, that these plaintiffs participated in festivities and a party prior to this accident, and that they are guilty of contributory negligence. * * * Where one voluntarily participates in midnight festivities, I submit in the condition of this case the court must pass ultimately as a thirteenth juror as to whether or not there is any evidence of wilful misconduct. * * * Calling your Honor's attention to the case in Hermance v. Clemow, 111 Cal. App. page 13, 295 P. 70, the Supreme Court points out that wilful misconduct must be something in excess of even gross negligence * * * there must be evidence of intention.

"By the Court: That is a matter for the jury. There is the protesting by Mrs. Gibson, wasn't that wilful misconduct driving at such excessive speed? That is a very interesting question of fact that the jury should pass upon, not the court. We must consider everything in favor of the plaintiffs in passing on a nonsuit. I will deny the motion."

The record does not show whether a motion for a new trial was made. In other words, at no place in the record is it shown that she ever made the point in the trial court. She should have done so, and she may not now change her theory of the case and for the first time present her theory in a court of review. But, the defendant argues, under such an interpretation of the record the jury may have based its verdict on mere negligence or gross negligence. The trial court instructed the jury in most explicit terms that it should not do so. Defendant's instruction No. XV. That admonition was repeated. Defendant's instruction No. XIX. Finally, as a closing admonition, the jury was told that, if the defendant was not guilty of willful misconduct, the jury should return a verdict for the defendant. In Durkee v. Chino Land & Water Co., 151 Cal. 561, at page 571, 91 P. 389, 392, the court said: "As the rule adopted by plaintiff for the measurement of damages was acquiesced in by defendant, no objection raised by it to the competency of the evidence given under it, and, as that evidence fully sustains the findings, the defendant is concluded by its conduct from raising any question of the sufficiency of the evidence when tested by some other and different rule than the one adopted and acquiesced in upon the trial. In this view, whether the rule adopted for the ascertainment of damages was the correct one or not, we are not called upon to consider. It was the one adopted and acquiesced in by both parties and followed by the court, and neither of the litigants can be heard after judgment to question its correctness, or the competency of the evidence introduced under it"—citing cases. In the case of Sommer v. Martin, 55 Cal. App. 603, 204 P. 33, the action was one to recover for personal injuries caused by the alleged negligence of the defendant. In the trial court the plaintiff, without objection, introduced in evidence a local traffic ordinance. Both parties tried the case on the theory that said ordinance was the governing law. After the trial and before the hearing of the case on appeal the decision entitled Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A. L. R. 1172, was handed down. Later the defendant Martin sought to change his theory of the law and attempted to rely on Ex parte Daniels, supra. This court held he could not do so, and on page 610 of 55 Cal. App., 204 P. 33, 36, quoted with approval as follows: "'Besides, it is due to the judge, in furtherance of justice, that his attention should be called to the legal principle which is claimed to be violated by the admission or rejection of the evidence. In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights, and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would, in most cases, be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.' Hayne, New Trial and Appeal, vol. 1, § 103. In the case of Horace F. Wood Transfer Co. v. Shelton, 180 Ind. 273, 279, 101 N. E. 718, 720, the court said: 'In attacking instructions Nos. 7, 9, 13, and 14 given by the court on its own motion, appellant seeks to question the validity of an ordinance of the city of Indianapolis providing a speed limit for automobiles within a certain prescribed territory in said city. During the progress of the trial the attorney for appellees read in evidence the ordinance in question and asked "There is no question about the validity and force of this?" To which one of the attorneys for appellant replied: "Oh, no." Later it was suggested that a subsequent attack might be made on the ordinance in case of appeal, to which the attorney stated: "That is an immaterial point. We will let it go just the way it is." It is a familiar rule that a party is restricted on appeal to the theory adopted at the trial and "when a theory is thus adopted, and acted upon below, with the concurrence of both parties, a judgment ought not be reversed because the court instructs the jury in accordance with it."'" In Checotah v. Hardridge, 31 Okl. 742, 123 P. 846, the Supreme Court of Oklahoma was considering the record in a case involving the devolution of title to lands in that state. At page 849 of 123 P., 31 Okl. 742, the court said: "The case, however, seems to have been tried in the lower court upon the theory that the Creek law applied to the entire devolution, and, if so, the parties will not be permitted to change front in this court, and take a new hold on another theory. This has been the uniform holding of this court"—citing cases. The authorities we have cited can be multiplied many times. 2 Cal. Jur. 237; 3 C. J. 718. In the instant case, although there was a conflict in the evidence, if the exactly correct instructions had been given, all of the members of this court are agreed that the evidence was sufficient to support the verdict. Under these circumstances, unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice, the judgment should not be reversed. Const. art. 6, § 4½. We are entirely unable to say that there has been a miscarriage of justice.

[3] The defendant attacks instruction number XII and number XIV. The attack on each is that each one in effect told the jury that the defendant was guilty of willful misconduct. This attack is based on the fact that the words "if any" were not inserted after "wilful misconduct," and therefore the trial court took from the jury the power to determine for itself whether the defendant's act was, or was not, willful misconduct. Speaking of a similar attack, in the case of Forrest v. Pickwick Stages System, 101 Cal. App. 426, at page 434, 281 P. 723, 726, Mr. Presiding Justice Koford, speaking for this court, said: "Appellants claim this instruction assumed as a fact that there was an absence of all evidence upon the subjects mentioned. If so, it is very slight and indirect and is cured by other instructions upon contributory negligence. In such instruction the expression, 'in the absence of all evidence to show' should be understood to mean 'if the jury finds an absence of all evidence,' and it is not an assumption of fact which is prohibited the trial judge. It is like defining negligence and contributory negligence. That does not assume negligence or contributory negligence to be an established fact in the case." That comment is particularly applicable to this record. That the trial court in the instant case did not assume that the defendant was guilty of willful misconduct is shown in instruction XV, which immediately followed, and which, among other things, said: "You are instructed that if you find from the evidence in this case that the defendant, Mame C. Easley, was not guilty of any willful misconduct as alleged in the complaint, then I instruct you that you need consider nothing further, and if you so find your verdict must be in favor of defendant, Mame C. Easley."

[4] It is next claimed that the evidence in this case was wholly insufficient to support the verdict. In support of the point the defendant quotes a considerable portion of the evidence. Thereupon she states: "Taking the above evidence in the light most favorable to plaintiffs and respondents, there is no evidence whatever that the defendant either committed a willful or intentional injury upon the plaintiffs or that she was guilty of a conscious failure to act to the end of averting injury, with knowledge of the peril to be apprehended from such failure." It is a sufficient reply to state that the evidence introduced contained some conflicts. For instance, the defendant, as a witness in her own behalf, claimed that immediately before the accident she made frantic efforts to avoid hitting the pole, and that she did not deliberately drive off of the highway, nor did she willfully cause injuries to the plaintiffs or the death of her husband. If in reaching its verdict the jury determined that the testimony of the defendant was insufficient to exonerate her, or if it determined that some of her testimony was not true, the jury was entirely within its rights.

[5, 6] The fourth point made by the defendant is that the amended complaint failed to state a cause of action. The amended complaint was framed in two counts. The first count was complete in itself alleging injuries sustained by Mr. Gibson. The second count was in all respects identical with the first count, excepting that it alleged the injuries sustained by Mrs. Gibson. The charging part

of each count was as follows: "That on or about the 8th day of May, 1932, while the plaintiff, O. B. Gibson, was so riding in that certain automobile being driven, operated and propelled by the defendant above named in a general southerly direction on and upon that certain public highway in the county of Santa Clara, state of California, known as McLaughlan avenue, near the intersection of that certain public highway in said county and state known as Tully road, the defendant, above named, so willfully and recklessly drove, operated and propelled said automobile in such a manner as to be guilty of willful misconduct as follows to-wit: defendant so propelled said automobile as to cause the same to swerve from one side of the highway to the other side, willfully drove said automobile at a high and excessive rate of speed, to-wit: approximately fifty to sixty miles per hour and said defendant, while so driving said automobile at such high and excessive rate of speed and while causing the same to swerve from one side of the highway to the other side, willfully caused the same to run off of the left side of the pavement and onto the gravel or dirt roadway and said defendant drove and propelled said automobile back onto her right-hand side of the paved portion of said highway and off of the right-hand side of said pavement so as to cause the same to collide and overturn against a certain Pacific Gas and Electric Company pole on the westerly side of said McLaughlan avenue, violently hurling the said plaintiff, O. B. Gibson, from said automobile and onto the ground or gravel portion of said roadway. * * *" While the pleading is not a model, it may not be said to be insufficient. In principle, we think that Stein v. United Railroads, 159 Cal. 368, 113 P. 663, is in point. On page 370 of 159 Cal., 113 P. 663, 664, the court quoted with approval: "It is well settled that negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent. But it must appear from the facts averred that the negligence caused or contributed to the injury." While this case does not sound in negligence, it does sound in willfulness. As it is sufficient to state that a certain act was done negligently, so we think it is sufficient to state that a certain act was done willfully. In Esrey v. Southern Pacific Co., 103 Cal. 541, 37 P. 500, the plaintiff was injured in a railroad accident. In her complaint she charged that the defendant acted negligently. Later she amended her pleading by alleging that the defendant acted willfully. On appeal it was claimed that the amendment was improperly allowed. The court held otherwise. On page 546 of 103 Cal., 37 P. 500, 502, it said: "The amendment pertains wholly to the manner in which the injury was inflicted, and actual damage is all that is sought to be recovered. The gist of the action is a claim of actual damages for personal injuries inflicted by defendant's moving cars, and these are the facts found stated in the original complaint." In the case of Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 86 P. 738, 903, the plaintiff had charged that the act of the defendant was done "carelessly, negligently, willfully and wantonly." On appeal it was claimed that the complaint did not state a cause of action. On page 618 of 3 Cal. App., 86 P. 738, 903, 904, the court said: "The claim that there cannot be carelessness, negligence, willfulness, and wantonness at the same time cannot be maintained. It is true that carelessness does not necessarily imply wantonness, but as wantonness may exist, without intent to injure, it certainly may imply carelessness. To do an act in reckless disregard of consequences, though not intending thereby to do injury, is to do the act in a careless and negligent manner, and would also, under some circumstances, be wantonly done. It was not necessary to sustain the action that the act of defendant be shown to have been wantonly and willfully, as well as carelessly and negligently, done. The fact that the manner of doing the act was charged in the conjunctive, did not deprive plaintiff of the right to show what happened and to recover accordingly. We violate no rule of pleading in holding that the complaint was sufficient as we understand the case of Esrey v. Southern Pacific Co., 103 Cal. 541, 37 P. 500."

[7] But the defendant's contention on this point must fall, even though it might at one time have had merit. To the amended complaint no demurrer was interposed. The parties went to trial, and both parties and the trial court treated the pleadings as containing a proper allegation of the willful misconduct of the defendant. Under all of the circumstances the defendant may not, in a court of review, for the first time present the contention which she now makes. McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Kurokawa v. Saroyan, 95 Cal. App. 772, 775, 273 P. 613; Berger v. St. Louis Storage & Commission Co., 136 Mo. App. 36, 116 S. W. 444.

The last point made by the defendant is that the trial court erred in denying her motion for a new trial. The record does not show that a motion for a new trial was made or, if made, the grounds thereof, the proceedings had, or the order made thereon.

The judgment is affirmed.

I concur: NOURSE, P. J.

SPENCE, Justice.

I dissent. The effect of the instructions given by the trial court at the request of respondents was to advise the jury that any one who voluntarily drives an automobile at a speed prohibited by law is guilty of willful misconduct within the meaning of the Guest Statute. There is no doubt that these instructions were erroneous. Forsman v. Colton (Cal. App.) 28 P.(2d) 429; Olson v. Gay (Cal. App.) 27 P.(2d) 922; Turner v. Standard Oil Co. of California (Cal. App.) 25 P.(2d) 988, 990; Walker v. Bacon (Cal. App.) 23 P.(2d) 520; Howard v. Howard (Cal. App.) 22 P.(2d) 279. The error is apparently conceded in the majority opinion, but it is there held that appellant is in no position to complain of the giving of said instructions. With this conclusion I cannot agree.

The trial of the cause was had before there had been any judicial determination of the meaning of willful misconduct as that term is employed in the Guest Statute. Throughout the trial the parties proceeded upon entirely different theories. Respondents took the position that any voluntary violation of a statute was sufficient. The trial court adopted this view. Appellant, on the other hand, claimed throughout the trial that respondents were required to show that appellant had willfully injured respondent or had willfully run off the road and into the pole. This extreme view finds some support in the minority opinion in Walker v. Bacon, supra, but neither the position taken by the respondents nor the position taken by appellant at the trial can be sustained in view of the above-mentioned decisions establishing the meaning of willful misconduct as used in said statute.

In the case of Turner v. Standard Oil Company of California, supra, the court defined willful misconduct as follows: "'Willful misconduct,' within the meaning of this statute, may then be defined as *intentionally* doing something in the operation of a motor vehicle which should not be done or *intentionally* failing to do something which should be done *under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.*" (Italics ours.) This definition appears to be sound in the light of the legislative history of the Guest Statute, and it finds approval in the other authorities above mentioned. While the intentional violation of a statute constitutes negligence and may constitute gross negligence or even willful misconduct *under certain circumstances*, willful misconduct contemplates something more than a mere intentional violation of one of our numerous statutory traffic regulations. To permit recovery on the theory of willful misconduct upon any showing short of that indicated in the approved definition would result in the complete nullification of the obvious attempt on the part of the Legislature to deny recovery to guests in cases involving mere negligence or even gross negligence. The rule may now be said to be established that even the willful on intentional violation of a statute will not suffice unless the circumstances warrant the inference that the driver knew that injury to his guest would be the probable result rather than a mere possibility. Willful misconduct, as thus defined, involves conduct which is inherently wrong because the act is *intentionally* done or the omission is *intentionally* made with *knowledge of the probability of injury to the guest* and it eliminates from its scope conduct which is wrong solely because of the violation, intentional or otherwise, of some traffic regulation. Invoking certain terms frequently employed with respect to public offenses, it may be said that willful misconduct implies conduct which is malum in se because of such intent coupled with such knowledge, rather than conduct which is merely malum prohibitum.

There can be little doubt that the giving of the erroneous instructions was prejudicial. It may be conceded that the testimony set forth in the majority opinion was sufficient to warrant a finding of willful misconduct, but the evidence was highly conflicting in every portion thereof which had any tendency to show willful misconduct. The evidence offered by appellant showed, among other things, that prior to the accident she was driving on the right side of the road at the rate of 40 to 45 miles per hour; that she did not swerve the car from one side of the road to the other; that nothing was said by any one about her speed or manner of driving; that immediately before the accident some one in the back seat said something which she turned her head to hear; that an instant later she saw the pole looming in front of her, whereupon she pulled the wheel as hard as she could to the left to avoid it, but the car skidded and the right side thereof struck the pole. It is entirely probable that the jury based its finding of willful misconduct solely upon the testimony offered by respondents relating to speed, and under these circumstances it cannot be said that the giving of the erroneous instructions was not prejudicial. In Walker v. Bacon, supra, the cause was reversed because of the instructions, and in that case the instructions were far more favorable to the defendant than were the instructions in the present case.

The majority opinion holds that appellant may not complain of the error in these instructions because she did not present the point in the trial court and may not now change her theory of the case. A reading of the record shows that appellant frequently made her point in the trial court and argued her motion for nonsuit upon the theory that there was no evidence whatever of any willful misconduct. The argument on the motion is not set forth in full, but the record shows that, after appellant made her point, argument by counsel followed. I find no change in the record or on this appeal of appellant's theory of her case. Instructions 18 and 19, proposed by appellant and given by the trial court, were purely defensive instructions, and I cannot agree with the majority opinion that said instructions were substantially the same as the instructions given at the request of respondents. As above stated, the effect of the challenged instructions was to tell the jury that, if appellant voluntarily drove at a speed prohibited by law, it was not necessary to make any further showing of willful misconduct. In other words, a showing of negligence was thereby declared sufficient to impose liability. On the other hand, the jury was told in instruction 19 that neither negligence nor even gross negligence was sufficient. The portion of instruction 19 just mentioned was a correct statement of the law and was in direct conflict with the whole tenor of the several erroneous instructions. The remaining portions of instructions 18 and 19 were not as clear as they might have been, but said portions were negative in form, and told the jury in effect that willful misconduct could not exist without intent, purpose, and design. Appellant cannot well be criticized for her failure to propose an affirmative instruction containing an accurate definition of willful misconduct when the meaning of that term, as used in the Guest Statute, was in doubt until the subsequent determination thereof by the appellate courts. Under the circumstances it seems to me that the judgment should not be permitted to stand when it is entirely probable that it resulted from the erroneous instructions which, contrary to the intention of the Legislature, made negligence rather than willful misconduct the basis of recovery.

It is no answer, as stated in the majority opinion, to point to the instructions which told the jury that it was insufficient to show mere negligence or even gross negligence on the part of appellant, and that the verdict should be in appellant's favor unless it appeared that she was guilty of willful misconduct. These instructions, when considered with the other instructions given, simply made confusion worse confounded. The jury was not guided by any correct definition of willful misconduct, but, on the contrary, the jury was told in effect in several instructions that acts which in law constitute mere negligence were sufficient to show willful misconduct, and the jury was further specifically told that it was not necessary for respondents to "make any further showing of willful misconduct to be entitled to recover."

Certain authorities are cited in the majority opinion on the subject of change of theory on appeal. I do not believe that these authorities are in point. In each of the cases cited the theory repudiated by appellant on appeal was the theory adopted and acquiesced in by both parties in the trial court. In the present case appellant did not adopt or acquiesce in the theory of respondents in the trial court, but, on the contrary, appellant strenuously argued against respondents' theory throughout the trial. The mere fact that in the trial court appellant adopted a theory in line with the views expressed in the minority opinion in Walker v. Bacon, supra, which theory was more favorable to appellant than any theory which the rules laid down in the above-mentioned authorities would permit, should not be held to preclude appellant from adopting and urging the definition of willful misconduct which has since been settled by said authorities.

Section 4½ of article 6 of the Constitution is also cited in support of the conclusion reached in the majority opinion, but I do not believe that said section can properly be applied to a case where the evidence is highly conflicting, where the instructions are irreconcilable, and where it appears probable that the judgment resulted from the giving of the erroneous instructions. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599; Hesler v. California Hospital Company, 178 Cal. 764, 174 P. 654; White v. Davis, 103 Cal. App. 531,

284 P. 1086; Zolkoske v. United States Farm & Land Co., 72 Cal. App. 63, 236 P. 344; Galloway v. United Railroads, 69 Cal. App. 770, 232 P. 491; Alcamisi v. Market Street Railway Company, 67 Cal. App. 710, 228 P. 410.

In my opinion the judgment should be reversed.

WIGHT v. ROHLFFS.*

Civ. 9396.

District Court of Appeal, First District, Division 1, California.
March 8, 1934.

Rehearing Granted April 6, 1934.

1. Appeal and error 🔑544(2).
Nature of action must be determined from pleadings alone, where appeal was upon judgment roll consisting of pleadings and judgment roll (Code Civ. Proc. § 963, subd. 2).

2. Appeal and error 🔑110.
No appeal lies from order granting new trial in action to declare a trust and for an accounting, where jury was waived because action was equitable and parties were not entitled to jury trial as of right (Code Civ. Proc. § 963, subd. 2).

Action by Wilder Wight against Alma Rebecca Rohlffs, as administratrix with the will annexed of the estate of Patrick Cahill, deceased. From an order granting plaintiff a new trial, defendant appeals. On appellee's motion to dismiss appeal.

Appeal dismissed.

M. A. Ross, of San Francisco, for appellant.

H. Raymond Hall, of Oakland, for respondent.

PER CURIAM.

The matter before this court is a motion to dismiss the appeal from an order granting a new trial in an action tried before the court without a jury, a trial by jury having been waived. Respondent contends that the action is one in equity, and therefore there is no authority giving a right of appeal from an order granting a motion for a new trial. Section 963, subd. 2, of the Code of Civil Procedure, provides in part as follows: That an appeal may be taken "from an order granting a new trial or denying a motion for judgment notwithstanding the verdict in an action or proceeding tried by a jury where such trial by jury is a matter of right." Therefore the question before this court is whether or not this is an action where the parties were entitled as a matter of right to a trial by jury, had such right not been waived.

The complaint alleges that on the 6th day of June, 1917, respondent and Patrick Cahill became the sole owners of the real estate and farm in controversy; that respondent owned an undivided one-third interest therein, but that the legal title to said property was vested in Patrick Cahill; that respondent originally invested $4,641.98 in said property, and on December 9, 1918, for the purpose of protecting respondent's interest therein in the event of the death of either party, the said Cahill executed and delivered to respondent a written memorandum to the effect that Cahill held one-third of said property in trust for respondent, subject to certain incumbrances, and subject to an accounting between them; that on or about May 1, 1921, it was agreed between respondent and said Cahill that said Cahill would continue to operate the business of said farm, and that he would dispose of it when a profitable disposal of same could be made, and would then account to respondent for the amount invested by him and for one-third of the net profits; that on or about May 24, 1929, Cahill disposed of said property, but that respondent had no knowledge of such disposal until June 25, 1931; that thereafter, on November 10, 1931, respondent filed his creditor's claim against the estate of Patrick Cahill, deceased. The prayer of the complaint is that appellant be required to account for the proceeds of said sale and of the profits arising from the operation of said property.

Appellant answered, denying the allegations of the complaint and alleging that on March 15, 1918, respondent had executed his deed to said Cahill for all his interest in said property and had given his receipt for all sums owing to him by Cahill on account of his interest in said property.

[1, 2] This appeal is brought upon the judgment roll alone, which consists of the pleadings and the notice of appeal. The nature of the action, whether legal or equitable, is to be determined by the pleadings alone (O'Dea v. Hibernia Savings & Loan Soc., 119 Cal. App. 622, 7 P.(2d) 318; Woolsey v. Woolsey, 121 Cal. App. 576, 9 P.(2d) 605), particularly where we have nothing before us but the judgment roll. It appears from the pleadings

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 31 P.2d 419.

that this action is one to declare a trust, and for an accounting, and is therefore an equitable action and one in which a trial by jury is not a matter of right. (Dean v. Midland Farms Co., 96 Cal. App. 214, 274 P. 71; Nason v. Shinjo, 72 Cal. App. 530, 237 P. 559; Cauhape v. Security Savings Bank, 127 Cal. 197, 59 P. 589).

Therefore, there being no authority authorizing an appeal under these circumstances, the appeal is dismissed.

137 Cal.App. 206

McKINNEY v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 9280.

District Court of Appeal, First District, Division 1, California.
March 5, 1934.

1. Commerce 🔑27(5).

Nature of work employee was doing at time of injury is test to determine whether he was engaged in interstate or intrastate commerce.

2. Commerce 🔑27(8).

That task in interstate commerce would have been performed by railroad electrician who was killed while on way to his work which consisted of interstate and intrastate services, *held* insufficient to show that electrician was then engaged in "interstate" and not "intrastate commerce" so that widow must seek compensation under Workmen's Compensation Law and not under Federal Employers' Liability Act (Federal Employers' Liability Act [45 USCA §§ 51–59]).

[Ed. Note.—For other definitions of "Interstate Commerce" and "Intrastate Commerce," see Words & Phrases.]

Proceeding under the Workmen's Compensation Law by Hannah McKinney, claimant, for the death of William C. McKinney, her husband, opposed by the Southern Pacific Company, employer. To review an order of the Industrial Accident Commission of the State of California denying compensation, claimant brings certiorari.

Order annulled.

Carroll S. Bucher, Henry G. Sanford, William T. Doyle, and George C. Faulkner, all of San Francisco, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

PER CURIAM.

William C. McKinney, the husband of petitioner, was on March 26, 1932, in the employ of respondent Southern Pacific Company as an electrician, his duties being to inspect and repair the electrical equipment of locomotives in respondent's roundhouse. On that date, while in the roundhouse on his way to work and before he had reached the place therein where he customarily performed his duties, he fell into a pit and sustained injuries which proximately caused his death.

Respondent commission found that the injury arose out of and occurred in the course of the employment, but denied an award on the ground that the work in which decedent was engaged or in which he was about to engage was work in interstate commerce, or so closely related thereto as to be a part thereof, and that consequently the commission had no jurisdiction of the claim. The petition was accordingly dismissed, and this proceeding was brought to annul the order of dismissal.

[1, 2] Employees of respondent company testified that decedent, but for his injuries, would have done work on locomotives which had been assigned to interstate commerce as well as on others assigned to intrastate service; also that it was the practice of respondent company to place the numbers of locomotives which employees were expected to inspect and repair on a blackboard in the roundhouse. This, however, was subject to change by the company. There is no evidence that decedent saw this list, and it was testified by an employee that he did not know which locomotive so listed it would have been his duty to repair first, as this would depend upon whether it happened to have "steam up" or was "dead." Respondents admit that, although decedent at the time of his injury had not actually commenced work, he was nevertheless performing services incidental to his employment. Judson Mfg. Co. v. Industrial Accident Com., 181 Cal. 300, 302, 184 P. 1; Bountiful Brick Co. v. Giles, 276 U. S. 154, 48 S. Ct. 221, 72 L. Ed. 507, 66 A. L. R. 1402. They claim that his passage through the roundhouse, being a necessary incident to his day's work, partook of the character of that work as a whole; and it having been testified that some of the locomotives upon which

he would have worked but for his injury were to be presently used in interstate commerce, he was necessarily employed in that service. In support of this they cite Erie Ry. Co. v. Winfield, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662, where an employee who had been engaged in both interstate and intrastate service was injured while leaving his employer's premises after his day's work. It was held that in leaving the premises the employee was but discharging a duty of his employment; and his day's work having included both interstate and intrastate commerce he was consequently engaged in the latter service. In the present case, however, while decedent was subject to be employed in both interstate and intrastate commerce, he had not been assigned to work in either. As held in the following cases, the true test is the nature of the work being done at the time of the injury; and the fact that he would have received orders to perform a task in interstate commerce, and but for the injury would have done so, is not sufficient to bring the employee within the Federal Employers' Liability Act (45 USCA §§ 51–59). Ill. Cent. R. R. Co. v. Behrens, 233 U. S. 473, 478, 34 S. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Chicago, Burlington & Quincy R. R. Co. v. Harrington, 241 U. S. 177, 36 S. Ct. 517, 60 L. Ed. 941; Erie Ry. Co. v. Welsh, 242 U. S. 303, 37 S. Ct. 116, 61 L. Ed. 319; Onley v. Lehigh Valley R. R. Co. (C. C. A.) 36 F.(2d) 706; Middleton v. Southern Pacific Co. (C. C. A.) 61 F.(2d) 929.

We are satisfied that decedent was not within the federal act and that respondent commission has jurisdiction of the claim. The order of dismissal is accordingly annulled.

137 Cal.App. 130

PEOPLE v. MOORE.

Cr. 2455.

District Court of Appeal, Second District, Division 1, California.

Feb. 27, 1934.

1. **Receiving stolen goods ⇨8(2).**

In prosecution for receiving stolen automobile clocks, evidence that accused had met person from whom he alleged he received clocks in prison *held* competent to show that accused knew that such person was ex-convict, as against contention that evidence was prejudicial as showing prior conviction.

2. **Receiving stolen goods ⇨7(6).**

Knowledge that goods were stolen is one of essential facts to be proved in prosecution for receiving stolen goods.

3. **Receiving stolen goods ⇨8(4).**

Knowledge that goods were stolen may be inferred from surrounding conditions, such as inadequacy of price asked and that goods were acquired from person of questionable character.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Alex Moore was convicted of receiving stolen property under information charging prior convictions, and he appeals.

Affirmed.

Peter J. Youngdahl, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. and Warner I. Praul, Deputy Atty. Gen., for the People.

YORK, Justice.

Appellant was charged by an information filed by the district attorney with the crime of receiving stolen property and with four prior convictions.

One L. G. Dodge, manufacturer's representative of an Eastern firm of clock manufacturers, had in his possession in June, 1933, some 400 automobile clocks. About June 19th he discovered that approximately 100 of the clocks were missing, and on July 15th he recognized nine of the clocks in an automobile dealer's establishment, the latter having taken the clocks in an automobile trade with one Kreutzer. Kreutzer, during the month of June, 1933, was living in the same apartment house in which defendant and wife had their home. Kreutzer testified that on June 25th defendant came to his apartment with a clock and told him that he had two dozen clocks which he had bought from a friend for $25; that after some discussion it was arranged that the witness Kreutzer should sell the clocks on the basis of netting defendant $2 for the eight-day clocks and $1 for the one-day clocks. The witness disposed of nine clocks by trading them to the Huntington Park Auto Company for an automobile. Later defendant gave the witness seven more clocks to sell, but shortly thereafter took them back, giving as his reason for so doing that they were not being sold fast enough.

Defendant claimed he had bought the clocks from a man named Richard C. Turner, and that Turner had told him he got them out of a salvage pile. A number of the clocks were found in defendant's apartment at the time of his arrest.

Appellant seeks a reversal of the judgment on the following grounds:

(1) The court admitted, over defendant's objections, evidence of a former conviction.

(2) (a) The court denied defendant's motion to dismiss at the conclusion of the people's case; the motion being made on the ground that the state had failed to make out a prima facie case, there being no evidence of any knowledge on the part of the defendant that the clocks in question were stolen.

(b) The court denied defendant's motion for a directed verdict made after defendant had rested, and made on the ground that the evidence was not sufficient in either character, quantity, or quality to sustain a judgment of guilty.

(c) The court denied defendant's motion for a new trial.

(3) The court refused certain instructions material to defendant's rights.

In interrogating the officer who made the arrest and who testified that the defendant told him he got the clocks from Richard C. Turner, the district attorney asked the following questions:

"Q. Did he say how long he had known Turner? A. Yes, he said he had known him for a long time.

"Q. Did he say whether or not he was in any business other than the bootlegging business? A. No, he didn't. So then I asked the defendant, Mr. Moore, how many clocks he had gotten from Richard C. Turner. He told me he got about two dozen. I asked him if it was not a fact that this Richard C. Turner went to Dodge's place at 365 North Sycamore and burglarized the place and taken the clocks from there, and he said no, he didn't know anything about them being stolen, Turner told him he had got them out of a rubbish pile.

"Q. Did he say where he met Turner? A. Yes.

"Mr. Youngdahl: Objected to as incompetent, irrelevant and immaterial.

"The Court: Overruled. A. I asked Mr. Moore where he met this Richard C. Turner, and he told me he had done time with him in Joliet.

"Mr. Youngdahl: I move that that be stricken.

"The Witness: I think he said he went there on the theft of an automobile.

"Mr. Youngdahl: I move that it be stricken from the record and the jury admonished to disregard it.

"The Court: Motion denied."

[1-3] The appellant contends that evidence of his imprisonment at Joliet was not introduced for impeachment or to prove any element of the offense with which he was charged, but that the only purpose was to allow the past for which he had paid in full "to rise up and smite him" (as the district attorney stated in his argument to the jury) and to permit the jury to infer that, because he had previously been convicted of a crime, it was more likely that he also was guilty of this offense. He further contends that the admission of such evidence was so highly prejudicial to his rights as to entitle him to a reversal of the judgment.

It is elementary that knowledge that the goods were stolen is one of the essential facts to be proved in a prosecution for receiving stolen goods, and this knowledge may be inferred from the surrounding conditions and circumstances, as, for instance, inadequacy of the price asked by defendant upon a sale of the goods, and also that they were acquired from a person of questionable character. Apparently, the questions complained of were propounded to the witness in order to bring before the jury the fact that Turner was an ex-convict and that appellant, at the time he purchased the clocks from Turner, knew this, rather than to show that appellant himself previously had been convicted of crime.

We have examined the evidence introduced at the trial and believe that it is sufficient to warrant the conviction, and that the court properly denied defendant's motions to dismiss and for a directed verdict.

We also believe the jury was adequately instructed, and that no error that would justify a reversal was committed by the trial court in its refusal to give certain of the instructions requested by appellant, which refusal has been cited by appellant as one of his grounds for a reversal of the judgment.

The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

LAWTON v. BOLES et al.

Civ. 8513.

District Court of Appeal, Second District, Division 1, California.

Feb. 27, 1934.

Rehearing Denied March 23, 1934.

Automobiles ⇨245(81).

Whether motorist operating automobile which was hit on right-hand side of its back part by motorbus traveling in same direction was contributorily negligent *held* for jury (St. 1925, p. 413, § 130(a).

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Cyrus C. Lawton against Sam E. Boles and another. From the judgment, defendants appeal. On motion to dismiss appeal, or affirm the judgment.

Motion granted and judgment affirmed.

Bart F. Wade, of Los Angeles, for appellants.

Redwine & Redwine and Donald M. Redwine, all of Hollywood, for respondent.

PER CURIAM.

The action was brought by the plaintiff to recover damages on account of injuries which resulted from a collision between an automobile driven by the plaintiff and a motorbus operated by defendant Boles, driver for the defendant corporation. At the time of the accident the two vehicles were traveling in the same direction, and the motorbus hit the right-hand side of the back part of the plaintiff's car.

The stated grounds of appeal, as shown by appellants' opening brief, are that the evidence is insufficient to support the verdict, and, particularly, that the plaintiff was guilty of contributory negligence as a matter of law. The cause came before us on motion by respondent to dismiss the appeal or affirm the judgment upon the grounds that the appeal was taken for delay only, and that the questions upon which the decision rests are so unsubstantial as to need no further argument.

At the hearing of the motion, the motion was granted and the judgment affirmed. This memorandum of opinion is filed as a more formal statement of the grounds of decision.

The evidence clearly shows that the accident and injury resulted from negligence of the defendant in the operation of its motorbus. On the question of contributory negligence, the contention of appellants is that the conduct of plaintiff in the moments immediately preceding the collision amounted to contributory negligence in that it constituted a violation of section 130(a) of the California Vehicle Act (St. 1923, p. 558, § 130(a), as amended by St. 1925, pp. 412, 413), wherein it is provided that "the driver of any vehicles upon a public highway before * * * turning * * * such vehicle shall first see that such movement can be made in safety. * * *" Conceding, without deciding, that there was some evidence from which the jury might have found that the plaintiff did not use due care under the circumstances existing at the time in question, we think that the evidence was at least equally open to the inference and proper finding that the plaintiff was not negligent. It seems unnecessary to set forth a new digest of the record in order to justify this conclusion.

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137 Cal.App. 237

DODD v. POSTAL TELEGRAPH-CABLE CO. et al.

Civ. 7738.

District Court of Appeal, Second District, Division 1, California.

March 7, 1934.

1. Appeal and error ⇨1002.

Jury verdict supported by substantial, though conflicting, evidence, cannot be disturbed on appeal.

2. Trial ⇨234(1).

Instruction that evidence respecting companion case was received solely to determine merits of plaintiff's personal injury case *held* not objectionable as taking from jury's consideration effect of all evidence relating to case referred to and which bore on credibility which should attach to certain testimony given by plaintiff.

3. Appeal and error ⇨1004(3).

Decision of trial court and jury respecting amount of damages cannot be set aside unless verdict is so plainly and outrageously excessive as to suggest passion, prejudice, or corruption.

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by Margaret A. Dodd against Postal Telegraph-Cable Company and another. From an adverse judgment, defendants appeal.

Affirmed.

Joe Crider, Jr., of Los Angeles, for appellants.

Newlin & Ashburn, and Porter & Sutton, all of Los Angeles, for respondent.

HOUSER, Justice.

On this appeal, in substance the appellants concede that through the negligence of the defendants, and without contributory negligence on the part of plaintiff, the latter sustained certain injuries for which she was entitled to a judgment for "some damages."

[1] The first point presented by the appellants as affording a sufficient reason for an order by which the judgment would be reversed, to wit, that "the evidence establishing and demonstrating that plaintiff gave false testimony relating to the state of her mental and physical condition prior to the accident in question, and supporting the issue that her physical condition was purely mental and imaginary, and that she was a malingerer within the theory of the defense," goes merely to the effect either that the evidence introduced by the defendants largely preponderated over that presented by plaintiff, or that the latter evidence was insufficient to support the judgment. In that connection, an examination of the evidence introduced on the trial of the action merely leads to the inevitable conclusion that, as between the evidence offered by plaintiff and the defendants respectively, a conflict existed. In such circumstances, the rule is well established that if the verdict of the jury is supported by substantial evidence the ensuing judgment cannot be disturbed; and since the necessary foundational fact in that regard herein is clearly apparent, it follows that the point suggested by the appellants may not prevail.

[2] It is next urged by the appellants that the trial court erred in giving to the jury the following instruction: "The merits of the case of Dodd v. Siegelman, Number 114438 on the records of this court, are not before you for determination herein. You are to consider such evidence as has been received with respect to the said case solely for the purpose of determining the merits of plaintiff's claim in the present action, with respect to the injuries alleged by her to have been received in the accident mentioned in the complaint in the present action, and the disabilities alleged by her to have flowed or resulted therefrom."

The objection by the appellants to the foregoing instruction consists mainly in the assertion that by such instruction the trial court took from the consideration of the jury the force and effect of any and all evidence which related to the case to which reference was had in the instruction and which bore upon the credibility which should attach to certain testimony given by plaintiff on the trial of the instant action. But liberally and properly considered, the criticized instruction will bear no such construction. If at all, it is only when its terms are subjected to close scrutiny or analysis that a construction thereof such as is suggested by the appellants becomes possible; and when other instructions which were given to the jury are considered, and which instructions related particularly to the credibility that should attach to the testimony that was given by the several witnesses, and of which credibility the jury was informed that it was the sole judge, it becomes obvious that the point presented by the appellants is without substantial merit.

[3] The appellants also contend that the verdict of the jury was excessive and that for that reason the judgment should be reversed. By practically universal authority, the rule is established that "upon appeal, the decision of the trial court and jury on the subject cannot be set aside unless the verdict is 'so plainly and outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption on the part of the jury.'" Hale v. San Bernardino V. T. Co., 156 Cal. 713, 715, 106 P. 83, 84; Lahti v. McMenamin, 204 Cal. 415, 419, 268 P. 644; and authorities there respectively cited. But neither "at the first blush," nor at all, does it appear that the verdict is "outrageously excessive." To the contrary, an examination of the record herein discloses the existence of ample evidence, if believed by the jury, upon which its verdict may legally rest.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

220 Cal. 174

NEVADA LAND & INVESTMENT CORPORATION v. SISTRUNK et ux.

Sac. 4809.

Supreme Court of California.
Feb. 28, 1934.

1. Ejectment 🔑28.

In action by vendor's assignee to cancel contract for sale of land, for possession, and to quiet title, defendant purchasers could file cross-complaint for damages resulting from vendor's fraudulent representations inducing execution of contract, cross-complaint being within "transaction clause" of statute (Code Civ. Proc. § 442).

2. Set-off and counterclaim 🔑29(1).

As respects right to file cross-complaint, facts surrounding cause of action and not form of complaint are determinative of what constitutes the transaction (Code Civ. Proc. § 442).

3. Ejectment 🔑28.

In action by vendor's assignee to cancel contract for sale of land, recover possession, and quiet title, purchasers' cross-complaint for fraud inducing execution of contract and to quiet title was maintainable as cause of action affecting property to which action related (Code Civ. Proc. § 442).

In Bank.

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

Action by the Nevada Land & Investment Corporation against Z. R. Sistrunk and wife, in which defendants filed a cross-complaint. Plaintiff's demurrer to the cross-complaint was sustained and its motion to strike allegations of fraud contained in answer was granted, and defendants appeal.

Reversed.

Prior opinion, 19 P.(2d) 245.

A. G. Bailey, of Woodland, for appellants.

Rich, Weis & Carlin, of Marysville, for respondent.

IRA F. THOMPSON, Justice.

The defendants herein, Z. R. Sistrunk and his wife, Cora Sistrunk, have appealed from a judgment decreeing that the agreement whereby the plaintiff had agreed to sell to the defendants the lands described in the complaint, be canceled; that plaintiff be restored to the full possession thereof and the defendants be ejected and enjoined from asserting or claiming any right, title, or interest therein. By its complaint the plaintiff set up that Garden Highway Orchard Company was the owner in fee and entitled to the possession of the premises in dispute and that on April 23, 1925, it entered into an agreement with the defendants for the sale thereof, a copy of which contract was attached as an exhibit; that the defendants went into possession under the contract and were occupying the premises; that on November 16, 1927, the Garden Highway Orchard Company had assigned and transferred to the plaintiff all its right, title, and interest in and to the premises and the payments due under the contract with defendants; and that plaintiff is now the owner of the land and has performed all the covenants and conditions of the agreement. There follow allegations of the default of the defendants, of the provision in the contract for forfeiture in such case at the option of the seller, and of the service of notice by the plaintiff in pursuance thereof declaring the exercise of the option and the termination of defendants' rights under the contract and that the defendants had refused to surrender possession. The prayer of the complaint was for restitution of the land, damages for the withholding in the sum of $250, the rents and profits, alleged to be of the value of $134.28, and that the agreement for the sale be canceled and title quieted in the plaintiff.

By their answer the defendants admit that they went into possession under the contract of sale, but deny that they still claim thereunder, asserting that the premises are entirely paid for and that they are the owners in fee. They deny that any payments are due to the plaintiff and that plaintiff is the owner of the land and allege that the Garden Highway Orchard Company had no right, title, or interest in the lands at the time of its assignment and transfer to the plaintiff. They admit the service of the notice alleged in the complaint, but deny the unlawful detention and the allegations of damage. As an affirmative defense and by way of cross-complaint it is set up that the execution of the contract was induced by the fraudulent representation of the Garden Highway Orchard Company as to the quality of the soil; that the agreed purchase price was $4,700 or $500 an acre; that the total paid on the contract before the discovery of the fraud was $1,863.58, which amounted to $1,393.58 more than the value of the premises, which were not worth more than $50 an acre; that the defendants had been damaged in the sum of $450 per acre or a total of $3,760; that the sums paid on the contract to the plaintiff before the discovery of the fraud were in excess of the reasonable value of the land and were in full performance of the contract; and that the defendants were entitled to a deed and to possession of the premises. The cross-complaint asks that title be quieted in the defendants; for damages in the amount of $1,393.58; that all the remaining payments (totaling $1,896.42) be canceled; and that the contract be canceled.

Plaintiff's demurrer to the cross-complaint was sustained without leave to amend and its motion to strike the allegations of fraud contained in the answer was granted. Upon this state of the case and upon a stipulation made for the sole purpose of supplying a statement of facts, the judgment appealed from was entered.

[1, 2] The ruling of the trial court upon the motion to strike and upon the demurrer to the cross-complaint has deprived the appellants of the opportunity to recover for the alleged fraud of the respondent except by a separate suit. The right of the defrauded vendee to set up the fraud of the vendor by way of "defensive relief" as an answer to the demand, or in abatement of damages in a suit for the purchase price, has been recognized in numerous cases: Paolini v. Sulprizio, 201 Cal. 687, 258 P. 380, 381; Gardner v. Cookson, 213 Cal. 359, 2 P.(2d) 370; and see Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223, 17 P.(2d) 1003. In Paolini v. Sulprizio, supra, it was said by this court: "In harmony with this principle, which permits the buyer to retain the property and bring suit for the recovery of the damages which he has sustained, there is a third course open to a defrauded vendee. He may set up the seller's fraud as a partial defense or counterclaim without any offer of restitution, and recoup his damages in the action brought by the guilty party to the contract. Field v. Austin, 131 Cal. 379, 382, 63 P. 692; Hunter v. McKenzie, 197 Cal. 176, 184, 239 P. 1090; Palladine v. Imperial Valley, etc., Ass'n., 65 Cal. App. 727, 749, 225 P. 291. This remedy has been styled 'defensive relief,' whereby the fraud is set up by way of defense to defeat an action brought to enforce an apparent obligation or liability. Toby v. Oregon Pacific R. R., 98 Cal. 490, 499, 33 P. 550. The fraud, given in evidence as a defense, 'will be an answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. This is the true as well as a salutary rule, and well calculated to do final and complete justice between the parties, most expeditiously and least expensively.' Field v. Austin, supra, page 382 [of 131 Cal.], 63 P. 692, 693. It may also be taken to be well settled in this jurisdiction that in such cases the *defrauded party may withhold payments under the contract*, to recoup the damages which may be *recovered*. Pembrook v. Houston, 41 Cal. App. 54, 181 P. 828; Palladine v. Imperial Valley, etc., Ass'n., supra. But in any event the party guilty of the deceit is entitled to have the damages mitigated to the extent of the nonperformance of the other party to the contract." (Italics ours.)

While in that case the action instituted by the vendor was for the recovery of the balance due under the contract, whereas the present suit is one to declare a forfeiture, to recover possession, and quiet title in the vendor, the two cases cannot logically be distinguished on that ground. If, as therein held, the defrauded party may withhold payments due under the contract to recoup the damages which may be recovered, thus using the fraud of the vendor to avoid his own apparent obligation under the contract, it can hardly be contended that the fraud of the vendor will not also serve as an excuse for his apparent default and as a defense to an action to have the contract canceled and title to the property quieted. There would be little consistency or justice in a rule which, when the suit was for the payments due under the contract, would allow the buyer to set up damage caused by the fraud of the seller in answer to the demand or in abatement of damages, but, when the action was one for possession of the premises and to quiet title, would not allow the same matter to be pleaded as a defense against a forfeiture for failure to make the payments which the law says he may withhold. The action of the trial court in striking the affirmative matter from the answer was therefore erroneous. An effort is made to construe some general language in Hincksman v. Delacour, 47 Cal. App. 416, 190 P. 832, to the contrary, but the ruling in that case is not in conflict herewith, and the general statements must be confined to the facts of that case.

The instant case must not be confused with those cases of which there are several in which the purchaser attempts to retain possession of the property without payment of the purchase price and yet seeks to disaffirm the contract either by reason of the failure of title in the vendor, or by reason of fraudulent representations on the part of the vendor.

The remaining question raised by this appeal is the propriety of the defendants' cross-complaint. If the cause of action for fraud was properly pleadable either as a counterclaim or as a cross-complaint, the order sustaining the demurrer without leave to amend was error. Luse v. Peters (Cal. Sup.) 28 P.(2d) 357; Terry Trading Corp. v. Barsky, 210 Cal. 428, 292 P. 474.

Without deciding the propriety of this pleading as a counterclaim, we are of the view that the defendants' cause of action for fraud comes within the "transaction clause" of section 442 of the Code of Civil Procedure, which prescribes what matter may be set up by way of cross-complaint. This conclusion is in accordance with the rule of the later cases which have approved a broader and more liberal interpretation of the "transaction" upon which the action is brought. Hanes v. Coffee, 212 Cal. 777, 300 P. 963, 965; California Trust Co. v. Cohn, 214 Cal. 622, 7 P.(2d) 297, 299, distinguishing and expressly disapproving earlier cases which adhered to a stricter interpretation of the "transaction clause" of the cross-complaint statute. Especially apt language is found in the two cases cited. In Hanes v. Coffee, supra, it is said: "It would appear that this action to quiet title arises out of the fact that the defendant claims an interest by virtue of a lease given by the plaintiff; that while plaintiff denies defendant's right to possession, defendant asserts his right and seeks damages for its violation; that consequently both claims are related to the same transaction, i. e., the leasing of the property, and each must be adjudicated upon a consideration of the same issues." And, in California Trust Co. v. Cohn, supra, similar language was employed: "So far as we are now informed, defendants' only connection with the property to which plaintiff seeks to have its title quieted arises out of the written instrument sought to be reformed. It is obvious therefore that the quiet title action is aimed or directed at any and all claims and demands made by the defendants under said written instrument. In other words, the pleadings now before us tend to indicate that, were it not for the defendants' claims under the written instrument which it is herein sought to have reformed, there would have been no necessity for the institution of plaintiff's quiet title action. This being so, both claims are necessarily related to the same transaction." So here, although it is true that the defendants' cause of action for fraud is not on the contract, but is collateral thereto (Paolini v. Sulprizio, supra), it nevertheless arose out of the same transaction as the plaintiff's cause of action. With equal truth it may be said of the instant case that, were it not for the written instrument, which the defendants claim they were induced to execute by the fraud of the plaintiff's predecessor, there would have been no necessity for the institution of the present action. The basis of plaintiff's cause of action rests on the alleged breach of the contract by the defendants. It is alleged in the complaint that defendants went into possession under the contract; the unlawful character of the possession only arose upon default. The basis of defendants' cross-claim is the contention that they have fully performed the contract except in so far as the failure to do so is offset and counteracted by the damages due them from the plaintiff, and they assert a right to possession and to have title quieted in themselves. The claimed damages themselves grow out of the asserted fraudulent conduct of the plaintiff's predecessor in interest in placing the defendants in their present position. The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction. Martin v. Hall (Cal. Sup.) 26 P.(2d) 288; California Trust Co. v. Cohn, supra; Hanes v. Coffee, supra; Terry Trading Corp. v. Barsky, supra; Story & Isham Commercial Co. v. Story, 100 Cal. 31, 34 P. 671.

[3] The cross-complaint might also be said to be a cause of action "affecting the property to which the action relates" and, on that account also, to come within the purview of the cross-complaint statute, for, although the action is for possession, the complaint also sets up ownership in the plaintiff and asks that its title be quieted.

It remains only to briefly notice the case of Watkins v. Warren, 122 Cal. App. 617, 10 P.(2d) 500, which the respondent urges in support of its position. It was there said that fraud in the procurement of the contract is neither proper answer nor counterclaim where the action is in ejectment and the plaintiff seeks possession only and not the remainder of the purchase price, for the reason that an equitable defense cannot be based upon a contract which the defendant has failed to perform and because the claim cannot be said to arise out of the same transaction. It is to be noted that the action there was for possession only, whereas here if defendants' allegations are sustained plaintiff's action is defeated in toto and defendants are entitled to have title quieted in them. The language therein to the effect that a claim for damages does not arise out of the same transaction as an action upon or for cancellation of the contract, being out of harmony with Hanes v. Coffee, supra, and California Trust Co. v. Cohn, supra, must be disapproved.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.

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220 Cal. 779

NEVADA LAND & INVESTMENT CORPORATION (a Corporation), Plaintiff and Respondent, v. V. E. MUSSER and May Musser (his wife), Defendants and Appellants.

Sac. 4808.

Supreme Court of California.

Feb. 28, 1934.

In Bank.

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

Prior opinion, 19 P.(2d) 248.

A. G. Bailey, of Woodland, for appellants.

Rich, Weis & Carlin, of Marysville, for respondent.

PER CURIAM.

Appeal from a judgment in an action for ejectment after attempted cancellation of an installment contract for the purchase of realty. The record in this case, except for the amounts of the purchase price, the payments made, and damages claimed, is practically identical with the record in Nevada Land & Investment Corporation v. Sistrunk (Cal. Sup.) 30 P.(2d) 389, in which the opinion of this court has this day been filed. Upon the authority of that case the judgment herein is reversed.

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220 Cal. 225

STOTTS v. BLICKLE.

Sac. 4803.

Supreme Court of California.

Feb. 28, 1934.

Rehearing denied March 30, 1934.

1. **Automobiles ⚷244(20).**

In action for guest's death when automobile struck pole, evidence justifying inference that driver fell asleep, and, though having difficulty in steering, neglected to make repairs, sustained finding of "gross negligence," or failure to exercise slight care (St. 1929, p 1580, § 141¾).

> Evidence showed that accident occurred on return trip from destination to which driver had traveled on morning of same day, and that during morning he observed that automobile did not steer properly, but nevertheless neglected to have repairs made when reaching destination; that accident occurred when automobile left pavement and remained off while traveling 150 feet until it struck pole located about 7½ feet from edge of highway; and that driver did not apply brakes and made no attempt to turn back to pavement.
>
> [Ed. Note.—For other definitions of "Gross Negligence," see Words & Phrases.]

2. **Automobiles ⚷6.**

Cause of action for guest's death due to motorist's gross negligence *held* not abated by subsequent statutory amendment eliminating gross negligence and leaving only intoxication and willful misconduct as grounds for recovery (St. 1931, p. 1693).

> This was true since amendment in question (St. 1931, p. 1693) did not destroy right of action against host for wrongful death of guest, but merely changed nature of proof required.

In Bank.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by C. A. Stotts against Charles W. Blickle. Judgment for plaintiff, and defendant appeals.

Affirmed.

For prior opinion, see 19 P.(2d) 73.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Irving D. Gibson, of Sacramento, amicus curiæ.

C. C. McDonald, of Woodland, for respondent.

Sullivan, Roche, Johnson & Barry, of San Francisco, and Jesse W. Carter, of Redding, amici curiæ.

LANGDON, Justice.

This is an action by the father of a minor to recover for the wrongful death of said minor. The deceased, a child nine years of age, was a guest in an automobile driven by defendant, his uncle. The accident occurred on May 17, 1931. At that time section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580) provided that an action based upon injuries or death of a guest in a motor vehicle could be maintained upon a showing of "intoxication, wilful misconduct, or gross negligence" of the operator. Plaintiff alleged gross negligence and presented evidence in support of the allegation, which resulted in a verdict in his favor.

[1] The evidence shows that on the morning of the accident, defendant drove from Woodland to Sacramento, observing that the car did not steer properly. On the way back to Woodland, in the afternoon, he felt drowsy and tired, as a result of lack of sleep the previous night. The car was still behaving erratically, one wheel occasionally leaving the paved portion of the highway. At about 5 p. m. he was driving along a clear highway, about thirty miles per hour, when suddenly the car left the pavement and for about one hundred and fifty feet was off the road, until it struck a power pole located about seven and one-half feet from the edge of the highway. Defendant did not apply the brakes, and made no attempt to turn the car back to the road. The deceased's mother, sitting in the back, called to him twice. He apparently did not hear the first call, but at the second he swerved the car and struck the pole a glancing blow which threw the deceased out of the car and killed him. Defendant's declarations and testimony, together with the foregoing circumstances, established by several witnesses, justified the inference that he dozed off at the time of the accident. This, coupled with his failure to repair the car at Sacramento, makes out a sufficient case of "failure to exercise slight care," or gross negligence. A very similar case is Malone v. Clemow, 111 Cal. App. 13, 295 P. 70. See, also, Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474.

[2] Defendant urges, however, that plaintiff's cause of action for gross negligence has been abated by the amendment of the statute in 1931 (St. 1931, p. 1693) subsequent to the accident, which eliminated the words "gross negligence" and restricted recovery to cases of intoxication or willful misconduct. The theory is that a cause of action dependent upon statute, such as an action for wrongful death, abates upon the repeal of the statute without a saving clause; and that the action for wrongful death is governed by this rule.

This theory, and its application to the "guest law," received full consideration by this court in the case of Krause v. Rarity, 210 Cal. 646, 293 P. 62, 77 A. L. R. 1327, and the principles therein discussed are determinative of the instant case. We there dealt with the original guest law, as enacted in 1929, which took away the right to recover for ordinary negligence, and permitted recovery only for gross negligence, intoxication, or willful misconduct. This court held that the statute could not be retroactively applied to defeat a cause of action for ordinary negligence which accrued before its enactment. It was pointed out that the right of action for wrongful death remained, but required different evidence to maintain it. "In other words, there has not been a moment of time since the enactment of section 377 to the present time when an action would not lie on behalf of the heirs on account of the death of the guest. The only change brought about by the new law was in the nature and character of the proof required in each case. There was no abolishment of the right or cause of action, but only a change in the proof required, not to maintain the action, but to permit a recovery." Krause v. Rarity, 210 Cal. 646, 654, 293 P. 62, 66, 77 A. L. R. 1327. See, also, Callet v. Alioto, 210 Cal. 65, 290 P. 438.

This language is clearly applicable to the situation presented by the 1931 amendment. It may well be that "wilful misconduct" differs more radically from "gross negligence" than "gross negligence" differs from "ordinary negligence." Nevertheless the matter is still one of the nature of proof required to establish the culpability of the defendant. The right of action against a host for wrongful death of a guest is no more destroyed by the 1931 amendment than by the 1929 statute.

This holding has already been indicated by us in our denial of a hearing in the cases of Castro v. Singh, 131 Cal. App. 106, 21 P.(2d) 169, and Gardiner v. Hogue, 131 Cal. App. 254, 20 P.(2d) 957, in each of which decisions the amendment was held not to be retroactive. The same conclusion was reached in Anderson v. Ott, 127 Cal. App. 122, 15 P.(2d) 526.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; THOMPSON, J.; SEAWELL, J.

220 Cal. 331

UNION SUPPLY CO. v. MORRIS et ux.

HOOKE et al. v. SAME.

S. F. 14721.

Supreme Court of California.
March 1, 1934.

1. **Mechanics' liens ⚷164(1).**

Any price limitation in oral building contract between owners and contractors would not be binding on materialmen and subcontractors who in good faith and without notice furnished materials or performed labor (Code Civ. Proc. § 1183).

2. **Mechanics' liens ⚷111(1).**

Owners did not suffer actionable damage because of failure of contractors under cost plus contract to demand itemized statements of materials and services from materialmen and subcontractors, in view of finding that rates charged were reasonable.

3. **Mechanics' liens ⚷149(1).**

Contractors' failure to render more complete statements to owners during progress of work under oral building contract on cost plus basis *held* not to absolve owners from paying reasonable value of materials and services which actually went into building.

4. **Mechanics' liens ⚷281(1).**

Evidence that in one instance building contractors accepted rebate on price charged owners for certain wood, of failure to give owners credit for unused lumber returned to lumber yard, and of destruction of time cards kept on job, *held* insufficient to establish general fraudulent intent to permit cost of construction to exceed reasonable price under cost-plus contract.

5. **Mechanics' liens ⚷281(5).**

Evidence sustained finding that mechanics' lien claims were filed within 90 days after completion of dwelling (Code Civ. Proc. § 1187).

6. **Appeal and error ⚷1015(2).**

Where allegations in affidavits supporting motion for new trial were controverted in counteraffidavit, trial court's ruling thereon could not be disturbed on appeal.

7. **Mechanics' liens ⚷202.**

Mechanic's lien is mere incident of debt secured and cannot be transferred apart therefrom (Civ. Code, § 1084).

8. **Mechanics' liens ⚷204.**

Valid oral assignment of claim due mechanic or materialman carries with it lien which is incident thereto, as against contention that lien can be transferred only by written instrument (Civ. Code, §§ 1052, 1084, 1971).

In Bank.

Appeals from Superior Court, Monterey County; Harry W. Falk, Judge.

Actions by the Union Supply Company, and by S. H. Hooke and another, against Gouverneur Morris and wife, which actions were consolidated for trial. From an adverse judgment, defendants appeal.

Affirmed.

W. C. Theile, of Salinas, for appellants.

Silas W. Mack, John Thompson, and J. W. Lenahan, all of Monterey, for respondents.

PER CURIAM.

Defendants Gouverneur Morris and Ruth J. Wightman Morris, his wife, appeal from a judgment decreeing foreclosure of mechanics' and materialmen's lien on property in the city of Monterey, this state, record title to which stands in the name of Mrs. Morris. By said judgment the court decreed that defendants were indebted to plaintiffs S. H. Hooke and W. E. Hooke, building contractors, in the amount of $15,518.98, which represents the full ballance due said contractors upon an oral agreement for the construction of extensive additions to appellants' residence, by the terms of which the contractors were to be paid all costs of construction plus 10 per cent. The court adjudged that said contractors had a lien for $14,897.60, and that the balance of $621.38, which was the amount unpaid on the architect's fee, was unsecured because not included in the claim of lien filed. The judgment further decreed that the Union Supply Company, plaintiff in a suit separately filed, but consolidated for trial with the action brought by the contractors, held materialmen's and subcontractors' liens upon the Morris' property for the amount of $11,670.69. This company furnished lumber which was used in the work of improvement, and was found by the court to be the holder by assignment of the claims of other materialmen and subcontractors in the total amount of $6,255.65. By reason of the fact that the sum of $15,518.98 found due the contractors, S. H. Hooke and W. E. Hooke, includes the amounts required to discharge all unpaid materialmen's and subcontractors' claims, the judgment provided that all payments made upon the judgment in favor of the Union Supply Company should pro tanto reduce the judgment in favor of the contractors.

A short time prior to June 5, 1930, the Morrises approached Mr. S. H. Hooke with reference to the construction of extensive alterations and additions to their residence, the nucleus of which was an adobe structure surviving from pioneer days and modernized to suit their needs. The grounds surrounding the residence cover almost an acre. The plans for the new addition are not before us on this appeal, but it sufficiently appears from the testimony that the new wing built by the contractors herein constituted the central and by far the larger portion of the house as reconstructed. At their first conference Mr. and Mrs. Morris exhibited to Mr. Hooke a pencil sketch of a floor plan which they had drawn themselves. Mr. Hooke drew certain floor plans to scale. He advised the employment of an architect, and at his suggestion the services of Mr. Wesley Hastings were obtained. On or about June 5, 1930, the contractors commenced work. At that time the plans had not been completed, nor all details of the construction agreed upon.

The arrangement between the Morrises and Mr. Hooke was that he should be paid all costs of construction, including material, labor, and incidental costs, plus 10 per cent. of such costs for supervising the improvement. W. E. Hooke is the son of S. H. Hooke. All negotiations were had with the elder Hooke, who had been a builder on the Monterey peninsula for many years and had previously done some work for the Morrises. Hooke testified that the Morrises did not fix any limit as to the price of the contemplated improvement. After the architect had made some drawings, Hooke made an estimate of $22,000–$25,000, which did not include the contractors' profit of 10 per cent. and was necessarily nothing more than a mere rough estimate, since the plans were far from complete. Mr. Morris claims that he definitely informed Hooke that it would be necessary for him to borrow funds with which to build; that he could not borrow more than $25,000 and expected with that sum to buy furnishings, as well as to construct the building. According to Morris it was definitely agreed that the cost of the building, including the contractors' commission, should not exceed $22,000, but that if it should cost less the owners should have the advantage of the saving. The actual costs of construction, found by the trial court to be reasonable, totaled $40,297.22, including the contractors' commission of 10 per cent., of which sum the Morrises had paid $24,778.24, leaving the balance of $15,518.98 unpaid.

[1] Upon this appeal appellants Mr. and Mrs. Morris contend that the testimony of S. H. Hooke that the contract price was not fixed at $22,000 is too inherently improbable to be given credence, and that as they have already paid a sum exceeding that figure they are indebted to the Hookes in no amount whatsoever. Any price limitation in the oral agreement between the owners and the contractors would not be binding upon materialmen and subcontractors, who in good faith and without notice thereof furnished materials or performed labor. The owner's liability is limited by the contract price only where the contract is recorded and a bond filed as provided by section 1183, Code of Civil Procedure. 17 Cal. Jur. pp. 47, 57. In defense of the contractors' demand, and by way of counterclaim to secure damages against the contractors in the event it should be determined that the unpaid materialmen's and subcontractors' claims held by the Union Supply Company constituted valid liens against their property, the Morrises alleged that plaintiff S. H. Hooke falsely and fraudulently represented that the addition could be completed for $22,000, when he well knew that it would cost far more. They further alleged that the actual costs of construction were far in excess of the reasonable costs because of the misconduct and negligence of the contractors in permitting materialmen and subcontractors to charge the highest possible rates, thereby increasing their own commission, and that the contractors were further guilty of negligence and misconduct in failing to inform them fully of the building costs from time to time during the progress of the work.

The court found for the contractors as to these several issues raised by the answer and counterclaim of appellants. There is no evidence in the record which will sustain the charge that the contractors falsely and fraudulently gave a low estimate. On the question whether the figure of $22,000 was understood to be a mere estimate or a fixed limitation as to the maximum cost of construction, the trial court accepted the testimony of Hooke that it was a mere preliminary estimate. It seems improbable that he would have been willing to agree to a fixed limit at a time when the plans were far from complete and important items in the construction had not been decided upon. Mrs. Morris left Monterey on a trip to the South Seas a few days after construction commenced and did not return until about the time the building was completed, but Mr. Morris continued to reside on the premises. He was very active in observing all details of the construction and had very definite ideas as to what he desired. From time to time changes were made in the plans drawn by architect Hastings, and in a number of instances after certain portions of the work had been done in accordance with the directions of Morris he decided that something else would be preferable and the work was done over. The conduct of Morris, as testified to by Hooke and by the subcontractors and materialmen, indicates that his insistence throughout was that everything, down to the smallest detail, should be exactly as he and Mrs. Morris desired it, and that said contractors and materialmen were warranted in inferring that price was not a major consideration.

The court's findings that the several claims held by the Union Supply Company represented the reasonable value of the materials furnished and labor performed, negative the contention of appellants that the contractors by negligence and misconduct permitted the charges for said labor and materials to exceed their reasonable value. Said findings were based on the testimony of the persons and firms by whom the materials were furnished and services rendered to the effect that in all cases their bills were based on the prevailing retail prices and wage scales on the Monterey peninsula.

[2, 3] Objection is made on the ground that certain of the bills rendered by the materialmen and subcontractors did not contain an itemized account of the materials furnished and hours of labor rendered. The failure of the contractors to demand such itemized statements was one of the charges urged against them in a complaint filed by the Morrises with the Department of Professional and Vocational Standards and Registrar of Contractors. The building procedure adopted was not calculated to produce a building in the most economical manner. Specifications were not prepared in advance, nor was a building contract fixing a definite price drawn up. Competitive bids were not sought on materials and subcontracts. However, the construction without a formal contract or competitive bids was fully acquiesced in and agreed to by Mr. Morris, and it was at his request that work was commenced before the plans were completed. It is true that the contractors, in protecting the interests of the owners, should have maintained a closer check on the prices of materialmen and subcontractors. But in view of the finding of the trial court that the rates charged were reasonable, it cannot be said that the owners have suffered actionable damage. It is likewise true that the contractors should have rendered more complete statements to the owners during the progress of the work, but their omission in this particular is insufficient to relieve the owners from paying the reasonable value of materials and services which actually went into the building. It is agreed that its construction is superior, both as to workmanship and materials.

[4] In support of their charge of fraud and negligence, appellants cite certain incidents. Respondent Hooke accepted a 10 ten per cent. rebate, amounting to $117, on the price charged the owners for certain hardwood. He attempted to justify this rebate on the ground that it had been necessary to make a number of trips to San Francisco in connection with procuring the wood. We cannot approve of the acceptance of this rebate. However, there is no evidence that he received a rebate in any other instance. He testified that he had not received a rebate from any other source, and the several materialmen and subcontractors who appeared upon the trial all testified that he had not asked for nor received rebates from them. As to the destruction of the time cards kept upon the job, the testimony was that they were turned in to the contractors' office at least once a week, posted to a permanent time book, and then destroyed in accordance with the usual custom of the office. It also appeared that Hooke failed to give the owners credit for lumber of the value of $53 returned to the lumber yard. But he testified that this was through inadvertence, and the error was corrected on the trial. These incidents fall far short of establishing a general fraudulent intent.

[5] Appellants also contend that the lien claims of respondents were filed too late. Where the owner fails to record a notice of completion, lien claims may be filed within ninety days after completion of the work of improvement. Section 1187, Code of Civil Procedure. The claims herein were filed on February 17, 1931, which is just within the ninety-day period provided there is evidence in the record to sustain the court's finding that November 20, 1930, was the date of completion. Although the foreman left the job on October 31, 1930, and the Morris family commenced to occupy the bedrooms in the new addition about that time, there is evidence that one Herrera, a laborer who had been working on the job, remained and received his wages from Hooke, and also that certain electrical fixtures were installed on

November 20. Although the work done after October 31 was principally outside the building, and consisted of completing the cistern, laying sidewalks, and putting in drainpipes, the work of improvement as undertaken by Hooke included work outside the building. A cesspool was built, drainpipes were changed, grading and excavating were done, sidewalks placed, and an approach to a driveway constructed. It cannot be said that as a matter of law the trial court's finding that November 20, 1930, was the date of completion is without evidentiary support.

[6] The court did not err in denying the motion for a new trial. The averments of the affidavits filed by appellants in support of their motion were controverted in the counter affidavit filed on behalf of the respondent contractors. The trial court resolved the conflict in favor of respondents and its action cannot be disturbed by an appellate court.

[7, 8] Appellants further contend that plaintiff Union Supply Company has no lien rights upon the claims of the several materialmen and subcontractors of which the court found it to be the assignee, for the reason that the assignments by which its claims were made orally, and there were no written assignments of the liens. It is contended that a mechanic's lien is an interest in real property which can be transferred only by instrument in writing. It is settled in this state that a mechanic's lien, like a mortgage or judgment lien, is a mere incident of the debt secured and cannot be transferred apart therefrom. Duncan v. Hawn, 104 Cal. 10, 37 P. 626; Rauer v. Fay, 110 Cal. 361, 42 P. 902; California P. C. Co. v. Wentworth Hotel Co., 16 Cal. App. 692, 118 P. 103, 113; Pitman v. Walker, 187 Cal. 667, 203 P. 739; 17 Cal. Jur. 158; 3 Cal. Jur. 279; Coon v. Shry, 209 Cal. 612, 289 P. 815; 18 Cal. Jur. 86. Section 1084, Civil Code, provides: "The transfer of a thing transfers also all its incidents, unless expressly excepted. * * *" As to mortgage liens, there is a further specific Code section which provides that "the assignment of a debt secured by mortgage carries with it the security." Section 2936, Civil Code. It follows, from the principle that the lien is an incident of the debt and passes with it by operation of law, that an express assignment of the security is not required. It passes with the debt which it secures, and an assignment which is sufficient to transfer the debt must carry with it the mortgage or other lien. In Martin v. Mowlin, 97 Eng. Rep. 658, 663, the English court declared: "A mortgage is a charge upon the land; and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence, nay, it would do it, though the debt were forgiven only by parol; for the right to the land would follow, notwithstanding the statute of frauds."

In this state it has been held that the assignment of a note, or its indorsement and delivery, or delivery alone, carries with it a mortgage given as security therefor, although said mortgage covers real property. Hurt v. Wilson, 38 Cal. 263; Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553; Phelan v. Olney, 6 Cal. 478; Bennett v. Solomon, 6 Cal. 134; Gessner v. Palmateer, 89 Cal. 89, 24 P. 608, 26 P. 789, 13 L. R. A. 187.

There is no requirement that an assignment of a debt due a mechanic or materialman must be in writing. The Code provides that "a transfer may be made without writing, in every case in which a writing is not expressly required by statute." Section 1052, Civ. Code. It follows that a valid oral assignment of the claim due the mechanic carries with it the lien which is an incident thereto. The early decision in Ritter v. Stevenson, 7 Cal. 388, holding that an assignment of a mechanic's lien must be in writing, is inconsistent with our later decisions covering mortgage liens on real property, and at variance with the principle that a lien is but an incident of the debt and follows a valid assignment of the debt.

If a mechanic's lien or a mortgage lien can be said to be an interest in real property within the meaning of section 1971, Code of Civil Procedure, said section nevertheless provides that an interest in real property cannot be transferred otherwise than "by operation of law," or by instrument in writing. An assignment of the debt for which the lien is security by operation of law carries with it the security.

The judgment is affirmed.

220 Cal. 134

KENNEY v. KENNEY.

S. F. 14886.

Supreme Court of California.
Feb. 26, 1934.
Rehearing Denied March 27, 1934.

1. Divorce 🔑**177.**
Order denying motion for new trial in divorce action *held* nonappealable.

2. Husband and wife 🔑**266.**
Spouses' separate property may be changed into community property by executed oral agreement that all property owned by them at time of marriage and subsequently acquired shall be community property.

3. Divorce 🔑**286.**
Evidence respecting value of community property sought to be divided in divorce action being conflicting, appellate court must accept evidence tending to support trial court's division.

4. Divorce 🔑**253.**
Evidence *held* not to establish that division of community property in interlocutory divorce decree was unequal or unfair.

5. Divorce 🔑**182, 184(5).**
Wife's motion for costs and counsel fees on appeal and support money pending appeal in divorce action is addressed to trial court's sound discretion, exercise of which will not be disturbed on appeal in absence of clear showing of abuse.

6. Divorce 🔑**182.**
Denial of wife's motion for costs and counsel fees on appeal and support money pending appeal *held* not abuse of discretion under circumstances.

7. Divorce 🔑**186.**
Appellate court could properly make additional finding on issue of residence of parties in order to affirm interlocutory divorce judgment, where omission to find thereon was inadvertent and resulted chiefly from fact that sole important issue concerned division of property (Code Civ. Proc. § 956a).

In Bank.

Appeal from Superior Court, San Mateo County; Franklin Swart, Judge.

Action for divorce by Sadie A. Kenney against William J. Kenney. From an interlocutory judgment and from an order denying counsel fees, costs on appeal, and support money pending appeal, and from an order denying motion for a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed. Appeal from interlocutory judgment and from the other order affirmed.

J. E. McCurdy, of San Mateo, and E. Hoffman, of Los Angeles, for appellant.

A. Devoto, of San Francisco, for respondent.

WASTE, Chief Justice.

[1] Plaintiff appeals from an interlocutory decree of divorce, from an order denying her counsel fees and costs on appeal and support money pending appeal, and from an order denying her motion for a new trial. The latter order is nonappealable, and the purported appeal therefrom must therefore be dismissed. The remaining two appeals will be considered presently.

[2] The action was instituted by appellant to procure a divorce on the ground of extreme cruelty. Respondent answered and cross-complained. At the commencement of the trial, it was apparent to court and counsel that the parties had reached a point where reconciliation was inconceivable and that the important issue in the case, therefore, had to do with a division of the property of the spouses. In view of this, and following a discussion between court and counsel, it was stipulated in open court that, in consideration of the withdrawal of respondent's cross-complaint, the appellant would "forego the question of any more than a fair or equal division * * * of the community property." The cross-complaint was thereupon withdrawn, and the appellant in a more or less perfunctory manner, and solely to satisfy the requirements of section 130 of the Civil Code, offered meager but corroborated proof tending to establish the allegations of her complaint. With this matter out of the way, the court then proceeded to hear evidence addressed to the extent, kind, and character of property owned by the parties. The evidence on this issue is voluminous, highly contradictory, and in many respects confusing. Without attempting to relate the evidence in detail, but referring to such portions only as tend to support the trial court's disposition of this phase of the litigation, it appears that at the time the parties married in 1919 the appellant was possessed of real property approximating in value $2,000, while the respondent husband owned property, real and personal, of approximately $8,000 in value.

During the marital status some of this property was improved, some disposed of, and other property acquired. To attempt to trace any particular fund or parcel would not only be difficult but a futile and useless task in view of the trial court's finding that all property owned by the spouses at the time of the commencement of the action was community property. This finding is amply supported by evidence tending to show an executed oral agreement between the parties that all property owned by them at the time of marriage and all property subsequently acquired should be community property. That such an executed oral agreement serves to change the status of property from that of separate to community is now well settled. Estate of Sill, 121 Cal. App. 202, 204, 205, 9 P.(2d) 243, 244; Estate of Wahlefeld, 105 Cal. App. 770, 775, 776, 288 P. 870; Vieux v. Vieux, 80 Cal. App. 222, 226, 227, 251 P. 640; Martin v. Pritchard, 52 Cal. App. 720, 724, 199 P. 846. In Estate of Sill, supra, it is stated: "Without regard to the presumption found in section 164 of the Civil Code, it is well settled that the separate property of either or both spouses may be transmuted into community property and this may be done without the necessity of any written agreement providing the agreement or understanding to that effect is fully consummated."

In the instant case the respondent testified that the parties had orally agreed, both before and after marriage, that all property then owned by them or subsequently acquired was to belong to them equally, or, as respondent put it, "fifty-fifty." That this agreement not only existed between the spouses but was, in fact, consummated by them during their marital life, is established and confirmed by their acts and conduct during that period in their dealings and transactions, appearing at length in the transcript, concerning the selling, purchasing, mortgaging, and improving of said properties.

[3, 4] The evidence being sufficient to establish the community character of the property involved, we now turn our attention to the trial court's division thereof, with a view to determining whether it constitutes a "fair or equal division" as contemplated in the stipulation above referred to. In the main, the property of the spouses consists of five parcels of real property, four of which are lots situate in San Mateo county and the fifth being a ranch situate in Lake county. Three of the San Mateo county lots are improved; two of them being income bearing and the third being occupied by the appellant as her home. Appellant was awarded the three improved San Mateo parcels, and the respondent was awarded the unimproved San Mateo lot and the Lake county ranch. As is to be expected, the values placed on these several parcels by the appraisers called by the parties are at variance. Under well-settled principles we are required, in the face of such conflict, to accept that portion of the evidence as to value which tends to support the trial court's division of the several parcels. With this in mind, we accept for present purposes the values fixed by respondent's appraisers, from which it is apparent that the three parcels awarded to the appellant are respectively valued at $4,500, $3,750, and $3,525, aggregating $11,775, while the two parcels awarded to the respondent are respectively appraised at $10,000 and $1,500, totaling $11,500.

Appellant urges, however, that, while these figures tend to indicate that she has been awarded in excess of one-half of the common property, the existence of incumbrances on two of the parcels awarded to her serves to reduce her share thereof below one-half of the aggregate value. In this connection it is important to bear in mind that the court below has awarded appellant all of the rent bearing properties. In addition, the trial court had in mind that appellant throughout the existence of the marriage, as disclosed by the evidence, handled and banked practically the entire income of the parties, including the earnings of both spouses and the rentals from the properties. It further appears in the evidence that appellant had banked much of this income in her name alone, and had consistently failed and neglected to apprise respondent of the status of such account or accounts. Moreover, appellant upon the trial of the cause failed and neglected to produce her bank statements disclosing the condition of such account or accounts, though she was repeatedly requested so to do and repeatedly promised so to do. With these matters before it, we are not prepared to say that the court below made an unequal or unfair division of the community property of the spouses.

[5, 6] This brings us to a consideration of the propriety of the order of the lower court denying appellant's motion for costs and counsel fees on appeal and support money pending appeal. Such a motion is, of course, addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse in the exercise thereof, its deter-

mination will not be disturbed on appeal. Mudd v. Mudd, 98 Cal. 320, 322, 33 P. 114; Gay v. Gay, 146 Cal. 237, 240, 79 P. 885. In view of the fact that the court below prior to trial allowed the appellant costs and counsel fees in an amount of $85 and support money pending trial in an amount of $50 a month, in view of the further fact, already referred to, that appellant under the interlocutory decree has been awarded the rental bearing properties, and in view of appellant's consistent failure to disclose the condition of bank accounts standing in her name alone and containing community funds, we cannot say that the lower court abused its discretion in denying the motion for costs and counsel fees on appeal and support money pending appeal.

[7] In conclusion, it should be noted that appellant makes the point that the court below failed to find on the issue of residence. In this appellant is technically correct. The omission is readily explainable. At the commencement of the trial, as already related, court and counsel in effect agreed that a divorce was essential and that the sole and important issue in the case concerned a division of the properties. Because of this, the evidence tending to establish the ground of divorce was, as stated above, meager, though sufficient, while that addressed to the property rights was voluminous. Under the circumstances, the trial court's findings concern themselves, in the main, with such property rights. However, the complaint contains the necessary allegation of residence, and a reading of the record discloses it was established by the testimony of appellant and her corroborating witness. Therefore, in order to satisfy the statutory residence requirement, and under the authority conferred on appellate courts by section 956a of the Code of Civil Procedure, the findings of the trial court are hereby modified and amended by adding thereto the following finding: "That all of the allegations of paragraph I of the plaintiff's complaint are, and each is, true." That an appellate court may make additional findings in order to affirm a judgment is now settled. Tupman v. Haberkern, 208 Cal. 256, 266, 280 P. 970.

What we have said amply disposes of the several appeals herein.

The appeal from the order denying a new trial is dismissed, and the appeal from the interlocutory decree of divorce and from the order denying costs and counsel fees on appeal and support money pending appeal are, and each is, affirmed.

We concur: CURTIS, J.; SHENK, J.; PRESTON, J.; IRA F. THOMPSON, J.; SEAWELL, J.; LANGDON, J.

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220 Cal. 231

JOHNSON et al. v. GENTRY et al.

Sac. 4788.

Supreme Court of California.
Feb. 28, 1934.

1. Commerce 🔑61(1).

Statute forbidding transportation of salmon caught outside state through certain fish and game districts in state during closed season *held* not unlawful interference with interstate commerce (Pen. Code, § 634, subd. 6, as amended by St. 1931, p. 1592; Const. U. S. art. 1, § 8, cl. 3).

2. Constitutional law 🔑225(1).
Fish 🔑9.

Statute forbidding transportation of salmon caught outside state through certain fish and game district in state during closed season *held* not invalid as discriminatory because salmon caught on high seas could be transported by land from adjoining state into state but not by water (Pen. Code, § 634, subd. 6, as amended by St. 1931, p. 1592; Const. U. S. Amend. 14).

3. Constitutional law 🔑48.

Presumption of constitutionality of act is determinative, in absence of convincing proof of unconstitutionality.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Alfred R. Johnson and others against J. Dale Gentry and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Eugene S. Selvage, of Eureka, for appellants.

Eugene D. Bennett, of San Francisco, and U. S. Webb, Atty. Gen., for respondents.

PER CURIAM.

Plaintiffs bring this action on behalf of Eureka Fishermen's Union, an unincorporated association of commercial fishermen comprising about 150 members, against respondents as members and deputies of the California fish and game commission, to restrain them from enforcing the provisions of Penal Code, § 634, as amended in 1931 (St. 1931, p. 1591). The lower court gave judgment for defendants.

The facts are not in dispute. The controlling provision of the statute in question reads: "No salmon from the high seas, Oregon, or any other fish and game district may be brought through fish and game districts six, seven, eight and nine between the sixteenth day of September and the thirtieth day of April of the year following, both dates inclusive." Pen. Code, § 634, subd. 6. This provision sets up, during the closed season for salmon fishing within this state, a barrier to the transportation of salmon caught outside the jurisdiction of the state. The districts mentioned therein comprise the three-mile marginal belt of ocean waters from Oregon to the Sonoma county line, and the waters of Humboldt Bay. In those districts, the law prohibits the taking of fish during the closed season. The statute under consideration provides also that salmon caught outside the three-mile limit, and hence lawfully acquired, cannot be transported through the waters of these districts during the closed season. Plaintiffs take their salmon in the waters of the Pacific Ocean outside the limits of the districts, and transport them to the city of Eureka for sale. The statute does not prohibit them from taking or selling the fish; it is aimed solely at transporting them through the designated waters. Plaintiffs therefore urge its unconstitutionality on the following chief grounds: First, that it violates the commerce clause of the Federal Constitution (Const. U. S. art. 1, § 8, cl. 3) by interfering with the transportation into this state of property lawfully acquired outside the jurisdiction; second, that it violates the equal protection clause of the Fourteenth Amendment to the Federal Constitution by discriminating between fishermen and carriers similarly situated.

[1] The purpose of the statute, as appears from the legislative declaration which first proclaimed it as an urgency measure, is to protect against excessive destruction of immature salmon. In the case of Svenson v. Engelke, 211 Cal. 500, 296 P. 281, this court held that the statute as it then read did not prohibit the possession or transportation of fish caught on the high seas during the closed season. The amended section was enacted to change the rule of that case. The enlarged scope was made necessary by reason of the impossibility of enforcing the statute without such provision. It is pointed out that it is a simple matter to fish within the districts and claim that the catch was obtained outside their limits. A patrol force of prohibitive size and expense would be required for any supervision over such unlawful activities. Consequently the statute must, as a practical matter, prohibit all such transportation. If it does incidentally interfere with interstate commerce, such is not its exclusive or major purpose.

With this statutory purpose in mind, the first contention of plaintiffs may be readily disposed of. In Ex parte Maier, 103 Cal. 476, 480, 37 P. 402, 403, 42 Am. St. Rep. 129, a statute prohibiting the sale of deer meat, and applying to deer imported as well as those killed within this state, was upheld; the court saying: "The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the close season, and foisted upon the market as game procured without the state; and, owing to the practical impossibility in the great majority of cases of proving with certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive. These and like considerations no doubt actuated the legislature in the premises, and induced the enactment of the statute in its present stringent form; and we know of no good reason why it should not be held to mean what it says. Similar statutes in other states have received a like construction." In Union Fishermen's Co. v. Shoemaker, 98 Or. 659, 193 P. 476, 194 P. 854, an Oregon statute was upheld which prohibited possession of salmon caught on the high seas. The court said (193 P. 476, 481): "Of course the state of Oregon has no jurisdiction over the waters of the Pacific ocean beyond the three-mile line; nor did the state by the enactment of the statute in question attempt to make fishing beyond the three-mile limit unlawful. The statute was adopted in order to make effective the prohibition against taking fish during the closed season from waters over which the state may rightfully exercise jurisdiction, and that the state has authority to do this is settled beyond controversy." To the same effect see Silz v. Hesterberg, 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; Van Camp Sea Food Co. v. Department of Natural Resources (D. C.) 30 F.(2d) 111;

and the remarks of this court in Svenson v. Engelke, supra, 211 Cal. 502, 296 P. 281.

[2] The other contention of plaintiffs is that the statute is discriminatory in its operation. It is pointed out that they may catch fish on the high seas, take the catch to Oregon, transport it by land into this state, and sell the fish at their place of business in Humboldt county; and that to prohibit them from accomplishing the same object by the shorter and profitable method of bringing the catch in by water, is to discriminate between types of carriage and transportation. An element of discrimination is inherent in the operation of the statute, and cannot be avoided if the object is to be carried out. There is little danger of unlawfully taken fish coming into Eureka by land, and there is such danger where the fish are brought in by water. The authorities above cited dispose of this claim.

[3] Plaintiffs make the further assertion that the statute discriminates in favor of Monterey salmon fishermen, to whom the prohibition does not apply. No explanation of this assertion is made, and, in the agreed statement of facts upon which the case was tried, there is no reference to fishermen operating off Monterey. Consequently there is nothing in the record by which we may test this claim of discrimination, and, in the absence of a convincing proof thereof, the presumption in favor of constitutionality is determinative. Defendants observe, however, that the particular districts covered by the legislation are those situated at the mouths of rivers where the salmon ascend to spawn and propagate, and are in need of the protection.

We have considered plaintiffs' contentions on their merits, but, in fact, the federal questions raised have already been conclusively determined against him. At the time the urgency statute was passed, the federal District Court had decided a similar case against certain fishermen operating in the San Francisco Bay district, and an appeal had been taken to the United States Supreme Court. The decision was subsequently affirmed in Noack v. Zellerbach, 283 U. S. 798, 51 S. Ct. 490, 75 L. Ed. 1421, the memorandum opinion reading as follows: "Decree affirmed. California Act of April 2, 1931, amending California Penal Code, § 634 (St. Cal. 1931, c. 101); Svenson v. Engelke [211 Cal. 500], 296 P. 281; New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75."

The judgment is affirmed.

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220 Cal. 327

OLIVER v. SPERRY et al.

Sac. 4789.

Supreme Court of California.

March 1, 1934.

1. Partition ⚷13.

Tenancy in common ⚷3.

Where deceased owning undivided interest in realty left surviving a husband and a son by former marriage, husband *held* tenant in common with other owners and was authorized to commence action for partition (Probate Code, § 221; Code Civ. Proc. § 752).

2. Appeal and error ⚷870(3).

Question whether plaintiff was entitled to commence partition action and question of interests of parties *held* finally adjudicated by interlocutory decree, and not reviewable on appeal from final judgment.

3. Appeal and error ⚷870(3).

On appeal from final judgment in partition action, only matters intervening subsequent to rendition of interlocutory decree may be reviewed.

4. Abatement and revival ⚷67.

Where plaintiff in partition action died after interlocutory decree became final but before final decree was entered, his executrix *held* properly substituted in his place and interest of deceased was allotted to her as executrix (Code Civ. Proc. § 763).

5. Partition ⚷111(3).

Where interest of one of defendants in partition action was subject to judgment liens which were acquired by codefendant, defendant's assignee took his interest subject to such liens and was properly required to pay such charges (Code Civ. Proc. § 766).

6. Partition ⚷114(2).

In partition action, proportionate share of attorney's fees and costs *held* chargeable to one intervening after interlocutory decree, to whom one of defendants had assigned his interest (Code Civ. Proc. § 796).

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by J. E. Oliver against Frank A. Sperry, Carrie Evelyn Sperry, and others, in which, after entry of interlocutory decree, A. H. Carpenter intervened, and in which, on the death of plaintiff, Minnie Bruse Oliver, as executrix, was substituted in plaintiff's place. From the final judgment, intervener appeals.

Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Louttit, Marceau & Louttit, of Stockton, for respondent Minnie Bruse Oliver.

George E. Frioux and Edward E. Breitenbucher, both of Stockton, for respondent Carrie Evelyn Sperry.

SHENK, Justice.

J. E. Oliver, the surviving husband of Harriet A. Oliver, deceased, brought this action to partition certain real property in San Joaquin county owned in part by the deceased wife in her lifetime. An interlocutory decree was entered which determined the right of the respective parties and ordered partition as follows: One-fourth interest to J. E. Oliver; one-fourth interest to Charles Elmer Miller, son by a former marriage and only surviving issue of Harriet A. Oliver, deceased; and one-half interest to Carrie Evelyn Sperry. Charles Elmer Miller appealed from the interlocutory decree, contending that Harriet A. Oliver had no interest in the property, and that as a consequence the surviving husband had no interest. The interlocutory decree was affirmed. Oliver v. Sperry, 97 Cal. App. 27, 274 P. 1030. The referees appointed by the court in the interlocutory decree filed their report dividing the property in accordance with the terms of the interlocutory decree. Thereafter A. H. Carpenter was permitted to intervene and set up an assignment to him of the interest of Charles Elmer Miller. The report of the referees was confirmed and a final judgment in partition was entered wherein property representing a one-fourth interest was allotted to Carpenter; property representing a one-half interest was allotted to Carrie Evelyn Sperry; and property representing a one-fourth interest was allotted to Minnie Bruse Oliver, executrix of the last will and testament of J. E. Oliver, deceased. Carpenter has appealed from the final judgment on the judgment roll alone, claiming error in those portions of the final judgment (1) which set apart a one-fourth interest in the property to Minnie Bruse Oliver, as executrix; (2) which determined that Carpenter was bound to pay certain charges which were a lien on the interest of Charles Elmer Miller, his assignor, and his proportion of attorney's fees and costs; and (3) which determined that J. E. Oliver was entitled to commence the action.

[1-3] Considering the last point first: Upon the death of his wife, J. E. Oliver was vested with an interest in the property. Section 1386, subd. 1, Civ. Code section 221, Prob. Code. On the record presented he was such owner as a tenant in common with the other owners. He was therefore authorized to commence the action under section 752 of the Code of Civil Procedure. Furthermore, this question and the question of the interests of the respective parties was finally adjudicated by the interlocutory decree. Pista v. Resetar, 205 Cal. 197, 270 P. 453. Only such matters may be reviewed on appeal from the final judgment as have intervened subsequent to the rendition of the interlocutory decree. Gutierrez v. Hebberd, 106 Cal. 167, 39 P. 529, 935.

[4] As to assignment No. 1, the record shows that J. E. Oliver died after the interlocutory decree became final but before the final decree was entered. The executrix was duly substituted in his place, and the interest of J. E. Oliver allotted to her as executrix. Carpenter attempts to base this claim of error on the rule that an executor or administrator of the estate of a deceased owner has no such interest in the land as to entitle him to institute partition proceedings. See Ryer v. Fletcher Ryer Co., 126 Cal. 482, 58 P. 908. But that rule does not apply where the proceeding is properly commenced and the executor or administrator of the deceased plaintiff is substituted into the case. In the event of the death of a party the proceedings are not "delayed or suspended," and the legal representatives may come in by substitution. Section 763, Code Civ. Proc.

[5, 6] Assignment of error No. 2 is also without merit. Prior to the acquisition by Carpenter of the interest of Miller, the defendant Carrie Evelyn Sperry acquired by assignment two judgments against Miller. According to the record here presented these judgments were liens against Miller's interest in the land before Carpenter acquired such interest. The court made the allotment to Carpenter subject to these liens. Miller's interest was subject to them and they could not, of course, be removed by his voluntary assignment to Carpenter. In other words, Carpenter acquired only the interest which Miller had, section 766, Code Civ. Proc., and he took the burdens with the benefits. The proportionate share of the attorney's fees and costs were properly chargeable to Carpenter. Section 796, Code Civ. Proc.

The judgment is affirmed.

We concur: WASTE, C. J.; IRA F. THOMPSON, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

220 Cal. 236

PEOPLE v. LARRIOS.

No. 3684.

Supreme Court of California.
Feb. 28, 1934.

1. Homicide 🔑314.

Where jury fails by its verdict of murder, first degree, to prescribe punishment at life imprisonment, trial judge must impose death penalty (Pen. Code, § 190).

2. Criminal law 🔑1170(2).

Refusal to permit accused to answer questions as to whether people living in house where he resided were under his "charge" and whether he was godfather of children residing there, offered to show that accused was at café where homicide took place on peaceable mission of buying food to take home, *held* not prejudicial where it was fully shown that he purchased such food and took it home.

3. Homicide 🔑163(1).

In homicide prosecution, accused should, as against technical objections, be permitted to state within reasonable limitations something of his background for purpose of determining punishment (Pen. Code, § 190).

4. Homicide 🔑314.

Statute gives jury wide discretion in meting out punishment for murder (Pen. Code, § 190).

5. Homicide 🔑276.

Evidence that accused in murder prosecution acted in self-defense in shooting deceased *held* to present issue for jury.

6. Criminal law 🔑1159(3).

It is not appellate court's province to weigh conflicting evidence unless evidence offered to prove facts found is inherently weak or improbable.

7. Homicide 🔑339.

Refusal to permit accused in murder case to answer question as to why he had revolver on his person at time of shooting *held* not prejudicial, where court informed accused's counsel that he might renew question on following day and thereafter matter was not again called to court's attention.

8. Witnesses 🔑337(2, 3).

Accused's reputation for truth, honesty, and integrity was put in issue as soon as he became witness in own behalf.

9. Criminal law 🔑696(4).

Accused's motion to strike out answer of witness to question as to accused's reputation for truth, honesty, and integrity and for peace and quiet *held* properly overruled for failure to specifically object to portion relating to reputation for peace and quiet.

10. Criminal law 🔑695(2).

In making objection, counsel must call court's attention to specific subject-matter which he deems to be improper.

11. Witnesses 🔑388(8).

Where testimony was taken by official stenographer at preliminary examination and transcript thereof was accessible to defendant, he was required, in undertaking to impeach such testimony, to call attention of witness to specific matter, permit him to read questions and answers, and then ask him if he so testified, notwithstanding interpreter was used.

12. Witnesses 🔑388(8).

Witness cannot be impeached by interrogating him in terms of conclusions as to whether his testimony at preliminary hearing was contradictory of his testimony at trial.

13. Criminal law 🔑782(5, 16).

In murder prosecution, instructions defining weight to be given to flight and self-defense *held* properly given under evidence.

14. Criminal law 🔑956(4).

Affidavit supporting motion for new trial, alleging refusal of sheriff or jailer to permit counsel to interview client through interpreter of own choice, *held* insufficient for failure to allege that such refusal was continued after setting of case or to show that full development of defense was prevented thereby and in view of failure to ask continuance or make complaint to court.

15. Criminal law 🔑939(1).

Motion for new trial on ground of new testimony *held* properly refused, where proposed witnesses were acquaintances of accused and no excuse was given for failure to call them at original trial.

16. Criminal law 🔑666(1).

Neither party in criminal case is required to call any person as witness whose testimony he is not willing to vouch for.

17. Criminal law 🔑666(1).

District attorney who should call witness whom he had reason to believe would testify falsely would violate oath of office.

18. Homicide 🔑233.

Prosecution need not prove motive in first degree murder case, though existence or want of motive is matter which jury should consider in arriving at verdict.

19. Homicide 🔑253(8).

Evidence *held* to sustain implied finding of jury that killing of deceased by shooting was without provocation and was committed under circumstances showing abandoned or malignant heart, warranting conviction of first degree murder (Pen. Code, § 188).

20. Homicide 🔑14(2).

No appreciable time between formation of intention to kill and act of killing need be shown to prove premeditation justifying conviction of first degree murder; it being necessary only that killing be preceded by concurrence of slayer's will, deliberation, and premeditation.

In Bank.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Manuel Larrios, also known as Mariano Alvarado, was convicted of murder in the first degree, and he appeals.

Affirmed.

Harry H. Parsons, of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., William F. Cleary, Deputy Atty. Gen., and Stanley Mussell, Dist. Atty., of San Bernardino, for the People.

SEAWELL, Justice.

[1] This appeal is from a judgment imposing the death penalty, and from an order denying a motion for new trial. The defendant was informed against, tried, and convicted in the superior court of the county of San Bernardino of murder of the first degree. The court thereupon pronounced the death penalty upon him as the law directs in such cases. The jury was fully instructed that it was within its discretion to relieve the defendant of the extreme penalty of the law by its verdict, but in order to do so, in case its verdict should be murder of the first degree, it would be necessary for it to affix the penalty in its verdict at life imprisonment in the state penitentiary, and upon a failure to do so the law imposed the duty upon the trial judge to sentence the defendant to suffer the extreme penalty of the law. That the law imposes the death penalty in such cases is too well settled to require a citation of authorities to the point.

All of the parties to the homicide, including the witnesses to the shooting and those who testified to the material facts bearing upon the conduct of the actors at the time of, and shortly prior thereto and immediately thereafter, are of Mexican blood.

The shooting of Matias Rodriguez by defendant Manuel Larrios, sometimes called Mariano Alvarado, which resulted fatally a few hours thereafter, occurred on June 4, 1933, near the entrance to the La Luz del Dia Café, located at 626 Mt. Vernon avenue, apparently an outlying business district of the city of San Bernardino, within which area quite a few Mexicans have shops or reside.

[2] The evidence shows that defendant is a native of Mexico and during the last ten years of his life he had resided four years in the state of Colorado and six years in the city of San Bernardino. During the last two years preceding the shooting he resided at the home of Mrs. Martinez, 1271 Spruce street, situate approximately 800 feet from the place where the shot was fired, at which house it appears that her mother and several children and perhaps one or two other persons resided. The defendant complains that he was not permitted to answer a question put to him as to whether or not the people who lived in said house were under his "charge," and the further question, "Are you the Godfather of any of the children there in that house?" No offer, however, was made by counsel to prove the existence of the facts as implied by said questions and the matter evidently was regarded as one of little importance. While the examination was rather rigidly restricted in this and a few other particulars, we cannot say, in view of the whole case, that the defendant was seriously, if at all, damaged by such rulings. The purpose of the above questions doubtless was to show that the defendant was at the Mexican café, where the shooting took place, on the peaceful mission of buying some tacos to take to the Martinez home. The purpose of said visit, however, was fully shown by the admitted fact that he purchased six tacos or tortillas, sometimes called Spanish tamales, at said café, paid 30 cents for the same and finally reached the Martinez home with them.

[3, 4] While the matter excluded by the court's ruling would have had no direct bearing on the homicide, nevertheless a person on trial for his life should, as against technical objections, be permitted to state, within reasonable limitations, something of his background. In some cases it may have a legitimate influence upon a jury in considering whether or not it should relieve the defendant of the extreme penalty of the law. In meting out the punishment for the commission of the crime of murder a jury, under the statute, is given a wide discretion. Sec-

tion 190, Pen. Code. In the instant case it is not probable that defendant suffered injury by the rulings of which complaint is made.

We now turn briefly to the history of the homicide as told by a number of witnesses.

Deceased, Matias Rodriguez, about 26 years of age, and his companion, Aniseto Delgardo, also a young man, resided at Bryn Mawr, or Redlands Junction. They had been companions practically all their lives. The deceased resided with his unmarried sister and Delgardo resided not far away. Deceased was the owner of a Ford touring car. On Sunday afternoon, June 4, 1933, some time between 1:30 and 2:30 o'clock, they left their homes to attend a ball game and later rode about San Bernardino until about 8:15 o'clock, at which hour they arrived at the La Luz del Dia Café, where they ate their dinners. The deceased and his companion, Delgardo, were strangers to the defendant and to all the other persons at the café. The defendant was known to the café people, to Reyes and to others residing in the immediate vicinity of the café. He seems to have been known as Mariano. Evidently the deceased, by his identification of defendant, had, so far as he could recall, no previous acquaintance with the defendant. Delgardo, his companion, could not recall ever having seen the defendant before he saw him at the café on the evening of June 4th. The evidence is to the effect that none of the parties, so far as sobriety was concerned, appeared to be affected with intoxicating liquor.

At the time the deceased and Delgardo entered the café, the defendant, who had ordered six tacos, was leaning against the counter or some object, waiting for the owner of the café, Mrs. Pattino, to prepare said tacos. Laura Florez, a young Mexican girl, was the waitress. It is the claim of Luis Reyes, admittedly an old acquaintance of the defendant, and no doubt very friendly with him, that he was seated in the café when the deceased and his companion entered. The waitress, Laura Florez, and the defendant corroborate him in this respect. Delgardo, on the other hand, was quite positive that Reyes was not in the café when he entered. However this may be, it is certain that deceased and Delgardo seated themselves at a table, and ordered their dinners, and that while they were eating the defendant, who was awaiting his order, left the café and presently returned. The waitress finally gave him his order in a paper bag, and he paid her 30 cents therefor, and left the café through the street door. The deceased, having finished his meal, went to the washroom and returning paid for the meal and left the café a couple of minutes in advance of the defendant. Shortly after the deceased passed through the door into the street a shot was heard. Delgardo's narrative of the shooting was that when he passed outside he saw the deceased and the defendant standing near the deceased's car, facing each other about three feet apart and the deceased had his hand to his side. Delgardo, addressing his companion, asked what had happened. Defendant had the pistol in his hand and when Delgardo asked what had happened he turned the pistol on him and said if "I wanted some that he had some for me." Delgardo said he didn't know what had happened. He didn't know what the trouble was about. The defendant then ran across the street into an alley which led through the opposite block and into a public street paralleling Mt. Vernon street. Said alley was fenced. Delgardo followed along the fence on the outside of the alley in an effort to note the direction of defendant's flight and saw him turn into said street. In so doing he was not seen by the defendant. Being unarmed he presently returned to his wounded companion, who was in much pain. No one else was in sight. He placed deceased in his automobile and drove him to the city hall and from there he was taken to the hospital, where he died the next day, after an operation in an effort to save his life. Three police officers, who were immediately detailed to apprehend the person who had shot the deceased, went to the café and interviewed the young lady waitress and the proprietress. No other person who claimed to witness the shooting was there. From the café they went directly to a bakery next door to the café and interviewed Mr. Gomez, the proprietor, and from there they went directly to the Martinez home, 1271 Spruce street, arriving at 9:45 o'clock. The shooting occurred at about 8:30. At the Martinez home they found the defendant, a Mr. Sandoval, Mary Duval, and Mrs. Martinez. They were all in the kitchen. The officers asked the company if there was any one there named Mariano and were informed by the spokesman that there was no one there by that name. Defendant appeared to be very nervous. Asked if he was Mariano he replied in the negative. A search was made of the house for weapons, but none were found. The defendant was told that he would be taken into the presence of the wounded man for purposes of identification. He denied that he was at the café on the night on which the deceased was shot or that he had had any trouble with any one or knew anything about the matter or that he had a gun. Mrs. Martinez rode by defendant's side to the hospital, representing herself as his sister, and talked with him in a low tone in Spanish during the trip to the hospital. Upon being brought into the presence of the wounded man, who was suffering great pain, the officers asked him if the defendant was the man who shot him. He replied: "Yes, that is the man who shot me; he shot me without any cause. I didn't want to fight." The defendant's reply was, "No." Mrs. Martinez admonished the deceased to "be careful and sure" what he was saying as he was making "a very serious charge." The deceased replied: "He shot me without cause." The defendant was forthwith placed under arrest. The evidence of the eyewitnesses and the uncontrovertible circumstances identified the defendant as the person who fired the shot so completely that he afterwards abandoned his defense of alibi and at the trial admitted the shooting, but claimed that he was protecting himself against a threatened assault about to be made upon him by Delgardo and in his attempt to shoot Delgardo he missed his mark and hit Matias Rodriguez, the deceased.

Luis Gomez, a boy seven years of age at the time of the homicide, was very close to the defendant, whom he referred to as Mariano, at the time he fired the shot. His father conducted a bakery adjoining the café and the boy was on the outside and saw the defendant fire the shot. He testified that he saw only three men, the defendant, deceased, and Delgardo, on the outside of the café. He saw defendant, without any words having been passed by any one, shoot, and he saw the wounded man assume what he described as a dying position. He also saw the defendant, after hiding a moment behind a truck, flee from the scene. The boy picked up the empty shell which the defendant ejected from his 25-caliber automatic revolver. The boy's testimony is somewhat confusing in its references to the deceased and Delgardo. Several times he used the term "the other man" interchangeably with the deceased and Delgardo. Both men were strangers to him. As to the defendant, whom he knew, there was no confusion as to his part in the commission of the homicide. No justification whatever is shown for the shooting by the boy's testimony.

[5, 6] The defense, which took on a dual aspect, was that Delgardo was the real assailant and that his motive was either to rob the defendant or to assault him with a knife and that the defendant did not in fact shoot at the deceased, Rodriguez, who was an innocent bystander, but hit him by accident. The defendant, in aid of this theory, testified that he had $78 in currency in a billfold or wallet, which he displayed when he paid the waitress 30 cents for the six tacos and the inference was that the deceased and Delgardo saw the money and Delgardo thereupon formed the intent to relieve him of his money. Neither the girl whom he paid, nor Delgardo, nor any one else in the café saw him with any money other than 30 cents, nor did he produce any convincing proof whatever that he had any such sum of money on his person, or that he had even a wallet. On the other theory, that Delgardo was the aggressor and was attempting to provoke an encounter with him, he testified to the former directing a most insulting word at him, which no one seemed able to satisfactorily interpret. Whether it was a term of unspeakable reproach, or one of trifling significance, remains in doubt. Whether it was spoken at all, and if so its provocative effect, were matters solely for the jury's consideration. The testimony offered by the defendant and his witness Reyes to the effect that Delgardo was advancing upon defendant in a threatening manner when he fired the shot were questions of fact solely for the consideration of the jury and it is not the province of an appellate court to weigh conflicting evidence unless the evidence offered to prove the fact found is inherently weak or improbable. No such situation is presented by this record. Defendant does not claim that he saw a knife, but that Delgardo was pulling his hand out of his front pocket when he shot. In accounting for the pistol the defendant testified that while running up the alley with the paper bag in one hand and the pistol in the other he stumbled and fell and dropped the pistol and he did not stop to pick it up. He also claimed at the trial that he had but a single cartridge in the revolver chambers. The pistol was not produced at the trial or otherwise accounted for.

The defendant made no satisfactory explanation as to why he waited on the outside of the café until the deceased and his companion came out of the café. According to the testimony of several witnesses, whom the jury unquestionably believed, the defendant must have waited several minutes for the deceased and his companion to appear. The evidence given by the defendant and witness Reyes as to the order in which the parties left the café and what occurred on the outside was contradicted by apparently creditable witnesses offered by the prosecution, one or two of whom were seemingly disinterested persons, and their testimony was sufficient to sustain the verdict of the jury. The testimony of both the defendant and Reyes in a number of particulars is so improbable as to impeach its verity. Reyes, who was a man fifty years of age, made no timely report to any one so far as the record discloses of the tragedy he claims to have witnessed. The defendant fled from the scene and denied knowledge of the shooting until about the time he was put on trial. No complaint of an attempted robbery or a threatened assault was made by him until he put on his defense. When taken into the presence of his victim and charged with the crime he made no attempt to justify his act, but instead sought to avoid the responsibility of his act by denying that he had any knowledge of the cause of Rodriguez's death.

[7-10] Appellant assigns a number of the court's rulings as error. In a few instances the rulings may be said to be erroneous in excluding or admitting testimony as to rather unimportant matters, but we are unable to find that the defendant suffered prejudicial injury thereby. One of said assignments consists in the refusal of the court to permit the defendant to answer a question as to why he had the revolver upon his person. The court in sustaining the objection of the district attorney informed defendant's counsel that he might renew the question on the following day, at which time he would give it further consideration. It does not appear that the matter was again called to the attention of the court. That the defendant had the pistol on his person and used it is admitted and no claim was made that he armed himself for the express purpose of shooting the deceased. No such inference could have possibly been drawn from the mere possession by him of the revolver, nor could it have influenced the jury's deliberations. The crucial question for the jury's determination was whether he was justified in using the deadly weapon in the circumstances of the case. Another assignment of error was directed at the testimony of a witness to the effect that defendant's reputation for peace and quiet was bad. The question as put was whether the witness knew the general reputation of the defendant in the community in which he lived for "truth, honesty and integrity, *and for peace and quiet.*" (Italics ours.) The witness answered that he did. The witness was then asked, "What is his reputation?" His answer was, "Very bad." Defendant's counsel at this juncture stated that he was engaged in talking with his client and he did not hear the last question and answer. The question and answer were read, and he then moved to strike out the answer and asked that he be permitted to place an objection to the question. The objection came somewhat late, as the italicized portion of the question at once shows that that portion of the question was objectionable, inasmuch as the defendant had not attempted to show that his reputation for peace and quiet was good. The court, however, permitted the objection to be placed in time, and overruled it. The defendant did not move to strike out the objectionable portion of the question, but his motion went to the entire question. Unquestionably the defendant's reputation for truth, honesty and integrity was put in issue and open to attack the moment he became a witness. Such is the universal rule. That portion of the question was properly in the case. No specific objection was directed at the portion that was amenable to objection. In making objections counsel must call the attention of the court to the specific subject-matter which he deems to be improper. Some four or five other witnesses testified that the defendant's reputation for truth, honesty, and integrity was bad, but the question as to his reputation for peace and quiet did not again arise.

Another ground of assignment of error is made by reason of the court sustaining an objection to questions asked the defendant as to whether he knew that the deceased and his companion saw the money which he had in his purse; or whether he showed it or exhibited it so that said two men could see it; or whether he knew that said men knew that he had money in his pocket. These questions were separately asked. Strictly speaking, the defendant should have explained how he handled his purse or money, if he had either, and stated the facts from which the jury may have concluded that the deceased and Delgardo should have known that defendant had the sum of money that he claimed to have had upon his person. The line is quite shadowy in some cases as to whether evidence amounts to a conclusion or a statement of fact. We are of the view that it would have worked no hardship on the defendant to have explained the manner in which he handled his wallet, if he actually had one.

[11, 12] Complaint is made as to the refusal of the court to permit counsel for defendant to impeach witness Delgardo on the rec-

ord of the transcript of testimony taken at the preliminary examination without first exhibiting to the witness said testimony, which, it is claimed, is contradictory of his present testimony. Where the testimony of a witness was taken by an official stenographer at the preliminary examination and the transcript of the proceedings was accessible to the defendant he must, where he undertakes to impeach the witness as to his testimony given at said examination, call the attention of the witness to the specific matter, permit him to read the questions and answers, if he so desires, and then ask him if he so testified. The fact that an interpreter was used does not alter the rule. Interrogating the witness in terms of conclusions as to whether his testimony at said hearing was contradictory of his present testimony is clearly not permissible.

Many of the assignments are not well taken. Either the alleged error was afterwards corrected—as, for example, the defendant was not allowed to state at an early stage of the trial the country of his birth, but later did so state—or the matters complained against were so inconsequential as not to require detailed analysis.

[13] A number of instructions, especially the one defining the weight to be given to flight, and self-defense, are assailed. In every instance said instructions were but a repetition of the well-approved instructions of this court on the subjects to which they relate. The complaint that the instruction on flight had no application to the facts of this case is wholly without foundation. That the defendant fled from the scene of the crime and attempted to conceal his identity as the person who fired the shot which resulted in the death of Rodriguez, so far as the fact is concerned, might as well be conceded. It is not open to question. We have examined all the instructions given by the court, and it cannot be said that the defendant was denied any legal right either in giving the instructions as a whole or refusing to give certain instructions offered by the defendant.

[14] On motion for a new trial the counsel for appellant has filed an affidavit in which he avers refusal on the part of the sheriff or jailor to permit counsel to interview his client through an interpreter of his own choice. Further complaint is made that the prosecution instructed several witnesses not to give the defense any information as to what their testimony would be at the trial. If this affidavit correctly set forth the attitude of the sheriff and district attorney, they exceeded their authority in the premises. While the affidavit contains averments of unauthorized acts on the part of said officers, it contains no averment that counsel for the defense was denied the privileges which the law guarantees to every person charged with crime to prepare his defense. The day on which the unauthorized acts are averred to have taken place was July 3d, prior to the setting of the case. Affiant does not aver that he did not, thereafter interview said witnesses, except the defendant himself, and it does not appear that he would not have been granted the right to converse with his client through his own interpreter rather than the official interpreter had he so requested. It appears that the matter was brought to the attention of the court but once, and while it was under consideration by the court counsel for defendant relaxed his effort and nothing further appears to have been done in the matter. He admits that during the trial his interpreter sat by his side. The defendant evidently spoke English to some extent. It will be observed, however, that counsel does not anywhere aver that he was in any wise hindered or deprived of the opportunity of fully developing his defense, or that he was injured by the matters set forth in his affidavit. No continuance or adjournment was requested or complaint made to the court that the defense was not fully prepared and ready to go forward with its case. The transcript of testimony which we have carefully read, consists of more than two hundred and fifty pages and it does not appear from an examination thereof that defendant was embarrassed or hindered in any way in the preparation and development of his case.

[15-17] Appellant presented a second affidavit on motion for new trial in which Mary Moreno Duval is the affiant. She is doubtless the woman who was at the Martinez home, where the defendant was apprehended at the time the officers visited said place shortly after the shooting. She gave no information as to her identity other than her name. She avers that she was one hundred and fifty feet distant from the parties when she saw after nightfall an altercation between the three parties in question; that the defendant was using the paper bag in an effort to protect himself from Delgardo, who was advancing upon him; that the defendant, after being followed, drew his pistol; that she covered her eyes; that hearing no shot she removed her hands from her eyes and saw the deceased and Delgardo trying to

take the gun away from the defendant and that he retreated. Affiant again covered her eyes and heard a shot. When she opened her eyes the defendant was running away from the scene of the trouble. After a minute or two she went into the café and asked the owner if she heard the shot and she was told that it was simply backfire from the automobile.

The record contains a third affidavit made by Jennie Mercado. The substance of her brief affidavit is that she was waiting in the kitchen of said café for an order of sandwiches and that she observed through a window frame one foot square, set in the door leading into the dining room, Reyes, Rodriguez, and Delgardo, eating their meals in the adjoining room; that when the defendant paid Laura Florez for the tacos she saw him take from a pocketbook a paper bill and he also took some silver therefrom and paid Laura Florez for said tacos; that defendant left the café and was immediately followed by Delgardo; that Rodriguez followed Delgardo and Reyes followed some seven or eight feet behind the deceased; that she heard a shot; that she went outside a few minutes thereafter, but she saw no one; that Mary Duval passed her going into the café From the crowd she afterwards learned some one had been shot.

The affidavits upon scrutiny are not impressive. Furthermore, all of the affiants were acquaintances of defendant and no excuse is given as to why they were not called as witnesses. Appellant explains that the district attorney was required under the statute to call Reyes. There is no merit in this claim. Neither party is required to call any person as a witness whose testimony he is not willing to vouch for. A district attorney who should call a witness whom he had reason to believe would testify falsely in favor of either the defendant or the people would violate his oath of office. Reyes was called by the defense.

Between the period of conviction and motion for a new trial the court informed counsel that in the absence of proof of specific motive, and also because of the shortness of time which elapsed from the time that the defendant left the café and the shooting, which occurred a few minutes thereafter, he was uncertain as to whether the jury should have found the defendant guilty of a greater crime than murder of the second degree. Upon further examination of the law on the subject, the court announced that it was satisfied that the crime constituted murder of the first degree and pronounced the judgment from which this appeal was taken.

[18] It is well settled that the prosecution is not required to prove motive. Proof of the existence of motive, or a want of such proof, is obviously a matter which the jury should, and doubtless does always, consider in arriving at its verdict. But proof of motive, if the evidence is otherwise sufficient to support the verdict, is not made a prerequisite to a conviction.

[19] The law implies malice when there is manifested a deliberate intention to take the life of a fellow creature. It is *implied,* when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. Section 188, Pen. Code. The evidence supports the implied finding of the jury that the killing was without provocation and was committed under circumstances which showed an abandoned or malignant heart. If it would have been murder for the defendant to have intended to kill Delgardo and in the execution of such attempt he unintentionally killed Rodriguez, the unlawful intent is transferred from the person intended to be killed by the given act to the person actually killed. The law applies with equal force and effect to the killing of the latter as it would have applied to the unlawful killing of the former.

The rules of law by which malice aforethought and premeditation are to be determined have been so thoroughly settled by section 188, Penal Code, and the many decisions of this court beginning with our earliest—making special reference to People v. Iams, 57 Cal. 115, where the subject was profoundly considered and the rule herein stated was definitely adopted, and ending with our latest decision, People v. Fleming, 23 P.(2d) 28, 32—that nothing may be added which would better assist juries and courts in their effort to fathom the intent of persons charged with homicides. Said rules form an important part of our criminal law structure and are our judicial guides in judging the intention and purposes of men in the commission of willful and voluntary acts which are so violent in form as to ordinarily result in the death of or cause great bodily harm to the person against whom they are directed.

[20] The rule as restated in People v. Fleming, supra, may here be repeated, as it answers the objection made by appellant as to shortness of time intervening between the intention to kill and the act of killing in the instant case as it did in the Fleming Case:

"But this court has said on innumerable occasions that in order to prove premeditation in one charged with murder it is not necessary to show that any appreciable space of time elapsed between the intention to kill and the act of killing. It is only necessary to quote from People v. Hunt, 59 Cal. 430, 435, the following statement of the law on this subject: 'There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.' The precise language of this decision has been repeated on numerous occasions by this court, and the principle there enunciated is irrevocably established as a part of the law of this state. People v. Bellon, 180 Cal. 706, 710, 182 P. 420."

In those cases where one "with no considerable provocation" viciously or wickedly shoots down another, section 188, Penal Code, implies malice. The same is true when the killing shows an abandoned and malignant heart. The evidence is amply sufficient to sustain the implied finding that the defendant acted "with no considerable provocation" in bringing about the death of Rodriguez. There is some evidence in the record on the part of defendant and his witness, Reyes, which, if believed, would tend to afford some evidence of express malice or premeditation on the part of the defendant. Reyes testified that when the defendant was inside the café either Delgardo or Rodriguez said something to the defendant which he was unable to hear. The defendant also testified that when he walked toward the piano to drop a nickel in the slot he heard one of the men "say something, but I did not understand what they said, and I turned around and went back." Subsequently he was asked if either of the men said anything to him while inside of the café and his answer was, "Not a single word." Whether he smarted under a fanciful belief that some reference had been made to him by the deceased or his companion while in the café, is somewhat confused on account of the defendant's inconsistent and contradictory testimony, but it is beyond question that he was armed and that he left the café first and waited, according to the testimony of several witnesses, from three to five minutes on the outside and immediately upon the appearance of the deceased he shot him. There was no reason why he should have waited on the outside, and if he had feared any mistreatment at the hands of the deceased and his companion, who were peaceably eating their meals, he would have gone his way and the killing would not have happened. His waiting on the outside and his quick action upon the appearance of the deceased would indicate malice or premeditation.

The case is one resting entirely upon the testimony of witnesses whose credibility was subjected to the scrutiny of the jury, and there appears to be no reason why its findings of fact should be questioned by this court. The conduct of the defendant following the homicide is absolutely inconsistent with the conduct of a person who felt the consciousness of justification. His testimony in accounting for his act and the circumstances thereof is not impressive. This court in such cases is not authorized to interfere with the judgment of conviction.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; SHENK, J.; THOMPSON, J.; PRESTON, J.; CURTIS, J.

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220 Cal. 260

CAPITAL NAT. BANK OF SACRAMENTO et al. v. STOLL et al.

Sac. 4754.

Supreme Court of California.

March 1, 1934.

Rehearing Denied March 30, 1934.

1. Principal and agent ⚷34, 42, 43(2).

Rule that agency is always revocable and that principal's death or incapacity revokes agency is subject to exception that agency or power coupled with an interest is not so terminated.

2. Principal and agent ⚷34.

Coexisting interest in subject of agency is essential element of irrevocable power.

3. Parent and child ⚷12.

Son who relinquished profitable employment to manage aged father's business until final distribution in consideration of salary and child's share as in case of intestacy had no such beneficial interest in subject-matter as prevented termination of agency on father's subsequent incompetency (Civ. Code, § 2356).

4. Parent and child ⚷**9(2).**

Where son relinquished profitable employment to manage aged father's business until final distribution in consideration of salary and child's share as in case of intestacy, father's subsequent incompetency did not of itself terminate contract as distinguished from agency (Civ. Code, § 2356).

IRA F. THOMPSON, J., dissenting.

In Bank.

Appeal from Superior Court, Sacramento County; H. D. Burroughs, Judge.

On rehearing.

Judgment of trial court modified and affirmed.

Prior opinion, 24 P.(2d) 780.

Howe, Hibbitt & Johnston and White, Miller, Needham, Harber & Mering, all of Sacramento, for appellants.

Inman & West and Sheridan Downey, all of Sacramento, Morgan V. Spicer, of San Francisco, and Ralph H. Lewis, of Sacramento, for respondents.

PER CURIAM.

We hereby adopt the following portions of our former opinion as a statement of the facts and issues presented in this case:

This appeal is from a judgment in favor of plaintiffs declaring that a contract employing the defendant Edwin P. Stoll was terminated by the incompetency of his father and employer, John T. Stoll, and restraining the defendant Edwin P. Stoll from interfering with the possession of the property or its management by the guardian. The facts necessary to understand the controversy are few and free from complications. All the defendants are sons of John T. Stoll, one of the plaintiffs. The plaintiff Jennie T. Stoll is his wife and the stepmother of the defendants. We do not include the bank as a plaintiff for reasons hereinafter to be stated.

For more than eight years before October 26, 1929, Edwin P. Stoll had been employed by the Remington Arms Company, and on the date mentioned, and for about four years prior thereto, was manager of its western cutlery division at a salary of $350 per month, together with his traveling and other necessary expenses when away from his home. His prospects with that company were very good and the opportunity for further advancement excellent. He saw his father rather frequently at the latter's home in Sacramento—probably four or five times a year. For some time prior to 1929 his father had desired him to give up his employment with the Remington Arms Company and take over the management of his father's affairs. The son had put his father off. Finally, in June of that year he received a letter from his stepmother as follows: "Your father wishes me to write you that he is not able to write, let alone go down to Oakland, and he would like to have you come up." In response, he went to Sacramento, where his father, then eighty-seven years of age, insisted that he could no longer put him off, else he would have to make other arrangements. Edwin P. Stoll told his father that he would assume the burden if he could be protected in the term of his employment and his interest in the estate; which employment should continue until the decree of distribution was signed. After consulting with his father's counsel, and after three different drafts of an agreement were submitted, the following contract was signed:

"This agreement, made and entered into this 26th day of October, 1929, by and between E. P. Stoll, of San Francisco, California, party of the first part, and John T. Stoll, of Sacramento, California, the party of the second part.

"Witnesseth: That the parties hereto are father and son:

"That the party of the second part being advanced in years desires the services of the first party to manage his business and properties during the remainder of his life, and thereafter until final distribution of the estate of said second party has been made, upon the terms and conditions hereinafter set forth;

"That said first party is now employed at a salary of $350 per month, and his interests are such that he cannot afford to relinquish said position without assurance of such employment as is herein provided, and this agreement is, therefore, predicated upon such relinquishment of employment by said first party and his employment, as herein set out, by said second party.

"That in consideration of the foregoing said second party agrees to employ, and said first party agrees to accept, such employment for a period of time commencing upon the

1st day of December, 1929, and ending with the final distribution of the estate of the second party, as above set forth, at a monthly salary of $350, payable monthly.

"That in consideration of the foregoing, first party agrees to devote his entire time and his best ability to the management, control and operation of the business and property of said second party during said term.

"That in further consideration of first party surrendering his said position said party of the second part agrees to take no action whatsoever that will in any manner reduce the share of the estate of said second party to which first party shall or would be entitled as an heir at law."

Edwin P. Stoll entered upon his employment as agreed and continued therein for two years. On December 2, 1931, his father was adjudged incompetent and the Capital National Bank was appointed guardian of his estate. On January 8, 1932, this action was commenced to have it declared that the contract was terminated and to restrain Edwin P. Stoll from interfering with the possession or management by the guardian of the property of his father. The first complaint was brought by the bank as guardian, but an amended complaint was filed wherein John T. Stoll appeared by the bank, the wife electing to join with the plaintiff, and the other sons with the defendant. The property consisted of three hotels, stores for thirteen or fourteen tenants, three ranches, and notes, etc., aggregating in value at the time of the contract $350,000 or more, with a monthly income of $1,800 or $2,000. Further, it was stipulated that Edwin P. Stoll performed the terms of his contract, and that there was no objection to his conduct of the position.

Various contentions are advanced by appellants. They complain that the action was commenced by the bank as guardian, but of necessity their argument in this particular must be accorded no further consideration in view of the amendment of the complaint to conform to the recognized procedure. Their other propositions may be included in the general problem of whether in the particular contract the power of the appellant Edwin P. Stoll was coupled with an interest so as to prevent the termination of the contract by virtue of the provisions of section 2356 of the Civil Code, which reads: "Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated, as to every person having notice thereof, by:

"1. Its revocation by the principal;

"2. His death; or,

"3. His incapacity to contract."

We have an unusual situation—a son sacrificing his employment and chances of further preferment in order to manage an aged father's estate upon the assurance that his employment shall continue until he receives his interest therein, which, it is agreed, shall not by any act of the father be reduced below that which he would take if his father were to die intestate. * * * We should have no hesitancy at all in declaring under the circumstances of the case, if John T. Stoll, possessed of all his faculties, were attempting to revoke the employment of his son under subdivision 1 of the above-quoted section, that * * * he would be answerable in damages for such a breach. Parke v. Frank, 75 Cal. 364–368, 17 P. 427; Roth v. Moeller, 185 Cal. 415–418, 197 P. 62. Nor can it be seriously questioned that in the event of his father's demise and the fulfillment of his part of the contract by Edwin P. Stoll he would be able to receive his share of the estate under the contract. Rogers v. Schlottlerback, 167 Cal. 35, 138 P. 728; Roy v. Pos, 183 Cal. 359–367, 191 P. 542. These observations do not, however, solve our present problem.

[1-4] The general rule that an agency is always revocable, and is revoked by operation of law in the event of death or incapacity of the principal, is subject only to the exception that an agency or power coupled with an interest is not so terminated. What constitutes an interest within the meaning of this exception has not been made particularly clear by the numerous and conflicting decisions dealing with the subject. But all the decisions agree that an essential element of this irrevocable power must be a coexisting interest in the subject of the agency. In Lane Mortgage Company v. Crenshaw, 93 Cal. App. 411, 269 P. 672, the agency was to manage a hotel, and the agent had a twenty-year lease of one floor, without rent. It was held that the agency was coupled with an interest—a present leasehold estate in the property which was the subject of the agency. The power was, moreover, a necessary means of protecting the interest, for unless the building were properly managed, a forfeiture of the basic land lease might result, which would destroy the agent's estate.

On the other hand, where no specific, present property interest has been found, the courts have consistently held the agency revocable, notwithstanding the fact that the agent gave valuable consideration, and, in spite of express declarations in the contract, that it was coupled with an interest and irrevocable. Boehm v. Spreckels, 183 Cal. 239, 191 P. 5; Crossin v. Elysian Springs Water Co., 105 Cal. App. 449, 287 P. 985; Scott v. Superior Court, 205 Cal. 525, 271 P. 906; Todd v. Superior Court, 181 Cal. 406, 184 P. 684, 7 A. L. R. 938; Kunz v. Anglo & London Paris Nat. Bank (1931) 214 Cal. 341, 5 P.(2d) 417; McColgan v. Bank of California, 208 Cal. 329, 281 P. 381, 65 A. L. R. 1075.

In the instant case it seems clear that despite the obvious detriment suffered and benefit conferred by the defendant, no present property interest passed to him by the agreement. He was promised two things. The first was a salary of $350 per month. This was, of course, not an interest in the estate. Secondly, it was agreed that his father would not reduce the amount of his expected inheritance. Here again, no present interest in the property passed, but by the very language of the promise, he was to get the interest only upon his becoming an heir, that is, upon his father's death. At most, this was an agreement to leave property by will or by intestacy. The case of O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861, where the defendant gave up a medical practice to manage plaintiff's property, and plaintiff agreed to devise certain land to him, points out that the remedy in such a case is an action for damages. See, also, O'Brien v. Perry, 130 Cal. 526, 62 P. 927; In re Hayden's Estate, 1 Cal. App. 75, 81 P. 668.

Such cases as Bridge v. Kedon, 163 Cal. 493, 126 P. 149, 43 L. R. A. (N. S.) 404, are not controlling here. In that case the defendant made an assignment to plaintiff of his expectant interest in the estate of his mother. The court held that the assignment created a "present equitable charge," enforceable as a contract to assign when the property came into the hands of the heir. The court recognized, however, that the right of plaintiff was purely contractual, and that prior to the death of defendant's mother, no property interest passed.

Plaintiffs also urge two other serious objections to holding this agreement irrevocable. Because of the conclusion we have reached as to the character of the agency, we do not deem it necessary to decide them.

It follows from the authorities considered that this case does not fall within the rare class of irrevocable agencies, and that the judgment of the court below, in so far as it terminates the agency, is correct. Whatever right the agent may have to recover damages or to protect his expectant interest in the estate is not involved in this action. We think, however, that the court was in error in declaring the contract terminated. The contract not only provides for the employment of defendant as agent, but also contains the agreement not to reduce his expectant share of the estate. If the consideration is adequate and the contract otherwise fair and reasonable, and the defendant is willing to perform and has not been guilty of any improper performance, we see no reason why this part of the agreement may not be valid and subsisting, and binding on the estate of the incompetent. As far as the record shows, defendants may pursue either or both remedies. But since the case has been tried and appealed on the issue of whether the agency was irrevocable, and no pleading or proof of other matters was presented, they must be made the basis of a separate action.

The judgment is modified by striking therefrom the words "said contract," and substituting therefor the words "the employment of Edwin P. Stoll," and, as so modified, it is affirmed.

I dissent:
IRA F. THOMPSON, J.

220 Cal. 124

McBURNEY v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

L. A. 14380.

Supreme Court of California.
Feb. 23, 1934.

1. Master and servant 🔑361.

Employer-employee relationship under employment contract is essential to recovery under Workmen's Compensation Laws, which are entirely of constitutional or statutory origin (St. 1929, p. 306, § 7; St. 1931, p. 2068, § 8 (a).

2. Master and servant 🔑364.

Indigent person receiving relief from county under statute is, in sense, county's ward (Gen. Laws 1931, Act 5814, §§ 1, 5, 6).

3. Master and servant 🔑364.

Recipient of aid from county welfare department, injured while clearing drainage ditch for city under work order issued by county welfare bureau, *held* not "employee" within Compensation Act, and no contract of hire existed between him and county (St. 1929, p. 306, § 7; St. 1931, p. 2068, § 8 (a); Gen. Laws 1931, Act 5814, §§ 1, 5, 6).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

4. Paupers ⚷46.

County supporting indigent person is entitled to his services and earnings to aid in support (Gen. Laws 1931, Act 5814, §§ 1, 5, 6).

In Bank.

Certiorari to Industrial Accident Commission.

Petition by Alton R. McBurney for a writ of certiorari to review an order of the Industrial Accident Commission, which denied compensation to the petitioner in a proceeding under the Workmen's Compensation Act against the County of Los Angeles and the City of Monrovia, his alleged employers.

Order affirmed.

Herlihy & Herlihy, E. Herbert Herlihy, and F. George Herlihy, all of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondent Industrial Accident Commission.

Everett W. Mattoon, Co. Counsel, and Fred M. Cross, Deputy Co. Counsel, both of Los Angeles, for respondent Los Angeles County.

William Fleet Palmer, of Los Angeles, for respondent City of Monrovia.

PER CURIAM.

This is a proceeding to review an order of the respondent commission denying compensation to the petitioner.

In January, 1932, the petitioner applied to the bureau of county welfare of the county of Los Angeles for assistance. After due investigation he was found to be a resident of the county and entitled to the relief sought. His requirements were fixed at $41.60 per month. From that time until April 11, 1933, he was given aid through the county welfare department. That aid took various forms. He was given groceries at irregular intervals from January 21, 1932, until April 11, 1933. At numerous times he received contributions of cash or its equivalent in rent. Commencing on January 26, 1932, also at irregular intervals, he was given work orders, covering a working period of about 45 days; the last one being dated December 17, 1932. By arrangement between the bureau of county welfare and other public agencies in the county, men who received work orders from the bureau were sent out to perform work for the period indicated on the card, and usually under the joint supervision of the representatives of the bureau and such other public agencies. When the last work card was issued to the petitioner, he reported to a city foreman of the city of Monrovia and was assigned to assist in clearing out a drainage ditch in said city. The work performed on this project is described as "made work," which is work provided in administering public relief and required as a condition imposed upon able-bodied persons receiving aid.

While the petitioner was working on or near a truck owned by the city of Monrovia and engaged in the same project work, he sustained an injury to his foot and ankle. The injury occurred on December 28, 1932, and on January 9, 1933, the petitioner filed with the respondent commission his application for an adjustment of his claim. After a full and fair hearing the commission found that the petitioner was injured "while occupying the status of receiving aid from the county welfare department of the county of Los Angeles," and that he "was not an employee as defined by law at the time of said injury," and ordered that the applicant take nothing.

Two questions are presented. The first one is whether the petitioner, at the time of the injury, was an employee as contemplated by the Workmen's Compensation Law. If he was, the next question is: Was he an employee of the county of Los Angeles or of the city of Monrovia, or of both? If he was not an employee, the second question need not be answered.

The problem of determining the status of a workman injured while engaged in public work as a condition of his receiving aid from public funds set aside for such purposes is of comparatively recent origin. It is a new one in this court. The respondent commission has been called upon in numerous cases to determine the question and has uniformly held that such a workman is not an "employee" as defined by our workmen's compensation laws. In at least one case the District Court of Appeal has denied a petition to review an order of the respondent commission in a similar case. Van Devanter v. Industrial Accident Com., Civil No. 8439, First App. Dist., Div. Two.

[1] Workmen's compensation laws were not known at common law. They are of con-

stitutional or statutory origin and have been upheld generally on the theory that industry should assume the liability of industrial injuries and death as a part of the cost of production. More recently the same liability has been extended to employment in other lines of endeavor, including public contracts for labor and services. In any case, the relationship of employer and employee under a contract of employment is essential to recovery of compensation. Section 7 of our Workmen's Compensation Act (St. 1917, p. 835, § 7, as amended by St. 1929, p. 306) defines an "employer" as one "who has any person in service under any appointment or contract of hire * * * express or implied * * *." Section 8(a) of the same act (St. 1917, p. 835, § 8(a), as amended by St. 1931, p. 2068) defines the term "employee" as "every person in the service of an employer as defined by section 7 hereof under any appointment or contract of hire, * * * express or implied * * *."

Section 1 of the act of 1901 providing for the maintenance and support of certain indigent persons resident of the county (Stats. 1901, p. 636, as amended; see Deering's Gen. Laws, vol. 2, p. 3130, Act 5814) provides: "Every county and every city and county shall relieve and support all * * * indigent persons * * * lawfully resident therein. * * *" Section 5 of the same act makes it the duty of the board of supervisors, or of any person or society so authorized by the board, to investigate every application for relief from the funds of the county; to supervise by periodic visitation every person receiving such relief; to devise ways and means of bringing such persons unable to maintain themselves to self-support; and to keep full and complete records of such investigation, references, relief, and rehabilitation. Section 6 of the act provides that whenever any person receiving relief under the act shall be or become the owner of any property, real, personal, or mixed, it is made the duty of the district attorney to marshal such property in the manner provided and to cause the same to be applied on the support furnished by the county.

In compliance with the provisions of the foregoing act, the county of Los Angeles has raised large sums of money by taxation for such relief. This money is kept in a separate fund in the county treasury and is disbursed therefrom on the order of the bureau of county welfare.

[2, 3] It may not be doubted that on the record presented the petitioner made application for relief and the bureau of county welfare granted the same in contemplation of and pursuant to the act of 1901. During the time a person is receiving relief under that statute he is in a sense a ward of the county, in whose behalf the Legislature has laid the duty upon the county to provide relief, of course only to the extent of its ability to do so. The petitioner had the right to invoke the relief granted and under the circumstances here shown the county could not deny it. The transaction thus far is in the field of public welfare, and the essential characteristics of a contract of hire are not present. Does the fact that a person while receiving such aid is sent out under work orders at a definite sum per hour or day thereunder supply such essentials? We are persuaded that it does not, on the record here presented. The petitioner's case was classified as an "open welfare case." That meant that he was entitled to relief and would be for some time to come. He would receive the relief whether he worked or not. The assistant director of relief projects testified that the bureau of county welfare provides work under a number of classifications, or a number of circumstances; that there were welfare cases when a doubt arose as to whether an applicant for relief would work if he had a chance; that in such a case a work test was prescribed for the man; that for this work he might not be paid at all, or might be paid a nominal sum, or he might be paid a substantial sum, even the equivalent of a going wage; that during the period of depression and widespread unemployment there were many able-bodied men willing to work who would be entitled to relief under the act of 1901, but who felt an abasement in accepting it with idleness and therefore preferred while receiving the relief to be engaged in some kind of activity; that the plan evolved has proved its merit by experience and is beneficial in two aspects: First, it demonstrates to the welfare authorities the sincerity and good faith of the applicant, or the opposite; and, secondly, it relieves the recipient of the odium of idleness while receiving aid from public funds.

[4] When the county supports an indigent man, the county "is entitled to his services and earnings to aid in his support." 48 Cor. Jur. p. 543. If a contract for hire existed the petitioner would be entitled to enforce payment from the funds of the county of the reasonable value of the services rendered. His status as here disclosed would not lend support to such a cause of action; and we

conclude that a contract of hire did not exist between the county and the petitioner at the time in question.

Recent decisions in other states involving the same or analogous situations are to the same effect. Basham v. County Court, Kanawha County (W. Va. 1933) 171 S. E. 893; In re Moore (Ind. App. 1933) 187 N. E. 219; Vaivida v. City of Grand Rapids (Mich. 1933) 264 Mich. 204, 249 N. W. 826; see, also, Thurston Chapter, etc., v. Department of Labor, 166 Wash. 488, 7 P.(2d) 577; Stiles v. Des Moines Council Boy Scouts of America (1930) 209 Iowa, 1235, 229 N. W. 841; Dillon v. Trustees of St. Patrick's Cathedral, 234 N. Y. 225, 137 N. E. 311; Zoulalian v. New England Sanatarium, 230 Mass. 102, 119 N. E. 686, L. R. A. 1918F, 185.

Counsel for the petitioner has not cited any authority contrary to the recent decisions in West Virginia, Indiana, and Michigan, above referred to, which are directly in point, and we have discovered none.

The order is affirmed.

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220 Cal. 314

REUTER v. BOARD OF SUP'RS OF SAN MATEO COUNTY et al.

S. F. 14969.

Supreme Court of California.
March 1, 1934.

1. Counties 🔑61.

Under county charter provision consolidating offices of county surveyor and county engineer and directing duties of consolidated offices to be performed by incumbent county surveyor, contention that person holding office of county surveyor when act became effective was not also county engineer could not be sustained (Const. art. 11, § 7½; St. 1933, p. 2953).

2. Counties 🔑61.

Under county charter consolidating offices of county surveyor and county engineer and directing performance of consolidated offices by incumbent county surveyor, contention that county engineer was not appointed in compliance with charter *held* without merit as applied to county engineer who became such because he was county surveyor (Const. art. 11, § 7½; St. 1933, p. 2953).

3. Counties 🔑20½.

Proviso in Constitution that county charter provisions relating to powers and duties of boards of supervisors and other county officers shall be controlled by general laws *held* void as repugnant to general provision of which it was part authorizing charter to provide for powers and duties of board of supervisors and other county officers (Const. art. 11, § 7½, subd. 4).

4. Constitutional law 🔑12.
Statutes 🔑181(2).

Construction should not be given to statute or Constitution, if it can be avoided, which would lead to absurd result.

5. Statutes 🔑228.

"Proviso," office of which is to explain, qualify, or restrain operation of preceding provision, should be read in light of subject-matter of act as well as in connection with clause which it follows.

[Ed. Note.—For other definitions of "Proviso," see Words & Phrases.]

6. Statutes 🔑207.

It is court's duty to reconcile conflict between proviso and body of statute when reconciliation is practicable to carry into effect Legislature's intent as it appears from whole act and from contemporaneous legislation.

7. Statutes 🔑207.

Proviso which is repugnant to body of statute and which cannot be reconciled therewith is void.

8. Constitutional law 🔑19.

Contemporaneous construction of constitutional provision by Legislature continued for more than 20 years cannot lightly be regarded by courts.

9. Constitutional law 🔑19.

Contemporaneous construction by Legislature accorded constitutional amendment providing for home rule charters for counties continued for over 20 years without question must, in view of doubtful meaning of its provisions, be held to have fixed its meaning (Const. art. 11, § 7½, subd. 4).

10. Counties 🔑61.

County charter provision transferring duties of road commissioners from board of supervisors to county engineer *held* valid notwithstanding conflict with general state laws (Pol. Code, §§ 2641, 2645, and § 4041.7, as added by St. 1929, p. 1453; Const. art. 11, § 7½, subd. 4; St. 1933, p. 2953).

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In Bank.

Original application for writ of mandate by Jack Reuter against the Board of Supervisors of San Mateo County, consisting of Manuel Francis and others, to compel the Board to assume jurisdiction and resume its duties over the roads and highways of the county.

Petition denied.

Raymond J. O'Connor, of San Francisco, and W. H. Morrissey, of Redwood City, for petitioner.

Edmund Scott and Richard O. Bell, both of Redwood City, for respondents.

Arthur H. Redington, of San Francisco, Everett W. Mattoon, Co. Counsel, and J. H. O'Connor, Asst. Co. Counsel, both of Los Angeles, and Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and Robert H. McCreary, Deputy Dist. Atty., all of Oakland, amici curiæ.

CURTIS, Justice.

The county of San Mateo, acting under the authority of section 7½ of article 11 of the Constitution of this state, framed a charter for its own government, which was approved by the Legislature at its session in 1933 (St. 1933, p. 2953). By this charter the office of county engineer was created, the offices of county surveyor and county engineer were consolidated, and the duties of the consolidated offices were directed to be performed by the incumbent county surveyor, with the proviso "that upon the termination of the present term of office of the surveyor, such office shall, ipso facto, become and be abolished, and the duties required by law to be performed by the surveyor shall thenceforth be performed by the engineer." Section 5 of art. 6 of said charter.

Sections 1 and 2 of article 9 of said charter provide as follows:

"Sec. 1. Consolidation of Existing Road Districts. All existing road districts in the county are hereby consolidated into a single road district which shall comprise all of the territory lying within the county.

"Sec. 2. County Engineer to be Ex-officio Road Commissioner. The county engineer shall be, ex-officio, road commissioner of the existing road districts of the county, and of the consolidated road district in section 1 of this Article provided."

The remaining sections of article 9 outline specifically the duties of the county engineer, among which are those set forth in section 3 of said article 9 as follows: "The county engineer as ex-officio road commissioner shall have and exercise the powers and perform the duties vested in road commissioners in pursuance of the general law, and such other powers and duties as may be vested in him in pursuance of the provisions of this charter."

After the approval of this charter by the Legislature and on July 31, 1933, the board of supervisors of said county, for the purpose of carrying into effect the provisions of article 9 of said charter, passed an ordinance, as required by section 6 of said article, whereby the members of said board of supervisors relinquished as road commissioners their duties over the roads of said county. Thereafter the petitioner herein, a citizen, resident, and taxpayer of said county, made written demand upon the board of supervisors that it resume its duties over the roads and highways of the county, as said duties are defined and directed to be performed by the general laws of the state. Upon the refusal of the board of supervisors to comply with this demand to resume jurisdiction over said roads and highways, petitioner instituted this proceeding before this court, in which he seeks to compel the board of supervisors, by writ of mandate, to assume jurisdiction and resume its duties over the roads and highways of the county. An alternative writ was issued to which the respondents have made their return, both by general demurrer and answer to the petition. The answer raises no issue of fact, so the questions presented are solely questions of law.

[1] The power of the board of supervisors to relinquish jurisdiction over the public roads and highways of San Mateo county, and the validity of its action in surrendering said jurisdiction to the county engineer is governed and must be determined by the section of the Constitution authorizing counties to frame and adopt charters for the government of their local affairs, and the charter of said county as framed and adopted under said section of the Constitution. Before discussing this question, however, we will consider a preliminary question raised by petitioner with relation to the right of the county surveyor of said county to discharge the duties of county engineer and to act as said county engineer. While the petitioner has alleged in an amendment to his petition that James S. James was not the county engineer of said county, he admits in his pleadings that James was, at the date of the adoption of said ordinance, the county surveyor of said county. We have already referred to provisions of the charter which created the office

of county engineer and which provide that the offices of the county surveyor and county engineer shall be consolidated, and which provisions of the charter further provide that the duties of the consolidated offices should be performed by the incumbent county surveyor during his present term of office. In the light of these provisions of the charter, we do not think there is any basis for the claim that James, who holds the office of county surveyor of the county, is not also the county engineer of said county, as that office is provided for and created by the charter.

[2] A further objection is made as to the manner in which James was selected to fill the position of county engineer.

There is a general provision of the charter to the effect that the appointment of certain officers of the county, including the county engineer, shall be made by the county executive, subject to confirmation by the board of supervisors. Petitioner contends that this provision of the charter was not complied with in the appointment of James as county surveyor. It is quite apparent that this general provision of the charter has no application to James' occupancy of the office of county engineer, under the express terms of the charter consolidating that office and the office of county surveyor then held by James. He holds the office of county engineer, not by virtue of any appointment, but under the provisions of the charter consolidating the two offices and directing him to perform the duties of county engineer during the remainder of his term of office as county surveyor.

Petitioner bases his claim that the board of supervisors has exclusive jurisdiction over the roads and highways of the county upon the contention that such jurisdiction is conferred upon the board by the general laws of the state, and that it has not been legally divested of that jurisdiction by the charter of said county. Respondents, upon the other hand, rely upon the provisions of the charter above referred to, and contend that by these sections of the charter the powers of road commissioners heretofore enjoined upon and performed by the several members of the board of supervisors have been taken from them and conferred upon the county engineer of the county. It is clear from the sections of the charter referred to above that at least an attempt was made by the framers of the charter, and by the people in their adoption thereof, to transfer the duties of road commissioners from the members of the board of supervisors to the county engineer, but petitioner contends that these provisions of the charter are rendered nugatory by the Constitution itself, which provides in subdivision 4 of section 7½ "that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws." Subdivision 4, § 7½, art. 11, Const.

In support of his contention petitioner calls attention to the general laws of this state prescribing the duties of the boards of supervisors over the roads and highways as the same are contained in sections 2641, 2645, of the Political Code, and section 4041.7 as added by St. 1929, p. 1453. By these sections of the Code each county of the state is divided into road districts, each supervisor is made ex-officio road commissioner of his district, and as ex-officio road commissioner, under the direction and supervision and pursuant to the orders of the board of supervisors, he is to take charge of the highways in his district, and shall employ all men, teams, watering cars and all help necessary to do the work in his district when the same is not let by contract.

The general law making it the duty of members of boards of supervisors to act as road commissioners in their respective counties, as defined in the sections of the Political Code referred to above, appear to be in direct conflict with the provisions of the charter of San Mateo county providing for the appointment of a county engineer, who shall be ex-officio road commissioner of the whole county, with all the powers and duties attached to said office of road commissioner, as well as further powers and duties over the roads and highways of the county conferred upon him by various provisions of the charter. Petitioner contends that, by reason of this conflict between the general laws and the charter provisions, the latter must give way under the proviso in subdivision 4 of section 7½ of article 11 of the Constitution "that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws."

The above proviso, relied upon by petitioner, occurs or is found in that part of section 7½ of article 11 of the Constitution reading as follows:

"It shall be competent, in all charters, framed under the authority given by this section to provide, in addition to any other provisions allowable by this Constitution, and the same shall provide, for the following matters: * * *

"4. For the powers and duties of boards of supervisors and all other county officers, for their removal and for the consolidation and segregation of county offices, and for the manner of filling all vacancies occurring therein; provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws."

[3, 4] From a mere reading of this provision of the constitutional section, it is apparent that the proviso contained therein is inconsistent with, and repugnant to, the general provision of that portion of the section of which it is a part. The general provision of the section provides that it shall be competent in all charters framed under said section of the Constitution, and "the same shall provide" for the powers and duties of boards of supervisors and of all county officers. At the time of the adoption of said constitutional amendment, the general laws of the state, with meticulous care, had fixed and defined the powers and duties of the board of supervisors and of each and every county officer in the state, except those acting under a city and county government, with which we are not here concerned. Therefore, if the powers and duties of boards of supervisors and county officers, as fixed by the charter, are "subject to and controlled by general laws," then any attempt to provide for such powers and duties in the charter would be an idle act and a useless expenditure of effort. If these powers and duties as fixed by the charter conflicted in any way with those fixed by general laws, then, if the proviso is to control, to the extent that they are inconsistent with those fixed by the general laws, they would be ineffective and void. If they did not so conflict with those fixed by the general laws, as we have said before, the charter provisions fixing said powers and duties, though valid, would simply amount to a re-enactment of that which was already the law—a mere superfluous or idle act. We do not think the framers of the amendment, nor the people of the state who ratified it, contemplated any such absurd result. It is a cardinal rule in the interpretation of statutes and also of constitutional enactments that a construction should not be given to the statute or to the Constitution, if it can be avoided, which would lead to absurd results. Bakkenson v. Superior Court, 197 Cal. 504, 511, 241 P. 874.

"A construction should not be given to a statute, if it can be avoided, which will lead to absurd results or to a conclusion plainly not contemplated by the legislature." Merced Security Savings Bank v. Casaccia, 103 Cal. 641, 645, 37 P. 648, 649. "In other words, where the meaning is doubtful, any construction which would lead to absurd results should be rejected, provided, of course, nothing stands in the way of a different and more rational construction, since absurd results are not supposed to have been contemplated by the legislature." 23 Cal. Jur. 766.

[5-7] Another rule of construction which we think can well be applied to the interpretation to be given to said constitutional provisions is that regarding the extent and scope of a proviso. In California Jurisprudence, vol. 23, p. 744, it is said: "A proviso—the office of which is to explain, qualify or restrain the operation of a preceding provision—should be read in the light of the subject matter of the act, as well as in connection with the clause which it follows. As a general rule, a proviso which is clearly repugnant to the body of the act will be ignored, though, in accordance with the settled rule, it is the duty of the court to reconcile a proviso, when reconciliation is practicable, with an apparently conflicting provision so as to carry into effect the intention of the lawmakers as it appears from the whole act and from contemporaneous legislation." "It would seem that the language there used could be construed as operative without nullifying these express provisions; but if this be not so, and the two provisions are contradictory, it is the proviso and not the principal part of the statute which must give way." City of Seattle v. Rothweiler, 101 Wash. 680, 172 P. 825, and cases cited. "Where the proviso is repugnant to the body or purview of the statute and cannot be reconciled therewith it is inoperative and void." 59 Cor. Jur., p. 1091. "Where a proviso is repugnant or inconsistent with the purview of the act it is common learning that the latter must prevail." Gist v. Rackliffe-Gibson Const. Co., 224 Mo. 369, 123 S. W. 921, 927. Applying the rule announced in these authorities, we have no hesitancy in holding that the proviso as it appears in the provision of the constitutional amendment above quoted, and which is repugnant to the provision itself, is, to that extent void and should be ignored in construing said provision.

[8] Another well-established rule of construction is that of contemporary construction. Following the adoption of section 7½ of article 11 of the Constitution in 1911 conferring upon counties the right to frame charters for their own government, the counties of Los Angeles and San Bernardino each

framed a charter which was approved by the Legislature during its 1913 session. The charter of the county of Los Angeles (St. 1913, p. 1490) created the office of county counsel, and assigned to that officer certain duties, which under the general law had theretofore been performed by the district attorney; also the office of registrar of voters, and assigned to that officer duties which under general law had theretofore been performed by the county clerk; and also the offices of superintendent of charities and purchasing agent, assigning to these officers duties which had theretofore been performed by the board of supervisors. The charter of the county of San Bernardino (St. 1913, p. 1660), provided for a highway commissioner with powers and duties similar to that of road commissioner, and also a purchasing agent, and made it his duty to purchase all supplies required by the county and its officers, a duty theretofore performed by the board of supervisors. In 1917 (St. 1917, pp. 1791, 1804) the Legislature approved a charter prepared by the county of Butte and which provided for a county road engineer, whose duties are similar to those of the county engineer in the San Mateo county charter. Other instances where the people of a county have framed a charter and the Legislature has approved it, in which the powers and duties which, under the general laws, are to be performed by certain county officers, have been assigned to some newly created office, will be found in the statutes of the state. St. 1927, p. 2029—county of Alameda; St. 1933, p. 3088—county of Sacramento. It will thus be seen that the contemporaneous construction placed upon said constitutional provision by the Legislature at its second session after the adoption of said constitutional amendment has been continued down to the present time. This construction, followed and acquiesced in for a period of more than twenty years, commencing soon after the adoption of said constitutional amendment, is not to be lightly regarded by the courts. It is a contemporary interpretation of a most forcible nature. In an early case this court so held and aptly stated the rule in the following language: "Contemporaneous exposition has ever been esteemed by jurists and statesmen as strong evidence in support of an interpretation or construction of a statute, or of a provision of the organic law in consonance with such exposition." Knowles v. Yates, 31 Cal. 82, 89. In a later case we approved the rule thus announced earlier in our judicial history, in the following language: "While the interpretation given to the act by the legislature is not controlling upon this court as to the meaning of a provision of the constitution, yet, where it is doubtful, the courts may, very properly, look to the contemporaneous interpretation given such provision, either by the legislature or the courts." Railroad Com'rs v. Market St. Ry. Co., 132 Cal. 677, 680, 64 P. 1065, 1066.

In the case just cited the court quotes with approval the following from Endlich on the Interpretation of Statutes (section 527): "The greatest deference is shown by the courts to the interpretation put upon the constitution by the legislature, in the enactment of laws and other practical application of constitutional provisions to the legislative business, when that interpretation has had the silent acquiescence of the people, including the legal profession and the judiciary, and especially when injurious results would follow the disturbing of it. The deference due to such legislative exposition is said to be all the more signal when the latter is made almost contemporaneously with the establishment of the constitution, and may be supposed to result from the same views of policy and modes of reasoning that prevailed among the framers of the instrument thus expounded."

[9] These expressions from our decisions apply most aptly to the situation with which we are now confronted. As we have seen, the Constitution was amended in 1911, giving the counties the right to frame charters for their own government. In 1912 two counties of the state framed charters thereunder and presented the same for approval to the Legislature at its session in 1913. They each contained provisions similar to that in the San Mateo county charter, providing for the segregation of the duties of certain officers and the bestowal of a part of said duties upon offices newly created under the charter. The same may be said regarding the charters of Butte, Alameda, and Sacramento counties. The construction thus given to the constitutional amendment has continued for over twenty years, and almost from the date of its adoption, and no question has ever been raised, with one exception to be later mentioned, to the power of the county by charter to provide for the duties of its officers different from and inconsistent with those provided by the general laws. The contemporaneous construction thus accorded to the constitutional amendment by the Legislature and those communities that have acted thereunder must, after the long lapse of time, in view of the doubtful meaning of its provisions, be held

to have fixed and determined its meaning. The one exception above referred to will be found in the case of Woolwine v. Superior Court, 182 Cal. 388, 188 P. 569, where the provision of the charter of the county of Los Angeles was under attack, which created the office of county counsel and assigned to that officer certain duties theretofore performed by the district attorney. The case was decided upon another point, and the court refused to pass upon the legality of the charter in so far as it created the office of county counsel. This decision was rendered in March, 1920, and since that time, in so far as the records of the appellate courts reveal, the question has not been raised.

In the case of More v. Board of Supervisors, 31 Cal. App. 388, 160 P. 702, the court sustained the validity of the charter of the county of San Bernardino, consolidating the offices of sheriff and coroner. There is nothing in that decision anywise helpful in the solution of the question now before us. In Wilkinson v. Lund, 102 Cal. App. 767, 283 P. 385, the court declared illegal a provision of the charter of the county of Butte which fixed a maximum tax rate to be levied in said county for all purposes at 2 cents on the dollar. The principle upon which that decision was rendered was that a county may not incapacitate itself to perform public functions, the exercise of which has been delegated to it by the state, by providing in its charter such a limitation of its tax rate as to render the performance of such functions impossible. There is nothing in that decision at variance with the views above expressed, although there is certain language to be found in the opinion in that case which is in apparent conflict with our construction of said constitutional amendment. That language was in no way necessary to the decision and cannot be regarded as a judicial determination of the matters with which it purports to deal, and, in so far as it conflicts with the views herein expressed, is hereby disapproved. In that case the court was dealing entirely with public functions which had been delegated to the county by the Constitution, and which it was held the county could not by means of a charter incapacitate itself from performing. The present proceeding is not concerned with powers or duties of that character, but simply with matters of local or county concern, and, as we have seen, the duties of road commissioner are to take charge of the roads of his district, and under the direction of the board of supervisors to employ men and hire teams and other necessary help to carry on the road work in his district when the same is not let by contract. While the state may have a general interest in the roads and highways of the counties, it is not concerned with the particular individual or official whose duty is simply to employ the men and teams and other help necessary to construct and repair such roads and highways. These facts differentiate the present case from that wherein the charter of the county of Butte was involved, and furnish a basis for our statement that there is nothing in the decision of the Butte county charter case in conflict with our conclusion that a county charter may provide for powers and duties of county officers, although such powers and duties, as fixed by the charter, may differ from, and be in conflict with, the powers and duties of such officers as provided by the general laws of the state.

[10] The general purpose of section 7½ of article 11 of the Constitution was to give local self-government or county home rule to counties of the state by means of charters framed under said constitutional amendment. That this was the intent and purpose of the section clearly appears from the language of the section itself, which declares that, after the charter has been approved by the Legislature, "such charter shall become the charter of such county and shall become the organic law thereof relative to the matters therein provided * * * and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter." In the arguments prepared in support of said constitutional amendment and sent to the voters of the state immediately preceding the election at which the amendment was adopted, it was said, among other things: "This proposal to amend the organic law occupying the second place on the official ballot for the ensuing special election on constitutional amendments, known as the 'County Home Rule Amendment,' is a logical growth from the successful administration of 'charter cities' formed under the 'Home Rule' provisions of our constitution relating to municipalities." Continuing the arguments, it is expressly stated that:

"The main object of this amendment is to place the local government of each county in the hands of its citizens—in other words it is designed to give 'home rule' to counties. The state Constitution in section 5, article 11, authorizes the legislature to provide by general and uniform laws for the appointment or election of boards of supervisors * * * and other county * * * officers as public convenience may require and prescribe their duties, fix their term of office and their compensation. * * * The general frame and structure of all county charters must be uniform, and shall provide for the following matters only:

"(a) For boards of supervisors their election, number, term of office and compensation. Also for their general regulation, their powers and duties, their removal from office and filling of vacancies."

The people of the state in the adoption of this amendment had good cause to believe, and evidently did believe, that they were thereby providing a means whereby they might have home rule in their local and county affairs, including the right, in the words of the amendment, to provide for the powers and duties of their county officers. The amendment as adopted by them, when construed as a whole, is not only susceptible of such a construction, but cannot be given any other reasonable interpretation. It is therefore our opinion that the provision of the charter of the county of San Mateo which transfers the duties of road commissioners from the members of the board of supervisors of said county to, and confers such duties upon, the county engineer, is a valid and constitutional charter enactment, and governs and determines the official of said county who shall perform and exercise such duties.

The petition is denied.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SHENK, J.; IRA F. THOMPSON, J.

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220 Cal. 229

ECKHARDT et al. v. MORLEY, Constable.

Sac. 4798.

Supreme Court of California.
Feb. 28, 1934.

1. Chattel mortgages 🔑150(1).

Mortgage on automobile became effective on its actual registration after properly signed documents and fees had been forwarded to division of motor vehicles, and not on its deposit with registrar, and hence intervening attachment on automobile in action against mortgagor gave successful plaintiff right to have execution sale thereof (Gen. Laws 1931, Act 5128, §§ 45¼, 49, 77).

2. Chattel mortgages 🔑90.

Fees for transfer of registration of automobiles must be paid in advance, and prior thereto chattel mortgage on automobile need not be registered (Gen. Laws 1931, Act 5128, §§ 45¼, 49, 77).

3. Chattel mortgages 🔑150(1).

Mere deposit of copy of chattel mortgage on automobile for registration with division of motor vehicles, without more, does not make subsequent registration thereof date from time of deposit (Gen. Laws 1931, Act 5128, §§ 45¼, 49, 77).

In Bank.

Appeal from Superior Court, Calaveras County; J. T. B. Warne, Judge.

Action by Carl Eckhardt and another against John T. Morley, as constable of Murphys Township, County of Calaveras, State of California. From an adverse judgment, plaintiffs appeal.

Affirmed.

A. G. Bailey, of Woodland, for appellants.

James S. Byers, of Gilroy, and Chas. P. Snyder, of San Andreas, for respondent.

PER CURIAM.

This is an action to enjoin an execution sale. H. M. Kurtz made a promissory note to plaintiffs and appellants for $1,700, and to secure payment executed on May 18, 1932, a chattel mortgage on certain automobiles, among them the Buick sedan involved in this action. The mortgage was recorded in Yolo county, where the property was situated, on May 27, 1932. On May 28, 1932, a certified copy of the mortgage and certificates of ownership of the cars were deposited with the division of motor vehicles, with a request for registration. The registrar refused to file them for the reasons, first, that the certificates of ownership had not been signed by the plaintiffs as mortgagees, and, second, that the filing fees of $1 for the mortgage and $1 for change of legal ownership on each vehicle had not been paid. On July 14, 1932, more than a month later, the certificates, properly signed, and the necessary fees, were forwarded to the division, and on July 15, 1932, the new certificates were issued. Prior thereto, however, on July 12, 1932, the defendant constable levied an attachment on the Buick sedan, in an action against Kurtz, the mortgagor herein. Judgment followed in the action, and execution was issued. The present suit by plaintiffs is to enjoin the execution sale.

[1] A single issue is clearly presented by these facts. Did the mortgage become effective as against creditors of the mortgagor at the time of its deposit with the registrar, or only upon its actual registration after properly signed documents and fees had been forwarded? The lower court held that it became effective only upon registration, and that therefore the intervening attachment was prior. We are of the opinion that no other holding is possible under our statutes.

[2] The California Vehicle Act (Deering's General Laws, 1931, Act 5128) makes a distinction between the "owner" of a vehicle, the party having the use thereof, and the "legal owner", the party having either legal title or a mortgage thereon. Section 45¼ of the act provides that no chattel mortgage on a motor vehicle shall be valid until the mortgagee is registered as the legal owner; and that registration of the mortgagee as legal owner and deposit of a certified copy of the mortgage, gives constructive notice thereof to subsequent purchasers and incumbrancers. Section 49 provides that the division shall not grant any application for transfer of registration unless the correct fee therefor has been paid; and section 77 provides that such fee shall be paid at the time registration is applied for. It seems obvious that the act contemplates payment of fees in advance, and that prior thereto there is no duty to register the transfer.

[3] Appellants rely upon the single provision of subdivision d of section 45¼ that registration "shall be deemed complete when a copy of a chattel mortgage is deposited with and upon receipt of request for registration by the division of motor vehicles." By itself, this statement might be controlling, but considered in connection with the rest of the act, it is not. Upon a proper request for registration, and under the other provisions of the act such request is proper when the documents are in order and the fees are prepaid, the registration will date from the time of deposit. But the mere deposit of the copy of the mortgage, without compliance with the rules for registration, cannot constitute registration. The situation is analogous to that governing recordation of instruments affecting title to real property. Under section 1170 of the Civil Code an instrument is deemed to be recorded when, after due acknowledgment or certification, "it is deposited in the recorder's office, with the proper officer, for record." Section 1213 of the same Code provides that a conveyance "recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees." Construing these sections, we have held that wherever the purpose of the recordation is to give constructive notice of the contents of the instrument, the mere deposit of it with the recorder is not the equivalent of recordation. Dougery v. Bettencourt, 214 Cal. 455, 6 P.(2d) 499.

The judgment is affirmed.

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137 Cal.App. 240

BARNHART et al. v. BLACKBURN et al.

Civ. 9310.

District Court of Appeal, First District, Division 2, California.

March 8, 1934.

1. Appeal and error 🔑888(1).

Appellate court cannot permit amendment of pleadings while cause is on appeal.

2. Appeal and error 🔑1170(1).

Provision of Constitution prohibiting reversal on appeal except for miscarriage of justice could not be invoked by respondents where pleadings, proof, and findings were all insufficient to support judgment (Const. art. 6, § 4½).

3. Exchange of property 🔑8(1).

In case of breach of contract of exchange, there can be no action at law for consideration agreed to be exchanged, but specific performance may be had in proper cases.

4. Exchange of property 🔑8(1).

In case of breach of contract of exchange, sole remedy at law is action for damages for breach.

5. Exchange of property 🔑8(5).

One who has fully executed exchange contract may recover, for breach, value of property to have been received at time of breach.

6. Exchange of property 🔑8(5).

If exchange contract remained executory as to both parties, plaintiffs were entitled to recover difference between value of their real property and value of stock to be received in exchange at time of breach.

7. Exchange of property 🔑8(3).

In action for breach of exchange contract wherein there was no allegation, proof, nor finding of value of defendants' stock at time of breach, plaintiffs could not recover, and judgment for value of stock when contract was made could not be sustained.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Albert W. Barnhart and another against Bruce Blackburn and another. Judgment was entered in favor of defendants on the first count of the complaint and in favor of plaintiffs on the second count, and, from that portion of the judgment relating to the second count, defendants appeal.

Reversed.

Hulme, Hastings & Bartlett and Gerald Bridges, all of Los Angeles, for appellants.

Russell Graham and Ames Peterson, both of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiffs filed a complaint entitled "Complaint for Money on Contract." It contained two counts. On a trial by the court sitting without a jury, defendants' motion for nonsuit as to the first count was granted. Judgment was entered in favor of the defendants on the first count and in favor of plaintiffs on the second count. Defendants appeal from that portion of the judgment relating to the second count, but no appeal has been taken from the portion of the judgment relating to the first count.

In the second count of the complaint, which was filed in 1929, plaintiffs allege that on May 6, 1927, plaintiffs and defendants entered into an agreement whereby "plaintiffs agreed to sell to the defendants and defendants agreed to buy from plaintiffs" certain real property in the city of Hermosa Beach, "and that as a consideration for the said sale the defendants agreed to deliver and transfer to the plaintiffs thirty-five (35) shares of the capital stock of Disappearing Roller Screen Company, Inc."; that plaintiffs "have complied fully with the said contract and have delivered into the said escrow a grant deed to the said property," but that "defendants have failed, neglected and refused, and still fail, neglect and refuse to deliver into the said escrow said thirty-five (35) shares of the capital stock of the Disappearing Roller Screen Company, Inc."; that said "thirty-five (35) shares of stock are of the reasonable value of $5,250.00." The prayer was for the alleged value of said stock. The answer denied certain of the material allegations of the complaint, including all of the allegations relating to performance on the part of plaintiffs.

The agreement of the parties was embraced in certain escrow instructions signed by them on March 6, 1927. No time for performance was specified therein. The evidence offered on behalf of plaintiffs affirmatively showed that neither plaintiffs nor defendants had complied with the terms of said agreement. Plaintiffs failed to deliver a deed and defendants failed to deliver the stock to the bank named as the escrow holder. There was evidence tending to show that the parties had on various occasions discussed the performance of the agreement until some time in December, 1928, at which time, according to the testimony of plaintiffs, defendants informed them that they would not take the property or deliver the stock. It was conceded by plaintiffs upon the trial that no tender of a deed to the property had been made to defendants prior to the commencement of this action. The complaint herein was not amended, and no leave to amend was asked by plaintiffs. In the findings the trial court found against plaintiffs on the issue of performance, but went beyond the issues embraced within the pleadings and made findings showing an excuse for nonperformance. It further found that the value of the stock "at the time when said written agreement was entered into" was $100 per share, and on this basis entered a money judgment in favor of plaintiffs. At the conclusion of the findings, it was recited that defendants were entitled to a good and sufficient grant deed conveying the property, and the judgment recited that such deed had been deposited into court.

[1, 2] Appellants attack the sufficiency of the complaint, the evidence, and the findings herein. These questions will be hereinafter discussed. They also contend that the judgment should be reversed, as the findings are not within the issues raised by the pleadings. They call attention to the fact that, while performance was pleaded, respondents were allowed to recover upon findings showing an excuse for nonperformance. They cite numerous authorities, among which are Kirk v. Culley, 202 Cal. 501, 261 P. 994; Estate of Warner, 158 Cal. 441, 111 P. 352; Daley v. Russ. 86 Cal. 114, 24 P. 867; and Peek v. Stein-

berg, 163 Cal. 127, 124 P. 834. Respondents concede that said findings were not within the issues made by the pleadings, and they ask leave of this court to amend their complaint. We know of no authority authorizing an appellate court to permit the amendment of pleadings while the cause is on appeal. Although the liberal provisions of section 4½ of article 6 of our Constitution have frequently been relied upon in affirming judgments despite the existence of error, we do not believe that said section may be invoked by respondents in this case where the pleadings, proof, and findings are all insufficient to support the judgment entered.

It appears to us that the fundamental fallacy in respondents' argument in support of the judgment is that respondents treat the agreement between the parties as an agreement of sale rather than as an agreement of exchange. Respondents state in their briefs: "This is an action for the *purchase price* of the Hermosa Beach property and not an action for specific performance. On this appeal respondents are resting upon their theory that this is purely and simply an action sounding in debt." (Italics ours.) Respondents then cite Amaranth Land Company v. Corey, 182 Cal. 66, 186 P. 765, and North Stockton Town Lot Company v. Fischer, 138 Cal. 100, 70 P. 1082, 71 P. 438, in support of the judgment. The authorities cited are not helpful, for each of said cases involved a contract of sale rather than a contract of exchange. It was there held that the vendor of real property under a contract of sale can recover the purchase price in an action at law without alleging or proving the fairness and adequacy of the consideration. This rule is well settled with respect to contracts of sale (Bonner v. Finney, 110 Cal. App. 518, 294 P. 466; Weisenberg v. Hirschhorn, 97 Cal. App. 532, 275 P. 997; Burg Bros. v. Bercut, 73 Cal. App. 114, 238 P. 166; Paramore v. Colby, 45 Cal. App. 559, 188 P. 72), but it can have no application to contracts of exchange, for the obvious reason that there is no agreement to pay a purchase price or, in other words, a monetary consideration under the ordinary contract of exchange.

[3, 4] Upon a breach of the ordinary contract of exchange, the rights and liabilities of the parties are somewhat different from those arising upon the breach of a contract of sale. In case of the breach of the ordinary contract of exchange, there can be no action at law for the consideration agreed to be exchanged by the other party, but specific performance may be had in proper cases by a suit in equity. The sole remedy at law is by an action for damages for the breach. 11 Cal. Jur. 15; 28 C. J. 227, § 75. Respondents concede that their action was not one in equity for specific performance, and, from what has been said, the action must be treated as an action at law, and the judgment herein must be sustained, if it can be sustained at all, upon the theory that it is a judgment for damages for the breach of the contract of exchange.

[5-7] In our opinion, the pleadings, proof, and findings were all insufficient to sustain the judgment herein as a judgment for damages. Upon the alleged breach of the contract of exchange, respondents were entitled to bring an action at law for damages, but such action necessarily had to be based either upon the theory that the contract had been fully executed by respondents or upon the theory that the contract remained executory on both sides. If the contract had been fully executed by respondents, they would have then been entitled to recover by way of damages the value of the stock *at the time of the breach.* If the contract remained executory as to both parties, respondents would have been entitled to recover by way of damages the difference between the value of the real property and the value of the stock *at the time of the breach.* 23 Cor. Jur. 232, § 82. The allegations of value in the complaint herein relate to the time of the filing of the action in 1929. The findings on value relate to the time of the making of the contract in 1927. There is neither allegation, proof, nor finding relating to the value of the stock at the time of the breach in 1928. From what has been said we conclude that the cause was tried and determined upon an erroneous theory, and that the judgment for the value of the stock at the time the contract was made cannot be sustained.

The portion of the judgment appealed from is reversed.

We concur: **NOURSE, P. J.; STURTEVANT, J.**

137 Cal.App. 248

DUNPHY et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9534.

District Court of Appeal, Second District, Division 2, California.

March 8, 1934.

Hearing Denied by Supreme Court April 19, 1934.

Prohibition 🔑12.

Order of federal district court that corporation's receiver desist from proceeding in municipal court action until final disposition of pending superior court action *held* not to affect superior court action, as respects right to writ of prohibition.

Petition for writ of prohibition by Ethel R. Dunphy and husband against the Superior Court of the State of California in and for the County of Los Angeles.

Writ denied.

John C. Kleber, of Los Angeles, for petitioner H. M. Dunphy.

Everett W. Mattoon, J. F. Moroney, and Roderick Johnston, all of Los Angeles, for respondent.

STEPHENS, Justice.

The effective part of an order issued out of the United States District Court, Southern District, California, Central Division, is as follows: "It is ordered that said Petition to show cause be, and the same is hereby, made absolute, that the said A. N. Kemp, Receiver for the Guaranty Building and Loan Association of Los Angeles, a corporation respondent above, is ordered, during the pendency of the action of H. M. Dunphy and Ethel R. Dunphy, Plaintiffs, versus A. N. Kemp, Receiver for the Guaranty Building and Loan Association, a corporation, being case number 320046 in the Superior Court of the County of Los Angeles, State of California, to desist from further proceeding or action in case number 287490, pending in the Municipal Court of the City of Los Angeles, State of California, entitled: A. N. Kemp, Receiver, vs. Ethel R. Dunphy and H. M. Dunphy; or to take any further action or proceeding against said H. M. Dunphy and Ethel R. Dunphy, involving the possession or title to property set forth therein, until the final decision has been reached in case number 320046 in the Superior Court of the County of Los Angeles, State of California."

The superior court action mentioned in the quoted order proceeded to judgment and process was about to issue, when petitioners, defendants in both the municipal and superior court cases, asked us to grant our writ of prohibition against the issuance of such process, contending that the order of the District Court was authority therefor. Upon an adversary hearing we made our order denying the writ.

We think it is clear that the District Court's order did not affect nor purport to affect the superior court or the action in the superior court at all.

I concur: CRAIG, J.

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137 Cal.App. 232

PEOPLE v. JARAMILLO.

Cr. 1780.

District Court of Appeal, First District, Division 2, California.

March 7, 1934.

1. Rape 🔑51(4).

Evidence *held* insufficient to sustain conviction of rape by force (Pen. Code, § 261, subd. 3).

2. Criminal law 🔑419, 420(10).

Policewoman's statement that interpreter told her that defendant, who spoke Spanish, admitted sexual relations with prosecutrix, *held* inadmissible as hearsay (Pen. Code, § 261, subd. 3).

3. Criminal law 🔑419, 420(12).

Unsworn statement of prosecutrix *held* inadmissible against defendant in rape prosecution (Pen. Code, § 261, subd. 3).

4. Rape 🔑59(3).

Refusing instruction that conduct of prosecutrix toward defendant subsequent to alleged rape by force might be considered in determining probability or improbability of commission of crime *held* error, where evidence tended to show friendly and courteous treatment (Pen. Code, § 261, subd. 3).

5. Criminal law 🔑308.

Defendant is entitled to presumption of innocence and to inferences which may be reasonably drawn from circumstances.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Rafael Jaramillo was convicted of rape, and he appeals.

Reversed and remanded for new trial.

Albert J. McGuire, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

NOURSE, Presiding Justice.

The defendant was tried before a jury on an information charging rape with force and violence. The jury found a verdict of guilty as charged, and from the judgment and the order denying a new trial the defendant has appealed on a typewritten record.

The prosecutrix was an unmarried female over the age of consent. She was born in Mexico, but had resided in the United States about six years. The defendant was also a native of Mexico, but the time of his residence in this country was not shown. For the facts of the occurrence the state relied entirely upon the testimony of the prosecutrix. This testimony is so contradictory in some respects and so fantastic and improbable in others that it is difficult to prepare a simple statement of the facts without comment or explanation.

As we understand her testimony, the prosecutrix went with her father to defendant's home for the purpose of receiving treatments for sinus trouble. After her father left she removed all her clothes and permitted the defendant to massage her body with hot towels and an alcohol rub. Two days later she returned for the same treatment and permitted the defendant to love and caress her. He then told her that sexual intercourse would aid in the cure and this was had over her feeble protest. After this was accomplished she remained with the defendant for about thirty minutes. Two days later she returned for more treatments for the sinus trouble—consisting of hot towels, alcohol rubs, and intercourse. On this occasion she took her mother with her and the two had lunch with the defendant. The prosecutrix remained with the defendant during the whole afternoon and then took him to her home, where he had dinner with her family and where he remained until late in the evening. On the following morning she went again to defendant's apartment and left with him a photograph of herself which, she said, was intended for her music teacher. She accepted from him presents of a guitar, articles of jewelry, two pairs of silk pajamas, and a key to his apartment. She accompanied him to dinner, followed by a trip to the beach. Early the following morning she let herself into defendant's apartment with the key he had given her and remained with him all that day. She received the same treatments as theretofore and, late in the afternoon, permitted the defendant to give her a hot bath in his bathtub. Her father called for her at about 6 p. m., and the defendant explained to him that it would endanger her cold to go out after the hot bath and it was arranged that her sister would come and sleep with her in defendant's apartment while he went home with her father and slept in her bed. On the following day she told some of her experiences to a friend, who insisted that she inform her mother. This was her first complaint or outcry.

Her story of resistance to the first attack is simply that, about an hour before it occurred, the defendant had given her something to drink consisting of egg, cinnamon, and bitters; that she felt weak following the massage; that she tried to push him away; and that she "told him to keep away please. I did not come for this reason; I come for your treatments." To this she testified the defendant replied: "I love you very much and I will marry you after."

[1] The judgment and order must be reversed for three reasons: The failure of the evidence to prove the offense charged; the error in the admission of the testimony of the policewoman; the refusal of the instruction covering the subsequent conduct of the prosecutrix.

Section 261 of the Penal Code defines rape under six subdivisions. The appellant was charged under the third—where resistance is overcome by force or violence. Evidence was offered which might have supported a conviction under the fourth subdivision of the section, or under section 268 covering seduction under promise of marriage. Some of these elements were referred to by the district attorney in his argument to the jury, and the respondent now relies upon them to support the judgment, but a sufficient answer is that the appellant was only summoned to defend the charge laid in the information.

[2, 3] A policewoman was called by the state and was permitted to testify, over appellant's objection, that, following the arrest, she took the prosecutrix and a Spanish interpreter to appellant's cell and had the interpreter read to the appellant in Spanish an unsworn written statement made by the prosecutrix in English, and that, after the reading, the interpreter told her that the appellant admitted having had relations with the

girl. This written statement of the prosecutrix was then read to the jury, but was not admitted in evidence. The hearsay rule was violated in every particular. If this was an accusatory statement, the witness did not know whether the appellant admitted it, or denied it, or stood mute. The prejudice is emphasized by the fact that the interpreter, when called by the state, denied that the appellant made the answer which the former witness said the interpreter told her he had made. On the other hand, the only competent evidence of appellant's conduct at the time came from the interpreter, who testified that the appellant turned to the girl and said in the Spanish language: "Now you know this is all wrong. I promised to marry you around the first of the year. * * *" Neither the written statement nor the testimony of the policewoman was admissible for any purpose. People v. Lapara, 181 Cal. 66, 71, 183 P. 545; People v. Goltra, 115 Cal. App. 539, 550, 2 P.(2d) 35.

[4, 5] The appellant requested an instruction reading: "The jury are instructed that it is proper for you to consider the conduct of the prosecuting witness toward the defendant after the alleged commission of the crime complained of. You may consider whether or not, subsequent to such time, she treated him with scorn and contempt, or whether the relations were courteous and friendly, and if you find from the evidence in this case that, at the time subsequent to the alleged commission of the crime charged against the defendant, the prosecuting witness voluntarily called at his place of business at divers times, exchanged gifts with the defendant, went to public places with the defendant, and assisted him in his business, you may take these facts into account in determining the probability or improbability of the commission of the crime."

The instruction should have been given. The charge was that the act had been committed with force and violence. The testimony of the prosecutrix was to be viewed in the light of what commonly occurs under circumstances of that kind. If a woman is outraged against her consent and with force and violence she would not ordinarily invite her traducer to her home to have dinner with her mother and sister, nor return day after day to his home where similar acts were committed. The defendant in a criminal case is entitled, not only to the presumption of innocence, but to the inferences which may be reasonably drawn from the circumstances. The evidence of the subsequent conduct of the prosecutrix should have been given to the jury with this instruction so that such inferences might have been drawn covering the element of force and violence charged in the information. A similar instruction was approved in Clokey v. State, 182 Ind. 589, 107 N. E. 273.

The judgment and order are reversed, and the appellant is remanded for a new trial.

We concur: STURTEVANT, J.; SPENCE, J.

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137 Cal.App. 150

BOGAN v. WHITE et al.

Civ. 4997.

District Court of Appeal, Third District, California.

Feb. 28, 1934.

1. Appeal and error 🔑977(1).
New trial 🔑6.

Granting or denial of new trial rests largely in discretion of trial court, and will not be disturbed except upon manifest and unmistakable abuse.

2. Automobiles 🔑217(5).

Pedestrian crossing street intersection was not required to look behind her for approaching automobile.

3. Automobiles 🔑217(5).

If pedestrian crossing street intersection was required to look behind her for approaching automobiles her duty was performed when she did so, and she was not required to continue looking in that direction.

4. New trial 🔑71.

New trial *held* warranted, where evidence was conflicting as to pedestrian's contributory negligence and motorist's negligence.

5. Appeal and error 🔑907(5).

Where record on appeal did not contain maps and diagrams to which repeated reference was made in testimony, judgment would be affirmed upon presumption that court decided correctly upon all evidence before it.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Nola Bogan against J. E. White and another. Judgment on the verdict was entered for defendants, and plaintiff moved for a new trial. From an order granting plaintiff's motion for a new trial, named defendant appeals.

Affirmed.

Len H. Honey, of Stockton, for appellant.

Charles H. Vance, A. L. Cowell, and Gumpert & Mazzera, all of Stockton, for respondent.

Charles H. Epperson, of Stockton, for defendant Bahr.

HELD, Justice pro tem., delivered the opinion of the court.

In this action, plaintiff claims damages of defendants for personal injuries suffered by her as a result of a collision between the automobile of defendant J. E. White and that of defendant H. Bahr. A jury returned its verdict against plaintiff and in favor of both defendants, and judgment on the verdict was entered accordingly. Plaintiff moved for a new trial on all the statutory grounds except, of course, excessive damages, and on May 19, 1933, an order was entered "granting the motion of plaintiff for a new trial upon the grounds among others of the insufficiency of the evidence to support the verdict and judgment." From this order the defendant J. E. White alone has appealed.

[1] The granting or denial of a new trial is a matter resting so largely in the discretion of the trial court that it will not be disturbed except upon a manifest and unmistakable abuse. 2 Cal. Jur. p. 905.

In Dow v. Southern Pacific Co., 118 Cal. App. 196, 4 P.(2d) 786, this court said: "It is well settled that, where there is a substantial conflict in the evidence, an order granting a new trial upon the ground of the insufficiency of the evidence to support the verdict will not be disturbed on appeal, in the absence of a clear and affirmative showing of a gross, manifest, or unmistakable abuse of discretion. The authorities supporting this rule are legion."

The record shows that the accident out of which this action arises occurred at about 8 o'clock on the evening of November 26, 1932, at the intersection of California and Channel streets in the city of Stockton. Defendant White at the time was driving a Pontiac automobile in a southerly direction on California street, and defendant Bahr was driving a Ford automobile in a westerly direction on Channel street. The plaintiff, at the same time, was on foot and was crossing Channel street from its northerly to its southerly side, on the west line of California street. The Ford automobile struck the Pontiac, and the latter struck plaintiff, causing the injuries complained of.

[2, 3] The negligence of appellant is not denied on the appeal, but it is contended that, regardless of such negligence, the plaintiff was shown to be guilty of contributory negligence as a matter of law, and that a recovery by her could not be sustained. Such contributory negligence is predicated upon plaintiff's failure to look to the north before she started to cross Channel street and also upon the alleged fact that she did not cross Channel street in the pedestrian lane. Her testimony, however, was that she glanced to the north and looked to the east, west, and south before she started across Channel street. Her course being on the pedestrian lane from the northwest corner of Channel and California streets, she was not required to look to the north, which would have been behind her. Cal. Jur. 1928 Supp. p. 197. Even though it had been incumbent upon her to look to the north when she stepped from the curb, her duty was fully performed when she did so, and she was not required to continue looking in that direction. Nickell v. Rosenfield, 82 Cal. App. 369, 255 P. 760.

On the question as to the location of plaintiff when she was struck, the testimony is in conflict. She testified: "I was walking straight across from one corner, headed for the other corner of South Channel Street." Her immediate destination was a fruit store on the corner south from the point where she left the sidewalk on the north side of Channel street. After leaving the north curb, she started straight across the street. It is true that on cross-examination plaintiff testified that the traffic button located on the extension of the curb line on the west side of California street was to her right as she crossed the street. But she also testified that she was "right close to it, right to it"; that the traffic button was "just to my right hand." The record would indicate that the plaintiff while a witness was laboring under such a physical disadvantage that she became confused as to directions. It appears that she testified, "I remember being right close to that button," and, when asked to state her position with reference to the button, she replied, "I just glanced down and saw it." When asked whether she glanced to her right or left, she replied, "It was to my—let me see now—it was to my left—no, right, I guess." The confusion of the witness is shown by the following excerpt from her testimony:

"Q. And the cross walk is this cement walk through here? A. Yes.

"Q. Now at the time that you were struck here with this automobile do you know whether or not that this button here that was out here in the intersection, were you there or whether you were over here in the cross walk? A. I was right even with the button.

"Q. Well were you on this side of it here? A. What I mean, even this way, I mean. I remember that button, that is the last I do remember, and I was right there inside of that button, about that far inside the button.

"Q. Well that is not the cross walk that is the street? A. Oh no, no, I mean, I am wrong. I came right from the corner, I came across to this side.

"Q. Then you were in the cross walk when you were struck? A. I was right about by that button, where that button is, I was not at the button, I was right there, I remember seeing the button.

"Q. I am marking about where you were when you were struck. A. Where I was struck, well I would say along there somewheres.

"Q. Right in here? A. Yes."

Defendant Bahr testified that he first observed the Pontiac when it was two feet distant from his car, that he had reached a point west of the center of California street when the collision occurred, and that immediately before the collision the Pontiac turned slightly to the right. Appellant testified that perhaps by being struck his car may have skidded to the right.

The affidavit of Laura Horn, which was before the trial court on the hearing of the motion for a new trial, is to the effect that, prior to the collision, the Pontiac swerved to the right and struck plaintiff. Sufficient excuse was shown for the absence of this witness from the trial.

Plaintiff testified that the rear and side of the automobile with which she came in contact struck her, and in her language that the automobile "side swiped her." It struck her on the left side, and her injuries were on the left side of her body.

[4] The testimony offered in support of plaintiff's case does not establish contributory negligence on her part. On behalf of appellant, there was testimony that would indicate that the Pontiac at no time was west of the southerly prolongation of the curb on the west side of California street, north of Channel street, to the curb on the west side of California street, south of Channel street. There is a clear conflict in the evidence, and this warranted the lower court in granting a new trial.

[5] The appellant in this case has not furnished the court with the maps and diagrams to which repeated reference was made in the testimony of the witnesses, and the record is incomplete in that regard and much of the testimony meaningless. In such a case, it has been held that, the appellate court being uninformed upon what record the court below acted, the judgment will be affirmed upon the presumption that the court decided correctly upon all the evidence before it. Wilmon v. Aros, 191 Cal. 80, 214 P. 962; Packer v. Wagner, 109 Cal. App. 26, 292 P. 523; Pascoe v. Payne, 124 Cal. App. 528, 12 P.(2d) 1091; Merrill v. Finigan (Cal. App.) 24 P.(2d) 188, 189. The following language of the court in the last-cited case is quite pertinent here: "We may take occasion to note that the record before us is not complete. It appears from the transcript that many witnesses illustrated their testimony by maps and diagrams which are not before us. * * * If a diagram is necessary in the court below, it is more necessary for a complete review of the evidence. Often the position of automobiles after an accident may be a contributory factor in influencing and directing the trial court's finding. All we can do on review is guess, and, with the presumption in favor of the judgment, the guess must follow the presumption."

After a careful examination of the entire record, we are fully satisfied that the trial court did not abuse its discretion in granting plaintiff a new trial.

The order granting a new trial is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

137 Cal.App. 189

KELSHAW v. SUPERIOR COURT IN AND FOR SAN LUIS OBISPO COUNTY et al.

Civ. 9124.

District Court of Appeal, Second District, Division 1, California.

March 2, 1934.

Hearing Denied by Supreme Court April 30, 1934.

1. Prohibition ⚷27.

Petitioner in prohibition to restrain contempt proceeding, attacking collaterally court order she refused to obey must show that order was void on its face.

2. Taxation ⚷904.

Statute regarding recovery of inheritance taxes "erroneously paid" refers only to some payment not made in conformity with order fixing amount of tax (St. 1929, p. 1846, § 11, subds. 3, 4).

[Ed. Note.—For other definitions of "Erroneously Paid," see Words & Phrases.]

3. Contempt ⚷21.

Superior court's order directing county treasurer's repayment of inheritance taxes, made after original order determining amount of taxes due from estate had become final and where no amount was erroneously paid, *held* void and violation thereof was not punishable by contempt (St. 1929, p. 1846, § 11, subds. 3, 4).

Application by Grace E. Kelshaw, as treasurer of San Luis Obispo County, for a writ of prohibition to be directed to the Superior Court of the state of California in and for San Luis Obispo County and others.

Writ granted.

W. H. H. Gentry, of Sacramento, and A. W. Brouillet, W. Urie Walsh and Herbert Kaufman, all of San Francisco, for petitioner.

M. R. Van Wormer, of San Luis Obispo, for respondents.

CONREY, Presiding Justice.

The petitioner, Kelshaw, treasurer of the county of San Luis Obispo, applied to the Supreme Court for a writ of prohibition, to prevent further action in a contempt proceeding now pending in respondent court. An alternative writ issued, and the cause was transferred to this court. Although there is an answer on file, the facts are not in dispute, and the questions at issue are those raised by demurrer to the petition.

In the matter of the estate of Halsey H. Carpenter, deceased, in the course of administration in respondent court, and after appraisement duly approved, by an order of date March 17, 1930, it was determined that the amount of inheritance taxes due to the state of California, for which the several heritable interests in the estate were liable, amounted to the sum of $23,449.27, and the payment of that sum (which had been made on March 10, 1930) to the treasurer of the county of San Luis Obispo was approved. In August, 1932, the administratix presented to the court her motion for an order directing the treasurer to refund a portion of said tax. In opposition to said motion, it was contended that the order fixing tax was a final judgment, and that the court had no jurisdiction at that time to make any order for refunding of any part of said tax. Nevertheless, on January 6, 1933, the court granted the motion, and directed the county treasurer, Kelshaw (petitioner herein), to refund and repay to said administratrix the sum of $1,149.51, found to have been overpaid in the aforesaid payment of inheritance taxes of said estate.

The treasurer having refused to comply with the provisions of said order of January 6, 1933, the court issued its citation to show cause why she should not be punished for contempt of court by reason of such refusal and disobedience.

Thereupon, this proceeding was instituted for a writ of prohibition. And it is admitted that unless so prohibited and restrained, respondent court will proceed to hear and determine said contempt proceeding, and punish the said Kelshaw, treasurer, for failure to comply with said order directing a refund.

[1] Petitioner's right to the writ of prohibition asked for in this proceeding depends upon the merit of her contention that the order which she has refused to obey is a void order. The attack being collateral, she must show that the order is void on its face, that is to say, upon the face of the record in which it is contained. We are of the opinion that the order is void, and that this fact so appears upon the face of the record.

The original order determining the amount of the inheritance taxes due from the estate having become final without appeal, and without any proceeding affecting it as such proceedings are authorized by the Code of Civil Procedure, or at all, the court was without jurisdiction to order repayment of the money unless authority therefor can be found in the provisions of the inheritance tax law. The contention of respondents, and the only contention made on this phase of the case, is that the refunding order was made under authority of the provisions contained in section 11 of the Inheritance Tax Act (St. 1921, p. 1511). (For section 11, as last amended, see St. 1929, p. 1846, Deering's Gen. Laws, 1931 Ed., Act 8443). The parts thereof requiring consideration here are subdivision (3) and subdivision (4). It was properly conceded by respondents that the application and order in question were not made under subdivision 3. Necessarily this was so because at the time when the refunding order was made, the time within which a refunding order could be made under the authority of subdivision 3 had expired.

[2] Subdivision 4 of said section 11 makes provision for orders to be made for the refunding and repayment of money paid for inheritance taxes "when any amount of said tax shall have been erroneously paid." This refers only to some payment not made in conformity with the order fixing the amount of the tax. In Estate of Brown, 196 Cal. 114, 122, 236 P. 144, 147, this point was settled by direct decision. The court said: "Subdivision 4, on the other hand, is concerned solely with the repayment of amounts of tax 'erroneously paid' in all cases where an adjudication is not necessary to determine the amount excessively paid. * * * But the remedy prescribed in subdivision 4 is not predicated upon an adjudication that there has been an overpayment; it extends to all those cases where no complaint is made of the original order fixing the tax but due to some error or inadvertence in giving effect to it a sum was 'erroneously paid.'" Again the court said: "From the foregoing discussion of these two subdivisions their scope may be thus briefly summarized: Where any attack is made on the original order fixing the tax the complaining party must pursue either of the two alternative remedies specified in subdivision 3 for the modification or reversal thereof within the time prescribed for either remedy. But, where the order fixing the tax is not questioned, and it is merely sought to recover an amount 'erroneously paid' arising from an error or inadvertence in paying under the original order fixing tax, then the remedy is found in subdivision 4."

[3] Since upon the face of the record it appears that the amount of inheritance tax paid was the exact amount provided for in the order fixing the amount of tax to be paid, the conclusion necessarily follows that there could have been no amount "erroneously paid" within the meaning of said subdivision 4. We are of the opinion that the court was wholly without jurisdiction to make the order. Therefore in the contempt proceeding the court is without jurisdiction to punish for violation of such void order.

Let the peremptory writ issue.

We concur: HOUSER, J.; YORK, J.

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137 Cal.App. 196

PEOPLE v. LAND.

Cr. 2439.

District Court of Appeal, Second District,
Division 2, California.
March 2, 1934.

1. Criminal law 🔑543(2), 1153(1).

Question of what constitutes "due diligence" within statute making testimony at preliminary hearing admissible where witness cannot with due diligence be found in state addresses itself to trial court's discretion and appellate court may interfere only in case of abuse thereof (Pen. Code, § 686).

[Ed. Note.—For other definitions of "Due Diligence," see Words & Phrases.]

2. Criminal law 🔑543(2).

Evidence that witness testifying at preliminary examination lived in another state and was engaged in business there showed witness could not with due diligence be found within state, making his testimony at preliminary hearing admissible in subsequent prosecution (Pen. Code, § 686).

3. Larceny 🔑65.

Evidence *held* sufficient to support conviction for grand theft, where defendant claimed he bought stolen automobile from another.

4. Criminal law 🔑552(1).

Jury could infer consciousness of guilt on part of defendant from his flight from officer.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Russell Everett Land was convicted of grand theft, and he appeals.

Affirmed.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Joseph L. Carr, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

ARCHIBALD, Justice pro tem.

Defendant and one Walter Blankenship were jointly charged in an information filed by the district attorney of Los Angeles county with the crime of grand theft. On the trial of defendant Land the jury returned a verdict of guilty. From the judgment of conviction entered upon said verdict and from the order denying his motion for a new trial, defendant Land has appealed.

Appellant urges (1) that the court erred in permitting the testimony of a witness taken at the preliminary hearing to be read in evidence at the trial, and (2) that the verdict lacks the support of evidence.

1. It is contended that the foundation laid was insufficient to show that the witness Gleason could not with due diligence be found within the state. It was admitted that Gleason testified at the preliminary hearing of appellant and was cross-examined by his counsel. It was also shown by a witness from the sheriff's office that telegrams were sent to Gleason at Jerome, Idaho, and replies received thereto, and that following these Gleason appeared in Los Angeles prior to the preliminary hearing, and that he left about two days after such hearing saying that he was going back to his home in Jerome, Idaho.

[1, 2] The term "due diligence," as used in section 686 of the Penal Code, is a relative one, and its application depends upon the particular facts of each case. People v. Fay, 82 Cal. App. 62, 255 P. 239. It would seem that where the introductory evidence discloses, as it does here, that the witness is a nonresident of the state, such fact alone would show that no amount of diligence in the use of the process of the court would avail. The question of what constitutes "due diligence" addresses itself to the discretion of the trial court upon the facts and circumstances shown, and only in case of an abuse of such discretion would an appellate court be justified in reversing a criminal case where the judgment was otherwise correct. People v. Ramos, 52 Cal. App. 491, 199 P. 544. That the conclusion reached by the trial court as to the foundation evidence is correct is demonstrated by the testimony of the witness Gleason, which shows that his home is in Jerome, Idaho, and that he was engaged in the mercantile business there, but that at the time he met appellant there he was chief deputy sheriff of the county in which he lives. Appellant himself testified that Gleason called on him after appellant went to Idaho and told him that he (Gleason) had a warrant from California and would have to take appellant and a car then in his possession "down." Under the circumstances of this case we fail to see that the trial court abused its discretion in admitting the testimony of Gleason in evidence.

[3, 4] 2. The evidence shows that a Chevrolet coach belonging to one Schaffert was stolen on June 25, 1932, by Blankenship while parked on a street in Whittier, Cal.; that appellant and Blankenship went to the Bassett Wrecking Company, near Puente, on the same day, where Blankenship purchased a Chevrolet roadster for $30; that the certificate of registration of the roadster was changed to show that it was a coach, the engine numbers of the stolen coach were effaced and the number of the roadster engine placed on the engine block of the coach, and that the license plates of the roadster were affixed to the coach. So far as the evidence shows, Blankenship changed the numbers. There is also evidence from which the jury could have found that appellant went to the yard of the Bassett Wrecking Company once or twice before the roadster was purchased; that he said he looked at the car bought by Blankenship and that it was a coach. On the 27th day of June, two days after the coach was stolen, appellant left for Idaho in it. He was there interviewed by Gleason, who says that he asked appellant if the coach was his and that the latter said it was. Gleason then said: "I told him that I would have to ask him then to drive it in as far as town, that I wanted to investigate it. He asked me what for, and I told him we had authorization from the officers in California." Appellant then said he would have to get the key, following which he went into the house and did not come back. The car was taken to town by Gleason, who found the secret number on the car identifying it as the one stolen from Schaffert. Appellant explains his flight by saying that the officer said he had a warrant from California and would have to take him and the car down, and that he thought his wife had attached the machine and wanted him arrested for failure to provide.

The car was in appellant's possession from June 27, 1932, until he left it in Idaho when the officer called on him, and we think there is sufficient evidence in addition to the fact of possession of the stolen machine to justify the conclusion that appellant was jointly interested with Blankenship in the theft thereof, in spite of his story that he bought it from Blankenship for $30 and in spite of his explanation of his flight from the deputy sheriff in Idaho when informed that the latter wished to investigate the car. The jury had a right to infer consciousness of guilt on the part of appellant from such flight.

Judgment and order affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 92

RUDAT v. CARITHERS.

Civ. 4701.

District Court of Appeal, Third District, California.

Feb. 24, 1934.

Hearing Denied by Supreme Court April 23, 1934.

1. **Evidence ⇨470.**

Evidence must be limited to facts where their probable results can be determined without special skill or training.

2. **Evidence ⇨470.**

Witness' opinion should not be admitted where underlying facts can be ascertained and made intelligible to court or jury.

3. **Evidence ⇨547.**

Admission of expert testimony is largely committed to trial court's discretion.

4. **Appeal and error ⇨971(2).**

Ruling on admissibility of expert testimony will not be reversed, in absence of clear showing of abuse of discretion.

5. **Evidence ⇨553(1).**

Ruling excluding hypothetical question asked physicist as to nature and effect of forces operating in automobile collision *held* not abuse of discretion, where question contained certain statements contrary to evidence and omitted statement of course pursued by car after collision and obstructions which it had to overcome.

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by Carl W. Rudat against Edna Catherine Carithers. Judgment for defendant, and plaintiff appeals.

Affirmed.

Bronson, Bronson & Slaven, of San Francisco, Geary & Geary and C. J. Tauzer, all of Santa Rosa, and Harold R. McKinnon, of San Francisco, for appellant.

J. Hampton Hoge, of San Francisco, and Ware, Murphy & Brownscombe, and Barrett & McConnell, all of Santa Rosa (A. Dal Thomson, of San Francisco, of counsel), for respondent.

JAMISON, Justice pro tem., delivered the opinion of the court.

This action was for damages for injuries resulting from the collision of two motor vehicles operated by plaintiff and defendant. It was tried by the court with the aid of a jury, and a verdict was rendered for defendant. Plaintiff moved for a new trial, which was denied, and judgment was thereupon rendered for defendant. From this judgment plaintiff has appealed.

The sole question to be determined on this appeal is whether or not the court erred in excluding the testimony of a witness produced by plaintiff, one Frank Rieber, an alleged physicist, to explain the nature and effect of the forces which came into operation at the moment of the collision. In other words, appellant sought to show by the testimony of this witness the relative speed at which the two automobiles were traveling at the time of the collision.

This accident happened at the intersection of the Sonoma-Petaluma road and the El Verano highway. Respondent was traveling northerly on the El Verano highway, and appellant was going westerly on the Sonoma-Petaluma road.

Respondent testified that she had in her car her two infant children, her little girl on the seat beside her and her little boy on a shelf behind her. She further testified that when she entered the intersection she was traveling about 20 miles per hour, that prior to entering the intersection she gave warning of her approach to it by sounding her horn, and saw appellant's car some distance down the Sonoma-Petaluma highway, about three times as far from the intersection as she was.

Two witnesses testified that they examined the marks made by the cars, shortly after the accident, and they found from said marks that the said collision occurred about

2 feet north of the center of the said intersection and some 4 feet east of the center of the El Verano highway.

Appellant testified that he was traveling west on the Sonoma-Petaluma road, and that he was about 200 or 250 feet from the intersection when he first saw respondent's car. He next saw it when he was about 50 feet from the intersection. Respondent's car was then about 125 feet from the intersection. When he first saw the car, it was traveling at a speed of 50 miles per hour. When he looked the second time, he sounded his horn and respondent slowed up. Appellant thought she was going to stop and let him go by, but her car began to pick up speed and entered the intersection at a speed of 60 miles per hour and turned to the left, and the front end of his car came in contact with the right side of respondent's car; that when he entered the intersection his speed did not exceed 15 miles per hour.

The only other eyewitness to the accident was S. L. Smith, who was produced by appellant and who testified that appellant passed him about a quarter of a mile from the said intersection. Appellant was then traveling about 35 miles per hour. When the witness was about 300 feet from the intersection, he saw a flash about 75 or 100 feet south of the intersection on the El Verano highway. This flash was going at about 40 miles per hour. Shortly after this he heard the crash of the collision. He could not observe whether or not appellant increased or diminished his speed as he entered the intersection.

After the collision, the respondent's car rotated and came to a stop some 80 feet from the point of the impact; and about 25 or 30 feet from the point of collision it struck and broke off a guy pole, 12 inches in diameter at the base. The appellant's car traveled some 40 or 45 feet after the collision and struck a concrete culvert and turned over in a ditch. After the collision, the right fronts of both cars were uninjured, but the left headlight and left fender of appellant's car were damaged.

The trial court sustained the objection to the hypothetical question propounded to the said Rieber upon the grounds that it was not a proper subject of expert testimony, and that it did not contain sufficient statement of the proven facts to render it a fair hypothetical question. The hypothetical question was as follows:

"Assuming, Mr. Rieber, 1st, the physical condition of the La Salle automobile (respondent's car), as it appears from the photographs which have been introduced in evidence as plaintiff's exhibits Nos. 2, 3, 4 and 5, to have been the condition of that automobile immediately after the collision; 2nd, the physical condition of the Dodge delivery car (appellant's car) immediately after the accident to have been the same as it now appears or appeared at the time you examined it; and assuming, 3rd, that the collision occurred at an intersection of two roads, as disclosed by this map, plaintiff's exhibit No. 1, the Dodge car traveling along the road running in a generally easterly and westerly direction, and the La Salle traveling along the road running in a generally northerly and southerly direction, the Dodge proceeding or heading westerly and on the right-hand side of the road at the time of the collision, and the La Salle proceeding or heading northerly and on the left-hand side of the road at the time of the collision, both cars being at substantially right angles to one another at the time of contact, and the contact to have been at this point in blue pencil marked 'B'; and assuming, 4th, that subsequent to the collision the Dodge car came to rest in the ditch located at this point on the map, the car being designated by this red rectangle marked 'truck' and the scale of this map being 1"-10', and that, likewise, subsequent to the collision the La Salle car traveled on its course a distance of approximately 83 feet from the point of contact, coming to rest facing south and at a point marked 'La Salle,' being a red rectangle at this point on the map; and assuming, 5th, that after the collision and before it came to rest, the La Salle car turned around in a clockwise direction, as viewed from above, until it struck on its left rear side a guy wire pole situate and marked here on this map approximately 40 feet from the center of the intersection and thereafter turned around in a counter-clockwise direction until it came to a stop at the place and in the manner heretofore stated; and assuming, 6th, the fact that the La Salle car after the collision and while so turning around and proceeding in its direction, as stated, struck and broke through a guy wire pole having a diameter at its base of 12" breaking same into 3 pieces, assuming all of the foregoing, could you, from the known laws of physics, determine the nature of the forces which must have acted to cause such motion in both cars, the points on the respective automobiles where such forces were applied, the relative magnitude of those forces, and can you describe those forces and their effects and manner of acting?"

As his question called for the nature of the forces which must have acted to cause such motion in both cars, and the magnitude of those forces and the effect that these forces would have upon the cars, in all fairness it should have contained a statement of the course pursued by appellant's car after the collision and what obstructions it had to overcome before its stopping. The question also contains some statements that are contrary to the evidence, in this, that the cars ran together at right angles, and that respondent was driving on the left-hand side of the road. The evidence shows that the two roads crossed each other at an angle, and the fact that appellant's car had its left headlight and left fender damaged and no other damage on its front would negative the inference of a collision at right angles, and there is no evidence that respondent was driving on the left side of the highway.

[1] If the relation between the facts and their probable results can be determined without any special skill or training, the facts themselves must be given in evidence and the conclusions or inferences must be drawn by the jury. 10 Cal. Jur. 949, 950. In Fishman v. Silva, 116 Cal. App. 1, 2 P.(2d) 473, 474, it is said by the court: "For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors of each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact."

To the same effect is Johnston v. Peairs, 117 Cal. App. 208, 3 P.(2d) 617. In Corcoran v. Ward, 115 Cal. App. 180, 1 P.(2d) 455, 457, the court said: "The complexity of forces operating on two rapidly moving vehicles in collision with one another often makes it exceedingly difficult to reconstruct the manner of the happening of the accident from testimony concerning the marks found upon the highway and the positions and condition of the cars after the accident."

[2-5] When all of the facts upon which the opinion is founded can be ascertained and made intelligible to the court or jury, the opinion of the witness is not to be received in evidence. Sappenfield v. Main St., etc., R. Co., 91 Cal. 48, 60, 27 P. 590. The admission of evidence by an expert is largely committed to the discretion of the trial court and its action will not be reversed in the absence of a clear showing of an abuse of that discretion. Vedder v. Bireley, 92 Cal. App. 52, 267 P. 724; Maris v. H. Crummey, Inc., 55 Cal. App. 573, 204 P. 259.

The trial judge is in a position to have the circumstances far more clearly before him than the appellate court can have them. A large discretion relating to the form of the question must necessarily rest with the judge.

We find no abuse of discretion in the trial judge.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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137 Cal.App. 276

PEOPLE v. ECHO.

Cr. 158.

District Court of Appeal, Fourth District, California.

March 9, 1934.

Criminal law 🔑1182.

Conviction was affirmed on accused's failure to file brief within time allotted, where transcript disclosed that accused had fair trial; that court gave correct instructions; that verdicts were justified by evidence; and that no prejudicial error was committed in admission or rejection of evidence.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

John Echo was convicted of rape and incest, and he appeals.

Affirmed.

Tom Okawara, of Fresno, for appellant.

U. S. Webb. Atty. Gen., for the People.

JENNINGS, Justice.

This is an appeal taken by the defendant from a judgment rendered by the trial court in conformity with the verdicts of a jury returned in a criminal action. Upon the rendition of judgment appellant gave oral notice of appeal from the judgment and from the order denying his motion for a new trial. He also filed a typewritten statement of the grounds of appeal, which included a prayer that the trial court direct the preparation of a transcript which should contain a transcription of all testimony produced during the trial, together with the instructions given by the court and those which were offered and refused. The court thereupon made its order directing the preparation of the transcript as requested. In compliance with the court's order such a transcript was prepared and filed in this court on November 7, 1933. On November 22, 1933, appellant filed a written request for an extension of time within which to prepare and file his opening brief. This request was granted and the appellant was allowed until December 22, 1933, within which to file his opening brief. The cause was placed on the calendar of this court for oral argument on Janaury 9, 1934. On the last-mentioned date appellant's counsel made written application for a further extension of time within which to file his opening brief. This request was granted and permission was accorded to appellant to file the brief at any time up to and including January 29, 1934. When the case was called for argument on January 9, 1934, appellant's counsel responded and called the court's attention to the fact that his request for the allowance of additional time had been granted and consented that the case be submitted for decision when all briefs should have been filed. The court thereupon ordered that the cause should be submitted for decision when all briefs were filed. The time within which appellant should have filed his opening brief has long since expired and no brief has been filed on his behalf. The court has accordingly submitted the cause for decision.

Examination of the transcript on appeal impels us to the conclusion that appellant received a fair trial, that the court fully and correctly instructed the jury as to the law, and that the verdicts of the jury were amply justified by the evidence which was produced during the trial. We further find that no error prejudicial to appellant was committed by the trial court in the admission or rejection of evidence. Under these circumstances, affirmance of the judgment from which this appeal has been taken is required.

The judgment and order are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

137 Cal.App. 225

PEOPLE v. BRADLEY.

Cr. 159.

District Court of Appeal, Fourth District, California.
March 6, 1934.

Rehearing Denied March 19, 1934.

1. Criminal law ⚷1037(2).

District attorney's remark in opening statement to jury that "this case arises out of a labor agitation" *held* not ground for reversal of conviction for engaging in riot; not being prejudicial to defendant, whose counsel failed to except to, or ask instruction to disregard, remark.

2. Riot ⚷6.

Defendant's statements in speech before alleged riot *held* admissible in trial for engaging therein to show his intent and general scheme or plan to commit crime.

3. Riot ⚷6.

Evidence *held* sufficient to sustain conviction for engaging in riot (Pen. Code, § 404).

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

L. Bradley was convicted of engaging in a riot, and he appeals.

Affirmed.

James M. Carter, of Los Angeles, and Gerald H. Catania, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Paul D. McCormick, Deputy Atty. Gen., for the People.

MARKS, Justice.

By an information filed by the district attorney of Fresno county appellant was charged with engaging in a riot near the city of Fresno in Fresno county on September 9, 1933. This appeal is taken from the judgment of conviction and from the order denying his motion for new trial.

While appellant's brief in many respects fails to conform to the rules of court, in view of the nature of the charge of which he stands convicted we have thought best to study the entire record, regardless of the deficiency of the brief.

On September 8, 1933, a public meeting was held in the courthouse park in the city of Fresno, where appellant addressed those assembled. It appears that a dispute had arisen in the grape industry in Fresno county, and that appellant and others were endeavoring to prevent laborers from engaging in the harvest of the grape crops. During the course of his speech, appellant stated that a strike was in progress, and, regardless of any opposition or interference made by officers of the law, the strikers were going to win. Then he announced that on the following day a delegation would go to the vineyards and take all workers out of the field regardless of what happened, and, further, that "if the bulls or any officers interfere, we will meet them and take their tin badges away from them, and run them back to town." On the next day appellant, with a number of others variously estimated at between twenty and sixty men, went to the vineyard of L. E. Elliott, where between one hundred and one hundred twenty-five laborers were engaged in harvesting his grapes. Appellant and his followers alighted from their truck and automobiles and assembled in the road adjoining Elliott's land. Elliott was on his own land armed with a shotgun. Appellant and his associates called to and threatened the laborers, endeavoring to get them to leave their occupation. They advanced on Elliott, shaking their fists, shouting in a loud and boisterous manner, advancing upon him with threatening gestures, and backed him some distance onto his own property. A number of peace officers saw the crowd and dust raised when at least half a mile from the disturbance and went to Elliott's assistance. Their leader, Deputy Sheriff Collins, told appellant and those assembled with him, at least three times, to move on and disperse. He arrested appellant and two others, and this prosecution followed. Just as appellant was being taken away, he called to his associates, saying: "Take a good look at him (referring to Elliott) because we will come back and get him."

We gather that the following grounds are relied upon for a reversal of the judgment: (1) Misconduct of the district attorney; (2) error in permitting the introduction in evidence of what was said by appellant in his speech on September 8, 1933; (3) that the evidence fails to support the judgment.

[1] Appellant quotes one isolated statement of the district attorney which occurred in his opening statement to the jury; namely, "This case arises out of a labor agitation." We have examined the opening address, and the context shows that this sentence was merely introductory to a statement of facts to be proved. We can conceive of no possible prejudice appellant could have suffered from it. His counsel failed to except to it when made and failed to ask the trial court to instruct the jury to disregard it.

[2] The statements made by appellant in his speech were properly admitted in evidence to show his intent and a general scheme or plan to commit the crime of which he was convicted. People v. Morani, 196 Cal. 154, 236 P. 135.

[3] The evidence is ample to sustain the judgment. Section 404 of the Penal Code defines a riot as "any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot."

While there is no proof of the use of actual force or violence on the part of appellant or his associates, there was a disturbance of the public peace, and conduct on their part which indicated threats to use force or violence. They certainly possessed the immediate power to put their threats into execution. All of the necessary elements of the offense were thoroughly established in this case.

The judgment and order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

137 Cal.App. 155

HAMMOND LUMBER CO. v. ROUBIAN et al.

Civ. 9344.

District Court of Appeal, First District, Division 2, California.

March 1, 1934.

1. Mortgages 🔑171(6).

Where notarial certificate attached to trust deed erroneously stated venue of another county, record of trust deed did not give constructive notice of contents to materialman furnishing material for building before corrected certificate was attached and deed rerecorded (Code Civ. Proc. § 1186).

2. Mortgages 🔑151(3), 186(5).

In action to foreclose mechanic's lien, evidence established that materialman had actual notice of deed of trust before delivering materials for building, and hence materialman could not foreclose lien as against claimants under deed of trust (Code Civ. Proc. § 1186).

Materialman had notice that owner of land made construction loan, and materialman accepted beneficial interest under deed of trust reciting it was subsequent to prior deed of trust as part payment for material furnished, and did not furnish material until two days after both deeds of trust were recorded.

3. Mortgages 🔑151(3), 186(5).

In action to foreclose mechanic's lien, evidence established that trust deed had been delivered prior to furnishing of materials for building by lien claimant who had notice of existence of deed, preventing foreclosure as against those claiming under trust deed (Code Civ. Proc. § 1186).

4. Mortgages 🔑67.

Recital in deed of trust that trustee would accept trusts when deed was made public record as provided by law *held* not to delay date of delivery of deed until duly recorded, since assent of trustee was not necessary to validity of deed.

5. Mortgages 🔑151(3).

Where trustor who makes trust deed of property to which he has no title subsequently acquires title thereto, trust deed, though unrecorded, is prior to mechanic's lien for material furnished by materialman having notice of deed (Code Civ. Proc. § 1186).

6. Mortgages 🔑151(3).

Where borrower has fully performed conditions of trust deed securing advances, that deed provided that lender need not advance money under certain conditions and could stop payment *held* not to make advances optional with lender as respects priority over mechanics' liens.

Appeal from Superior Court, Los Angeles County; Georgia Bullock, Judge.

Action by the Hammond Lumber Company, substituted in lieu of the Male-Knudson Lumber Company, against the Bay City Building & Loan Association, the Fidelity & Guaranty Company, the Southern Investment Company, and others. Judgment for plaintiff, and named defendants appeal.

Reversed.

Charles I. Baker, Gilbert E. Harris, and Arch H. Vernon, all of Los Angeles, for appellants.

Edgar C. Smith, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem.

This is an action to foreclose a mechanics' lien. Judgment went for the lien claimant's successor in interest. The defendants Bay City Building & Loan Association, Fidelity & Guaranty Loan Company, and Southern Investment Company, all three corporations, have appealed from the judgment.

The record has been brought up under the alternative method. It is claimed by the appellants that the trial court erred in finding that a certain trust deed through which the appellant Southern Investment Company claims title to the real property in suit was subject to the mechanics' lien. This contention is based upon the following uncontroverted evidence: On January 16, 1930, the defendant Barbara C. Roubian, acting through her codefendant John Roubian, who was her husband, entered into an agreement with the former plaintiff, the Male-Knudson Lumber Company, to purchase certain building material to be used in erecting a building upon the parcel of land described in the complaint. On January 20, 1930, a building loan contract was executed by Mrs. Roubian with Smith & Sons, Inc., to secure a loan of $9,000 to be used for the building above referred to, which loan was to be secured by a trust deed on the above-mentioned property. On the same date she executed the note for said money and the trust deed to secure the same. On January 25, 1930, she received the deed to said real estate which was the source of her title thereto. It appearing to the interested parties that the $9,000 to be obtained through the first deed of trust would be insufficient to complete the building, Mrs. Roubian, on the last-named day, procured another loan from another party in the sum of $3,000 and executed a second trust deed on the property which contained a clause making it subject and subsequent to the first trust deed. The second deed of trust was not acknowledged until February 5, 1930. On the following day there was filed for record in the official records of Los Angeles county, the county where the property is situated, the deed through which Mrs. Roubian deraigned her title, also the first trust deed and the second trust deed. Two days later the Male-Knudson Lumber Company began to furnish building material on the premises in accordance with the contracts of January 16, 1930, and thereafter continued to do so until April 10, 1930, when their part of the contracts was completed. It further appears without conflict that the first trust deed was properly acknowledged by Mrs. Roubian, but the notary public erroneously wrote the venue of the notarial certificate as the county of San Diego instead of the county of Los Angeles. This deed, after having been recorded, was on February 15, 1930, sent by the county recorder to the defendant Bay City Building & Loan Association, the beneficiary named in the deed, and on February 19, 1930, said company had the certificate of acknowledgment corrected by the notary to conform to the facts and had the deed rerecorded on February 20, 1930. It also appears by stipulation that both the loan agreement and the first deed of trust were delivered on January 20, 1930, the day of their execution. Guy R. Male, an officer of the Male-Knudson Lumber Company, who on January 16, 1930, signed the material contracts for his company, testified that the contracts with Mrs. Roubian had been obtained through one of their salesmen; that he, Male, knew on said date that there was a first construction loan in this case for $9,000 or was to be one; that he knew his company was taking as part payment for their material a beneficial interest in a paper secured by a trust deed on the property; that he was informed such interest would be a second or subsequent trust deed; that he was not informed of the amount of either. Referring to the contracts for material the witness testified in part as follows: "Q. Calling your attention to the Exhibit 3, and particularly the item marked '5th Draw' at about the center of the first page of this Exhibit, I call your attention to that item '$75 Int. in T. D.', which is part of the payment to be made for material (indicating document). Will you explain that item to me? A. That was a beneficial interest in a paper that was secured by a trust deed on this property. Q. So that you were taking, as a part payment, a beneficial interest secured by a trust deed on this property? A. Yes. Q. And were you informed whether that would be a first, second or third trust deed? A. I was informed it would be a second." The witness was further informed that such interest would be subsequent. G. G. Wyatt had control of the negotiations on behalf of the Control Engineers, a company which appears to have had general supervision and control of the construction and he testified that he signed the contracts on behalf of his company and they were signed by Mr. Male on behalf of the Male-Knudson Company; that the contracts were prepared in the office of the Control Engineers and signed on January 16, 1930; that the terms of the contracts were discussed; that he could not recall just what was said at that time, but that it was understood that there was a first trust deed against the property for a construction loan; and that he was sure Mr. Male was informed of that and they discussed the second trust deed. It was also stipulated that the second trust deed recites that it is subject to a first trust deed in the amount of $9,000. It was further stipulated that by proceedings regularly had for that purpose, the property was sold to the defendant Southern Investment Company through a sale under the first trust deed.

Under the foregoing evidence the decision of this appeal depends upon the construction to be placed upon section 1186 of the Code of Civil Procedure, which reads as follows: "The liens provided for in this chapter (mechanics, builders and materialmen) are preferred to any lien, mortgage, deed of trust, or other encumbrance, upon the premises and improvements to which the liens provided for in this chapter attach, which may have attached subsequent to the time when the building, improvement, structure, or work of improvement in connection with which the lien claimant has done his work or furnished his material, was commenced; also to any lien, mortgage, deed of trust, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, structure or work of improvement in connection with which the lien claimant has done his work or furnished his material was commenced."

[1] It is clear that due to the faulty notarial certificate attached to the first deed of trust, until the corrected certificate was attached thereto and the document rerecorded, the deed was not constructive notice of

its contents. Indeed, we understand that appellants concede such to be the case. In any event such is the correct rule of law. See section 1186, Code Civ. Proc., vol. 1; Cal. Jur., pp. 229–254; 22 Cal. Jur., p. 603. There was therefore no constructive notice to the lienholder of the first trust deed at the time the material was delivered on February 8, 1930.

[2] The next question to be determined is whether, under the above evidence, the Male-Knudson Lumber Company had actual notice of the existence of the first trust deed when they commenced furnishing the material on the premises. It will be observed that on January 16, 1930, the day the contracts to furnish material were signed by Mr. Male and the other interested parties, Mr. Male knew there was a first construction loan of $9,000, or there was to be one; that he knew his company was taking as part payment for their bill of material a beneficial interest in a second trust deed, and he knew such interest was second and subsequent to the first trust deed. It is also recited in the second trust deed that it is subsequent and subject to a first trust deed for $9,000. Mr. Wyatt's testimony discloses that the subject-matter of both the first and second trust deeds were discussed with Mr. Male. It appears that the first deed of trust was actually made and delivered on January 20, 1930, almost three weeks before any material was furnished. In substantiation of the contention that the foregoing evidence sustains the finding of the court, that the Male-Knudson Lumber Company had no notice of the existence of the first trust deed, respondent cites J. & W. C. Shull v. Brooke, 107 Cal. App. 88, 289 P. 885. There is, however, a distinction between the cited case and the one at bar. In the cited case the court holds that whether or not the lien claimant had actual notice of the existence of a trust deed, rested upon a conflict of evidence and therefore the finding upon that question could not be disturbed. It was further urged in that case that mere knowledge by a lien claimant that the owner was compelled to finance a building operation was sufficient to put the lien claimant upon inquiry to ascertain whether or not the property was chargeable with any lien. However, the court held that such contention could not be upheld. To the same effect is National Hardware Co. v. Sherwood, 165 Cal. 1, 11, 130 P. 881.

It is further claimed by respondents that all the evidence in the case at bar merely discloses notice in advance that there was to be a trust deed or building loan on the property and this was insufficient notice under section 1186 of the Code of Civil Procedure of an unrecorded incumbrance upon the property and cite in support thereof Hardy v. Frey, 49 Cal. App. 551, 196 P. 92, and J. & W. C. Shull v. Brooke, supra. Again we think there is a distinction between the cited cases and the one at bar. In Hardy v. Frey, the dispute was between the holder of a mortgage lien and the lien of a contractor. The mortgage was delivered for record four days after the contractor entered upon the property and commenced work. Prior to commencing work the contractor knew the mortgage had been signed and acknowledged. It was held by the court that the mechanics' lien took precedence over the mortgage lien. Such conclusion was reached because there was no evidence in response to an affirmative defense of the answer that the mortgage had never been delivered. Delivery was, of course, indispensable to the validity and operation thereof. What has previously been said concerning the case of J. & W. C. Shull v. Brooke, supra, as to what constitutes notice, applies with equal force to this point. The case of Keeling Collection Agency v. Penziner, 123 Cal. App. 296, 11 P.(2d) 24, 25, is similar in its facts to the case at bar. There the lien claimants had been told by the owner that "he had his loan" of $150,000 from the West American Finance Company and the builder testified that the owner had told him "that 'he had a building loan,'" there was also a clause in the building contract in that case as follows: "This, a copy not to be recorded or used till building loan is recorded." It was there held that the trust deed for the building loan took preference over the mechanics' lien, because of the written agreement last referred to. Comparing the case last cited with the case at bar, in the case at bar, Mr. Male testified that he knew there was a first construction loan of $9,000 or there was to be one; that he knew his company was taking as part payment for their material a beneficial interest in a second trust deed which would be second or subsequent to the first trust deed of $9,000. It is true that there is no written statement as in Keeling Collection Agency v. Penziner, supra, that the copy was not to be recorded or used until the building loan had been recorded, yet the fact that the material was not furnished until two days after the instruments were all filed for record, is persuasive that such was the intention. As stated in National Hardware Company v. Sherwood, supra, at page 9 of 165 Cal., 130 P. 881, 884. "Where a person accepts a mortgage which recites that it is subject to another mortgage on the same property, the rule is that he is estopped thereby and is not allowed to defeat or impair the other mortgage by denying its priority or validity at the time he took it to the amount of it as recited in his own mortgage." In the case at bar, before the respondent had delivered any material, he had accepted an interest in a second trust deed, which recited that it was taken subject to the first one. We think the foregoing evidence conclusively shows that when material was first delivered on the ground, the Male-Knudson Lumber Company had actual knowledge of the existence of the first deed of trust.

[3-5] It is a further contention that the first trust deed was not delivered until February 19, 1930, when it was legally recorded. However, as heretofore stated, it appears in the stipulation of the parties that it was actually delivered on January 20, 1930. If this were not sufficient to show a delivery before any material was furnished, no other reasonable construction that it was delivered could be placed upon the evidence that it was delivered to the county recorder of Los Angeles county for recordation on February 6, 1930, two days before any material was furnished and it was never returned to the grantor. Neither does the recital in the deed itself that the "trustee accepts these trusts when this deed of trust, duly executed and acknowledged, is made a public record as provided by law," delay the date of delivery. Indeed, it has been held that the assent of the trustee is not necessary to the validity of the deed. 25 Cal. Jur. 30, 31; Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am. St. Rep. 92; 41 C. J. 429. It is also settled law that where a trust deed has been executed and delivered as security for the payment of money, and the trustor had no title to the property conveyed and title is subsequently secured by the trustor, the trust deed, even though unrecorded, takes precedence over a mechanics' lien for material thereafter furnished by a materialman who had notice of the unrecorded trust deed. Keeling Collection Agency v. Penziner, 123 Cal. App. 296, 11 P.(2d) 24.

[6] Respondent further contends that the entire loan fund as set forth in the first trust deed constituted an optional advance because under certain conditions the lender could not be compelled to advance the money and could stop payment. As we understand the cases cited, none of them are authority for the proposition that where, in a case like this, the borrower has fully performed on his part, the advances to be made under the agreement are optional with the lender.

Respondent claims that the equities of the case are with it. It seems to us, however, that a technical error of the notary public gave to plaintiff an opportunity to question the right of defendants to enforce their security for a debt justly due them and that the equities of the case are with the defendants.

We think that what we have already said is decisive of the case and the judgment should be reversed. It is so ordered.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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137 Cal.App. 209

Ex parte COWAN.

Cr. 1341.

District Court of Appeal, Third District, California.

March 5, 1934.

Habeas corpus 🔑29.

Petitioner convicted of failure to provide for minor children *held* entitled to habeas corpus to obtain release, where judgment failed to show offense was willful and without lawful excuse (Pen. Code, § 270).

Original application of W. V. Cowan for a writ of habeas corpus to be directed to the sheriff to secure petitioner's release from custody.

Writ granted.

Busick & Busick, of Sacramento, for petitioner.

Neil R. McAllister and Rose M. Sheehan, both of Sacramento, for respondent.

PER CURIAM.

On the 13th day of September, 1933, the petitioner was convicted and sentenced to six months' imprisonment, in the justice's court of the city of Sacramento, in the county of Sacramento, for an alleged violation of section 270 of the Penal Code, relative to providing for one's minor children. The argument in this case has taken a wide field, and, in the discussion, the second paragraph of section 270 of the Penal Code has been challenged as being unconstitutional. By reason of what we are about to say, this question need not be considered.

The judgment of the justice's court, so far as relevant here, is in the following words and figures:

"WHEREAS, on the 13th day of September, 1933, the defendant, W. V. Cowan, was duly convicted in the Justice Court of the City of Sacramento, County of Sacramento, and State of California, of the crime of failure to provide for minor children, committed within said City, on the ——— day of April, 1933, And at the time of conviction, the defendant waived a postponement of time for rendering judgment, and was informed by the court of the nature of the complaint, and of his plea and of the verdict, and was asked by the court whether he had any legal cause to show why judgment should not be pronounced against him; and no sufficient cause being alleged, or appearing to the court, it is therefore considered and adjudged by the court that the defendant, W. V. Cowan, be imprisoned in the county jail of the County of Sacramento for the term of six (6) months.

"Richard P. Talbot, Acting Judge of the Justice Court in and for said City of Sacramento."

This judgment was affirmed on appeal, and the judgment of affirmance is in precisely the same words, except that the word "his" is inserted before the word "minor."

While the provisions of section 270 of the Penal Code, if constitutional, makes the failure to provide for one's minor children prima facie proof that such failure is willful and without lawful excuse, it does not make the mere fact of failure to provide for minor children a crime in and of itself. The judgment which acts as the commitment must show that the failure so to provide was willful and without lawful excuse, assuming that the Code section referred to is constitutional.

The judgment in this case not showing that the defendant has committed any crime, it follows that the writ should be granted, the petitioner discharged, and bail exonerated.

It is so ordered.

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137 Cal.App. 245

PACIFIC ELECTRIC RY. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8988.

District Court of Appeal, Second District, Division 1, California.

March 8, 1934.

1. Master and servant ⚷416.

Finding that death of street car conductor struck by automobile arose out of and in course of employment *held* implied finding that at time of accident employee had arrived at place of employment, in view of statement of employer's counsel that only issue was whether conductor had arrived at place of employment at time of accident.

2. Master and servant ⚷405(4).

Evidence sustained finding that street car conductor killed by automobile when returning from lay-over period at terminus of route had arrived at place of employment and that injury arose out of and in course of employment.

Certiorari proceeding by the Pacific Electric Railway Company to review an award of the State Industrial Accident Commission in favor of Alice Leigh and another for the death of Walter J. Leigh, employee of the Pacific Electric Railway Company.

Affirmed.

Frank Karr, of Los Angeles, for petitioner.

Everett A. Corten and Arthur I. Townsend, both of San Francisco, for respondents.

CONREY, Presiding Justice.

This is a proceeding in certiorari to review an award made by the Industrial Accident Commission of compensation for the death of one Walter J. Leigh, who at the time of the accident which caused his death was a car conductor in the employ of Pacific Electric Railway Company. The beneficiaries of the award are the widow and minor son of said Leigh.

On March 5, 1932, Leigh was employed on that part of the employer's railway system which runs between Claremont and Pomona. The company maintains a terminal station on Garey street in Pomona, with a passenger station on the west side of the street. The railroad tracks are laid in the street, level with the pavement in the usual way for street railway tracks. The car on which Leigh was conductor arrived at the Pomona station at 8:28 in the evening, and was due to leave Pomona for its next run at 8:50, thus leaving an interval of twenty-two minutes. For lay-over periods of less than one hour employees received pay, but, according to the custom of the company, employees might use these intervals of time for their own purposes.

On the occasion in question Leigh telephoned to his home in Pomona and requested his son to bring down the family automobile and take him home so that he might change shoes. This was done and, after the change of shoes, the return trip was made to the railway station, arriving there at 8:50, just in time for Leigh to be on the car for its run to Claremont. The motorman had brought the car to its position on the north-bound track, with the open car door opposite to the door of the station on the west side of the street. The Leigh boy brought the automobile to a stop at the west curb, south of the station. The employee Leigh stepped out of the car and walked in a northeasterly direction toward the door of the street car. When he had arrived at the south-bound track, and at a distance of about ten feet from the car door, he was hit by a passing automobile, thereby causing his death.

When, after the application for adjustment of claim had been filed with the Industrial Accident Commission, the case was brought to hearing before a referee, admissions of fact and undisputed evidence left open for decision the single issue: "Was death caused by injury which arose out of and in the course of employee's employment?" The attorney for the company suggested a stipulation as follows: "Cannot we stipulate that it happened in a certain way, that is to say he had half hour lay-over on pay, and that he had gone to his home and returned to his car at about the leaving time, the only issue remaining that is whether or not he had arrived at his place of employment." At that time the applicant Mrs. Leigh was not represented by counsel, and she made no response to the offered stipulation. The referee then asked her if she was willing to admit that what the attorney said was true. She replied: "Well, as far as I know."

Referring to the statement which had been made by the attorney (Mr. Turner), the referee said: "You admit that statement, Mr. Turner, that the reporter has just read?

"Mr. Turner: I do.

"The Referee: That's admitted on the part of defendant employer here and you understand is not a stipulation on the part of both the employer and the applicant.

"Mr. Turner: That's all right. Defendant is willing to be bound by that statement."

[1] Thus it is seen that the proceeding was tried upon the theory that, aside from the undisputed facts, the single issue of fact to be determined was whether or not at the time of the accident the employee had arrived at his place of employment. By its original findings the commission determined that the employee's death was not proximately caused by an injury arising out of and occurring in the course of his employment. This may fairly be interpreted as an implied finding that at the time of the accident he had not arrived at his place of employment. It was ordered that the applicants take nothing. Thereafter a rehearing was allowed and the matter again came before the same referee for further hearing. The referee announced that all testimony taken at the preceding hearing would be considered. Additional testimony was then taken. One of the subjects of this additional evidence related to the circumstances attendant upon the trip which Leigh made to his home for the purpose of changing his shoes, and the reasons therefor; also relating to the rules of the company and customs of the company and its employees with reference to use of their time during short lay-over periods. The cause was resubmitted for decision, and the commission made its finding that the employee Leigh, while employed as a conductor, at the time and place stated, "sustained injury arising out of and occurring in the course of his employment when he was struck by an automobile, the injury proximately causing his death on March 6, 1932." In view of the admissions of fact to which we have referred and the testimony as contained in the record, this later finding amounts to an implied finding that at the time of the accident the employee had arrived at his place of employment.

[2] Briefs presented for our consideration herein have brought to our attention a number of recent decisions on the subject of compensation rights of employees when injured on public streets at times when the employees were engaged upon personal errands. We think that we need not indulge in any new effort to state the effect of those decisions. The controversy sometimes turns on a question of the character of such personal errand as being incidental or not incidental to the subject of employment. For the purposes of the present decision, we will assume that the employee had departed from the duties of his employment, and that, if this accident had

occurred at some appreciable distance from the station, there would have been no right to compensation for his death. Therefore we assume also that the authority of the commission to award compensation in this case depends upon the existence of evidence sufficient to support the finding that at the time of the injury Leigh was upon the premises of his employment. After reading the evidence, we have formed the opinion that the evidence does sustain such finding; that is, it is sufficient to have warranted a decision that at the moment of occurrence of the injury the employee had arrived upon the premises, or was within an area constituting a part of the premises of his employment, and was there for the purpose of immediate resumption of his duties as conductor. From this it must follow that the injury and death arose out of and occurred in the course of the employment.

The award is affirmed.

We concur: HOUSER, J.; YORK, J.

* * *

137 Cal.App. 180

NORTH HOLLYWOOD MORTG. CO. v. NORTH AMERICAN BOND & MORTG. CO. et al.

Civ. 8956.

District Court of Appeal, First District, Division 1, California.

March 2, 1934.

1. Judgment 🔑581.

Where judgment of dismissal relied on as estoppel and bar to second action was reversed, any estoppel was thereby eliminated.

2. Judgment 🔑563(2).

Judgment entered on motion to dismiss and stipulation of material facts reached during colloquy between court and counsel *held* "judgment on merits" that plaintiff take nothing by his action.

[Ed. Note.—For other definitions of "Merits," see Words & Phrases.]

3. Judgment 🔑951(1).

Presumption is that judgment appealed from is valid.

4. Bills and notes 🔑384.

Mortgagor whose property was purchased at trustee's sale by assignee of holder in due course of note secured by trust deed could not, as alleged successor of corporation defrauded by officer making mortgage loan, set off against claim of such assignee, innocent of officer's fraud, claim against such officer, particularly where neither officer nor his estate was shown to be insolvent (Civ. Code, § 3139).

5. Pleading 🔑8(2).

Allegation that "plaintiff is reincorporation, reorganization or successor" of certain corporation as appeared from the following facts *held* conclusion from facts stated.

6. Corporations 🔑630(4).

In action by alleged successor of dissolved corporation, allegations failed to show that plaintiff was successor in interest with power to maintain action.

Allegations were that certain negotiations were carried on with a view to reorganization, but that they were never carried out. Plaintiff did not allege that at time of dissolution it owned any stock in dissolved corporation, but plaintiff's complaint showed that at all the times mentioned it was a separate corporate entity.

7. Corporations 🔑617(1), 625.

On dissolution of corporation its property passes to the stockholders, and only its trustees, or successors appointed by court in case of disqualification, may maintain action against officer who had defrauded corporation.

8. Corporations 🔑625.

Where alleged frauds on corporation by officer by means of secret profits, unlawful retirement of personal stock and misappropriation of corporate funds occurred in 1925, or between 1924 and corporation's dissolution in 1928, action not begun until 1931 by alleged corporate successor *held* barred by laches, absent showing that corporate books were not available to stockholders, or that audit disclosing facts could not have been made.

9. Bills and notes 🔑362.

Purchaser of note after maturity from holder before maturity in due course took note free from defenses against payee, where such purchaser was not party to payee's fraud (Civ. Code, § 3139).

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Suit by the North Hollywood Mortgage Company against the North American Bond & Mortgage Company and others. From a judgment dismissing plaintiff's action, plaintiff appeals.

Affirmed.

Wheeler & Wackerbarth and Henry E. Carter, all of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondent Widney Watson Bower.

Bryan, Button & Cummins, of Hollywood, for respondent North American Bond & Mortg. Co.

McNUTT, Justice pro tem.

This is an appeal by plaintiff from a judgment of dismissal of its suit entered by the superior court for the county of Los Angeles on motion of the defendants on the grounds: (a) That contentions of the plaintiff have already been adjudged adversely to it in an action in said court numbered 279048, wherein plaintiff herein was plaintiff, and defendants were said Henshey, Tatem et al., defendants herein, reference to further particulars being made to the judgment roll which is made part of the motion; (b) that the present action is frivolous; (c) that it is an imposition on the court; (d) that it is baseless; (e) that plaintiff shows no right to enforce any right or rights by the present action; (f) that it is vexatious; (g) that it is barred by laches and the statute of limitations; (h) that the court has inherent power independent of statute to dismiss it.

[1, 2] Said motion was also made "on what counsel has stated at the time said motion was made" (reporter's transcript, p. 39) and was based upon all the files and records in the action, including the notice of motion and judgment roll in the action adverted to. Since it appears that the judgment of the trial court in dismissing said action numbered 279048 was reversed by the District Court of Appeal (North Hollywood Mortgage Co. v. Henshey, 126 Cal. App. 411, 14 P.(2d) 842), the ground of estoppel by that judgment is eliminated as one of the bases for the motion to dismiss in the instant case. Since among the grounds upon which the judgment was entered was an agreement of material facts reached during the colloquy between and among counsel and court on the presentation below, said judgment is in effect one upon the merits that plaintiff take nothing by its action.

A chronological statement of salient facts taken from the pleadings and from the admitted facts, though they be not pleaded in such order, will give lucidity to plaintiff's legal theory as applied to such facts. In June, 1924, the B. F. Tatem Finance Corporation (hereinafter called the finance company) was organized; up to the year 1927 it was engaged in the business of automobile financing; B. F. Tatem, not joined as a defendant, would seem to have been its dominating genius. About October 15, 1925, Tatem commenced and in April, 1927, accomplished the first of his alleged iniquities upon the finance company by so operating a real estate deal with one Brokaw as to make for himself a secret profit of $45,196.29 at the time he was president and general manager of the finance company. On or about December 31, 1925, and while still president and general manager thereof, Tatem next secretly mulcted the finance company by, contrary to the order of the Corporation Commissioner, causing the retirement of 10,000 shares of its common stock and withdrawing $30,000 from the company as the consideration of said retirement; that between the date of its organization and its dissolution by judicial decree, December 28, 1928, Tatem perpetrated the third and last of his alleged depredations upon the finance company by misappropriating $27,785 and converting same to his own use. Assuming that Tatem operating either through a biddable board of directors, or secretly, thus possessed himself of corporate assets, it is familiar law that there arose a series of causes of action in the aggrieved corporation to be asserted by that corporation at the instance of its board of directors; by a suit on its behalf by its stockholders as its representatives, where the board had refused to act; in the trustees on dissolution, or in "the reincorporation, reorganization or successor of the B. F. Tatem Finance Corporation," as plaintiff claims to be.

Now plaintiff enters. It is alleged that it is and at all of the times in the complaint mentioned was a California corporation with its place of business in Los Angeles; that it is and during all of the times (except as otherwise alleged) was the owner of a certain piece of land; that on February 9, 1928, it executed its promissory note for $40,000 payable on or before a year from date bearing interest at 7 per cent.—with an acceleration clause. Said note was payable to defendant Henshey; the full consideration therefor was received from Tatem; on said date plaintiff executed a deed of trust on said land and delivered it to defendant North American Bond & Mortgage Company as trustee for defendant Henshey, as beneficiary. Henshey indorsed the note to Tatem, who indorsed it to a bank before maturity and for a valuable consideration; after maturity the said bank reindorsed it to Tatem, "who at the same time and as a part of the same transaction indorsed it to defendant Bower."

That prior to October 30, 1930, Bower, as owner and holder of this secured note, delivered to the said North American Bond & Mortgage Company, trustee, an election to declare a default, properly thereafter recorded, and the trustee caused notice of sale to be published; sale to take place February 25, 1931.

The complaint herein was filed February 24, 1931. No restraint pendente was sought, so that on the hearing of the motion to dismiss August 3, 1931, the sale had taken place and the property had been bought in by Bower for the amount due under the note so secured by the deed of trust.

During the discussion in the court below precipitated by the motion to dismiss, attention of plaintiff's counsel was drawn to the futility of seeking to enjoin a sale which had taken place; he thereupon said, "We are going to set it up in a supplemental complaint," referring to an attack upon "the document which arose after this litigation was filed." (Reporter's transcript, p. 25.) Application for leave so to do was not asked, and none was proffered, none was filed, but the motion was made on the "points set forth in your written pleadings and filed here," also the admissions and statements made by counsel in open court.

Tatem had meanwhile died. Neither he nor his representative was a party to the action, and there is no allegation that he was, or his estate is, insolvent. Plaintiff, it may be observed, received its full $40,000 for the note; it makes no offer to return it or to do equity, and it was stipulated that no defendant was a participant in any fraud committed by Tatem, none of whose alleged frauds tainted the said note.

[3, 4] Plaintiff's theory seems to be that it has succeeded to the finance company's right of redress against Tatem on account of sums of money that he illegally took from it; and that since they vastly overtop in amount the claim of Tatem's assignee defendant Bower against the plaintiff, the latter may seek an accounting of Tatem, charge Bower with the results, and offset Bower's claim on the $40,000 note by Tatem's peculations. This argument is grounded upon the erroneous assumption that Bower stood before the court below as an actor, plaintiff, or suitor, seeking the aid of a court to foreclose or otherwise realize upon or reduce to a liquidated amount the said claim against plaintiff at bar, whereas Bower occupied no such position. The trustor (plaintiff) named defendant bank trustee for Bower (or his assignor); Bower caused the property to be sold and bought it in, no attempt having been made by plaintiff to stop him. The facts here render inapplicable the case upon which in respect to compensating demands plaintiff places reliance, namely, Ripley Improvement Co. v. Hellman Commercial Trust & Savings Bank, 90 Cal. App. 83, 265 P. 835. There the bank held a trust deed and note secured thereby, executed by plaintiff. The bank also held a sum of money which it had previously wrongfully exacted from plaintiff. The suit was brought to compel the bank to apply so much of said money as was necessary to extinguish the trust deed note. In the present case Bower is not alleged to have anything of plaintiff's which could be applied upon its $40,000 note. All intendments support the validity of the judgment below, and since the judgment was avowedly based upon all the propositions advanced as grounds for dismissal, this court cannot say that the grounds of laches, the statute of limitations, that plaintiff's complaint states no cause of action against the defendant, and that defendant Bower was a holder in due course, were not adequate to support the judgment without regard to the failure of the ground of estoppel by judgment to support the same. It is thus apparent that there is no equity in plaintiff's bill, and no showing is made why its remedy at law against Tatem was not adequate.

Plaintiff asserts that the manner of its succession to the rights of the finance corporation to sue Tatem, or putting it in another way, to any right which the latter company had against Tatem or through him against Bower, appears by virtue of the allegations of paragraph XI of its complaint. Admittedly, then, its entire case (other bases of the judgment of dismissal aside) stands or falls with the sufficiency of the facts pleaded in paragraph XI to carry any cause of action into it from the finance corporation.

[5-7] From paragraph XI we quote briefly: "That the plaintiff herein is the reincorporation, reorganization or successor of the B. F. Tatem Finance Corporation, as will appear from the following facts." The last qualifying clause renders the opening clause thereof but a mere conclusion. Limitations of space prevent a complete analysis of the contents of this paragraph XI, but it may be generally observed that, instead of containing recitals of things that had occurred to warrant the deduction that plaintiff was the reincorporation, reorganization, or successor of Tatem Finance

Corporation, the complaint contains recitals of suggestions that were made and embodied in the form of various resolutions looking towards the accomplishment of such purpose but which it cannot be said from any allegation of fact ever fructified. Certain recommendations were made at the instance of Tatem to the stockholders by the board of directors, but they were not carried out. For example, there is no allegation that plaintiff owned any stock in the finance company at the date of the latter's dissolution December 28, 1928 (subparagraph 9 of paragraph XI of the complaint) or at any time after November 3, 1928. The present action was not commenced until February 24, 1931. Of course, on dissolution of the finance company, the title to its property passed to the persons who were its stockholders at the time of dissolution. 7 Cal. Jur. pp. 170 and 171. After dissolution its trustees are the only persons who may prosecute an action to recover damages arising from fraudulent misappropriations and acts by which the corporation was defrauded. 7 Cal. Jur. p. 174; and if these trustees were disqualified to act the court upon application of a stockholder or creditor might appoint new trustees. The effect of the dissolution of a corporation is to terminate its existence. 7 Cal. Jur. 137. The complaint further alleges that the plaintiff corporation was at all times in the complaint mentioned a corporation organized and existing under the laws of the state of California, so that it had been a corporate entity at least all the time that the finance company had had such character up to the date of the latter's dissolution. The only thing that would seem to have passed from the Tatem Finance Company to the plaintiff were two pieces of real property. In brief, there are no allegations adapted to show reorganization, reincorporation, or successorship in interest. There is no allegation in the complaint that plaintiff at the time of the commencement of this action was a stockholder of the finance company.

[8] As equity withholds its aid from those who sleep upon their rights (if they have any), matters pertinent to its failure to have proceeded in a timely manner will be noticed. It is alleged upon information and belief that during the months of October, November, and December, 1925, and January, 1926, and at the time when the transactions were in the making whereby Tatem took his first profits in the Brokaw real estate deal, that Tatem was in full and complete charge of the business and affairs of the finance company, and that its board of directors were under his domination. There is no allegation that its books were not available at all of said times to the stockholders, nor is any fact alleged why the audit of the books which is said to have been made in May, 1929, might not have been made at an earlier date. It is further alleged that until the year 1929 Tatem concealed from the finance company and from plaintiff the fact that he had made this secret profit of $45,196.29. The manner of concealment is not alleged nor is any fact disclosing the manner of discovery, much less why the discovery might not have been made at an earlier date. For aught that appears in the complaint, Tatem continued in the above relationship to the finance company up to and during the time of the discovery of the alleged peculations and was one of the trustees appointed on dissolution of the finance company by judicial decree, December 28, 1928. At all events the instant suit was not filed until the 24th of February, 1931, and no effort is made to account for its not having been filed sooner.

The same reasoning applies to the second and third alleged causes of action so far as regards laches. The second cause of action arose in December, 1925, and was discovered by accountants in May, 1929. The third cause of action, namely, that of misappropriation of $27,785 by Tatem, is said to have arisen some time between the dates of organization and dissolution, respectively, of the finance corporation; its discovery by plaintiff being assigned to the month of May or June, 1929. We repeat that for aught that appears in this complaint, Tatem was just as much the dominating genius of the finance company and/or the plaintiff its alleged successor at the time the audit was made as he was earlier, and therefore plaintiff has not met the necessity of alleging facts to show that its discovery of Tatem's alleged frauds could not have been made at an earlier date.

[9] Apart from any other defense available to Bower, she being a purchaser after maturity of a note negotiated before maturity to a holder in due course, she stood in the shoes of said holder and not in the shoes of the original payee. Therefore, plaintiff could not assert against her the cause of action, assuming it to inhere in plaintiff, sought to be offset by its suit. Section 3139, Civil Code, provides: "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud

or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

The fact that Bower took from the bank through Tatem is of no significance to the contrary, because it is admitted that Tatem was not nor was anybody a party to any fraud or illegality affecting the instrument, as the $40,000 note was not tainted by any fraud whatever; the corporation plaintiff having received the full $40,000 consideration upon the issuance thereof.

The judgment therefore should be, and accordingly is, affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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137 Cal.App. 135

PETERS et al. v. BIGELOW et al.

Civ. 4982.

District Court of Appeal, Third District, California.

Feb. 27, 1934.

Rehearing Denied March 29, 1934.

Hearing Denied by Supreme Court April 26, 1934.

1. False Imprisonment 🔑20(1).

Complaint alleging that defendants imprisoned plaintiffs in county jail without probable cause or authority and against their will *held* not insufficient because failing to allege that imprisonment was unlawful.

2. False Imprisonment 🔑19.

Two individuals whom defendants arrested at same time and place could join as plaintiffs in one action for false imprisonment and could join their causes of action in same complaint (Code Civ. Proc. § 378, as amended by St. 1927, p. 631, and § 427, as amended by St. 1931, p. 396).

3. Statutes 🔑158.

Courts do not favor implied repeals of statutes.

4. Statutes 🔑158.

Presumption exists that Legislature did not intend to impliedly repeal statute by enacting subsequent statute if by reasonable construction effect can be given to both statutes.

Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Action by David Peters and another against W. R. Bigelow and others. From a judgment of dismissal, plaintiffs appeal.

Reversed and remanded.

Henderson, Henderson & Carey, of San Francisco, for appellants.

H. R. Given and C. A. Paulsen, both of Weaverville, and Carr & Kennedy, of Redding, for respondents.

HELD, Justice pro tem., delivered the opinion of the court.

The plaintiffs herein are David Peters and William Peters. The amended complaint contains two counts. In the first count, plaintiff David Peters alleges that on the 18th day of June, 1931, at or near Salyer, in the county of Trinity, the defendants by force compelled him to go to the town of Weaverville, and that said defendants did then and there imprison him in the county jail of Trinity county, and detain him therein and restrain him of his liberty for a period of approximately seven days, without probable cause, and without any right or authority so to do, and against his will. Compensatory damages in the sum of $15,000 and punitive damages in the sum of $5,000 are alleged. The second count is substantially a repetition of the first count, with the exception that, where the name of plaintiff David Peters appears in the first count, there is substituted in the second count the name of William Peters. It is also alleged in the second count that the acts complained of by David Peters in the first cause of action "are the same acts complained of herein by plaintiff William Peters in this cause of action, and the times, places and persons present alleged in this cause of action are the same as those alleged in the first cause of action herein."

Defendants interposed a demurrer to the amended complaint. The demurrer is a general one as to each count of the amended complaint, and also on the grounds of misjoinder of parties, and misjoinder of causes of action. Thereupon, the court made its order sustaining defendants' demurrer to the amended complaint, without leave to amend. This order was entered in the minutes of the court on the 25th day of August, 1932, and judgment dismissing the action was entered on May 12, 1933. The plaintiffs appeal on the judgment roll.

[1] In support of the general demurrer, defendants argue that the amended complaint fails to show that the arrest of plaintiffs was

unlawful. While the position of plaintiffs does not clearly appear from their brief, it is apparent that their contention must be that, having shown the arrest, the burden is on defendants to show justification. In People v. McGrew, 77 Cal. 570, 20 P. 92, 93, it is held that, plaintiff having shown the imprisonment, "it devolves upon the defendant to prove that he was justified in what he did, and that the imprisonment was lawful." In Mackie v. Ambassador Hotel & Inv. Corp., 123 Cal. App. 215, 11 P.(2d) 3, 6, the court says: "The arrest being shown, the burden was on the person or persons making the arrest to show justification therefor." To the same effect are: Sebring v. Harris, 20 Cal. App. 58, 128 P. 7, and Ah Fong v. Sternes, 79 Cal. 32, 21 P. 381. In the latter case the court says: "The allegation that the plaintiff was 'confined and restrained of his liberty by the defendant' is an allegation of physical and bodily restraint, which would serve as a foundation for the old action of trespass vi et armis. In such an action it is not necessary to aver * * * that the imprisonment was * * * unlawful. * * * If matter of justification exists, it must be pleaded by the defendant."

This latter case was approved by the Supreme Court in Monk v. Ehret, 192 Cal. 189, 219 P. 452, 453, wherein it is said: "We are satisfied that the complaint states a cause of action for false imprisonment. It is not necessary to allege that the imprisonment was unlawful."

Defendants rely on the case of Evans v. Wixon, 38 Cal. App. 542, 176 P. 873, which is one of the cases cited in a note to 25 Corpus Juris, page 532, in support of the text that "a plaintiff in an action for false imprisonment must aver that the detention or imprisonment was wrongful or unlawful." Other cases cited are Donati v. Righetti, 9 Cal. App. 45, 97 P. 1128, and Davis v. Pacific Tel. & Teleg. Co., 127 Cal. 312, 57 P. 764, 765, 59 P. 698. The same note refers to Ah Fong v. Sternes, supra, as containing a statement, obiter dictum, that such allegations are not essential. But Ah Fong v. Sternes is followed by the Supreme Court in Monk v. Ehret, supra, wherein it is also held that the statement in Davis v. Pacific Tel. & Teleg. Co., supra, that, "in order for the complaint to state a cause of action [for false imprisonment], it would have to show that the defendant unlawfully arrested the plaintiff without legal authority," is obiter dicta, and the doctrine of Ah Fong v. Sternes, supra, is expressly reaffirmed.

Defendants rely also upon the case of Burlingame v. Traeger, 101 Cal. App. 365, 281 P. 1051.

An examination of the authorities will reveal that, in those cases where it was held that a necessary allegation in the complaint was one setting forth that the imprisonment was unlawful, the arrest was made pursuant to process, allegedly invalid. On the other hand, in those cases (except People v. McGrew, supra, which was a criminal case), where it was held that a mere allegation of imprisonment was sufficient, the arrest was made without process. The rule would seem to be that, where without process an arrest is made, it is not necessary to allege that such arrest was unlawful; while, if process was employed, the facts constituting the invalidity thereof must be set forth. In other words, if the act complained of is one, the mere stating of which constitutes a trespass, it is manifestly illegal. This distinction is pointed out by this court in McAlmond v. Trippel, 93 Cal. App. 584, 269 P. 937, 938, where is quoted with approval from Culver v. Burnside et al., 43 S. D. 398, 179 N. W. 490 the following: "The action for false imprisonment is frequently alleged to have been committed by reason of some wrongful arrest under some pretended or void order of some court, in which class of false imprisonment cases it is incumbent on the plaintiff to allege facts showing or tending to show that such arrest, under such court procedure, was wrongful, unauthorized, and without any probable cause; but in a cause of action alleged as the one at bar there may have been no court procedure at all, and under such a complaint it is incumbent on the defendants, if they acted under lawful court procedure, to affirmatively allege and prove such facts as justification."

In Foerst v. Hobro, 125 Cal. App. 479, 13 P.(2d) 1055, 1056, cited by defendants, the distinction is recognized. It is there said that: "Where, as here, it affirmatively appears from the complaint that the alleged wrongful detention is pursuant to judicial proceedings, facts must be stated showing that such proceedings were defective."

In McAlmond v. Trippel, supra, the allegation of the complaint is set forth at page 587 of 93 Cal. App., 269 P. 937, 938, as follows: That the defendants "without legal authority of any kind whatsoever, * * * arrested and imprisoned the said plaintiff." And this court there quoted approvingly from Culver v. Burnside, supra, as follows: "We are of the view that a complaint which states, in substance, that the defendants, at a specified time and place, unlawfully and maliciously detained plaintiff and restrained him of his liberty for the space of one hour without any right or authority so to do, and against his will, states a cause of action which is not subject to general demurrer."

The amended complaint here alleges the imprisonment of plaintiffs in the county jail, and their detention and restraint there for a period of approximately seven days, without any right or authority, and against their will. This is such a trespass upon the rights of plaintiffs as calls upon defendants to show a justification therefor. The amended complaint, therefore, states facts sufficient to constitute a cause of action in favor of each plaintiff and against defendants.

[2] Defendants urge also as grounds of demurrer that a cause of action in favor of plaintiff David Peters is improperly joined with one in favor of plaintiff William Peters, and also that there is a misjoinder of parties plaintiff. The joinder of parties and of causes of action are questions so inextricably interwoven that these grounds of demurrer must necessarily be considered together.

Section 378, Code of Civil Procedure, permits a joinder of plaintiffs in one action, where the relief sought arises out of the same transaction, whether jointly or severally, where, if separate actions had been brought, any question of law or fact would arise which is common to all the parties. A similar provision obtains under rules of court in England and in Canada, and it has been held that in such cases there are two conditions to be satisfied: First, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction; and secondly, that there should be a common question of fact or law; and provisions of this character have been held to apply to actions for tort. 47 Cor. Jur., p. 59, § 119.

In Colla v. U-Drive Autos, Inc., 111 Cal. App. (Supp.) 784, 294 P. 378, five individuals, each of whom suffered personal injuries in the same accident, were held properly joined as plaintiffs in the same action, and permitted to recover the damages severally suffered by each. In this case, two individuals, David Peters and William Peters, by separate counts seek to recover for damages suffered by each alone by acts of defendants complained of. It sufficiently appears that the defendants committed such acts at the same time and place and with the same persons present. The arrest of both, it clearly appears, was one transaction, within the meaning of that word. The same witnesses would no doubt be called as to both counts, and there would be a question of fact common to both. Without doubt, section 378, Code of Civil Procedure, clearly covers this case, and both plaintiffs are proper parties to the action.

[3, 4] The question then arises whether, in a case where two plaintiffs may be joined as parties, they still may not join their causes of action in the same complaint. If this be so, it could only arise from the language in section 427, Code of Civil Procedure, which requires that "the causes of action so united * * * must affect all the parties to the action." Obviously, William Peters is not affected by the cause of action alleged to exist in favor of David Peters, nor is the latter affected by the cause of action alleged to exist in favor of William Peters. Section 378, Code of Civil Procedure, was amended into its present form in 1927 (St. 1927, p. 631). Section 427 at that time contained the requirement that the causes of action united must affect all the parties to the action. It is plain that it was the intention of the Legislature in amending section 378 in 1927 to except from the requirements of section 427 those cases coming within the provisions of section 378. To hold otherwise would give no effect whatever to the amendment of 1927 to section 378. Nor did the amendment of 1931 to section 427 (St. 1931, p. 396), relating to cases of conspiracy alone, serve to reenact the requirement now in that section that the causes of action must affect all parties to the action. Pol. Code, § 325. This requirement being an unamended part of the section is deemed not to have been changed, but to retain the status it occupied prior to the amendment. City of Los Angeles v. Lelande, 11 Cal. App. 302, 104 P. 717. Otherwise, the 1931 amendment to section 427 must be held to have impliedly repealed section 378. And implied repeals are not favored. It will be presumed that the Legislature did not intend such a repeal, if by a fair and reasonable construction effect can be given to both sections. 23 Cal. Jur. 694.

While the rule that causes of action where they do not affect the same parties may not be properly united was at one time strictly adhered to (Johnson v. Kirby, 65 Cal. 488, 4 P. 458), this court prior to the amendment of section 378 into its present form, and the enactment of sections 379a, 379b, and 379c (added by St. 1927, pp. 477, 478, 631), relaxed the rule to permit the joinder of a cause of action affecting all the parties with another cause of action which affected only some of them (Hepler v. Wright, 35 Cal. App. 567, 170 P. 667). And this decision was approved by the Supreme Court in Joerger v. Pacific Gas & Electric Co., 207 Cal. 8, 276 P. 1017, 1023. There it was said: "One of the objects of the reformed or code procedure is to simplify the pleadings and conduct of actions, and to permit the settlement of all matters of controversy between parties in one action, so far as may be practicable."

To the same effect are Nelson v. Marsh, 100 Cal. App. 582, 280 P. 695; Adams v. Southern Pacific Co., 109 Cal. App. 731, 293 P. 681; McPhetridge v. Smith, 101 Cal. App. 141, 281 P. 419, and Teeter v. Los Angeles, 209 Cal. 689, 290 P. 11.

The two causes of action set forth in the amended complaint are, therefore, properly joined in one complaint.

Inasmuch as the demurrer was improperly sustained, it is not necessary to pass upon the question whether the lower court abused its discretion in failing to allow plaintiff to further amend. It would seem, however, that such abuse of discretion could not be predicated upon the action of the court where leave was not asked. There can be no refusal, where there was no request made, that could be refused. Haddad v. McDowell, 213 Cal. 690, 3 P.(2d) 550.

The judgment is reversed, and the cause is remanded for further proceedings in accordance herewith.

We concur: PULLEN, P. J.; PLUMMER, J.

HENDRICKSEN et al. v. STATE SUBSIDIARY, Limited. *

Civ. 4948.

District Court of Appeal, Third District, California.

March 1, 1934.

Rehearing Granted March 31, 1934.

Hearing Denied by Supreme Court April 30, 1934.

1. Chattel mortgages 🔑139.

Grantee of ranch, including live stock thereon, permitting grantor, who was grantee's agent, to continue in possession, *held* estopped to claim ownership of live stock as against subsequent mortgagee under unrecorded chattel mortgage relying on grantor's possession and on examination of records which failed to show conveyance of personalty (Civ. Code, § 3543).

2. Chattel mortgages 🔑139.

Antecedent indebtedness, consisting of matured note and mortgage, *held* valuable consideration for chattel mortgage given as additional security, within protection of equitable doctrine of bona fide purchase, though there was no agreement as to extension of time for payment of original obligation.

3. Estoppel 🔑107, 110.

Party must plead estoppel on which his cause of action or defense depends unless he is without knowledge that his claim must ultimately rest on estoppel.

4. Chattel mortgages 🔑84.

Chattel mortgage, though not recorded nor executed in accordance with statutory formalities, *held* valid obligation as between parties (Civ. Code, § 2959).

5. Chattel mortgages 🔑139.
Fraudulent conveyances 🔑147(2).

Mere transfer of ownership of land on which personalty is located is not sufficient to constitute change of possession of personal property sold, as respects rights of subsequent purchaser or mortgagee of such personalty under doctrine of estoppel (Civ. Code, § 3543).

6. Chattel mortgages 🔑229(1).

Mortgagees suing to recover possession of mortgaged live stock and increase thereof or their value and damages for withholding thereof were entitled to possession or value as of date of trial, and not as of date of judgment.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by W. A. Hendricksen and another against the State Subsidiary, Limited. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Barbour, Kellas & Backlund, of Fresno, for appellant.

G. L. Aynesworth, J. K. Tuttle, and Ben H. Johnson, all of Fresno, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought by plaintiffs as mortgagees to recover possession of certain hogs and sheep and the increase thereof, or

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 45 P.2d 190.

their value together with damages for the withholding thereof by defendant, who claims possession by virtue of ownership.

Plaintiffs took possession of the property at the commencement of the action and retained possession until some time after the trial, when, pursuant to stipulation, the property was sold and the proceeds therefrom substituted pending the final determination of the respective rights of the parties therein.

Judgment was entered in favor of plaintiffs for the value of the property, and from that judgment defendant now prosecutes this appeal.

Briefly the facts are that Fred B. Fox was the owner of a certain fruit and stock ranch in Madera county, commonly known as the Fox or River ranch. For many years Fox had been a representative of an affiliate company of defendant, and as such made and collected its loans and on its account bought and sold properties. In August, 1930, an accounting was had between Fox and his employer and it then developed that Fox was indebted in a considerable amount to his company. By agreement this liability was liquidated by Fox conveying to defendant certain of his property including the Fox or River ranch, together with the personal property thereon. Defendant claims that immediately upon the execution of the deed it took over the management and possession of the ranch and the live stock thereon. In this regard, however, the court found there was no actual or continued change of possession of the personal property from Fox to the defendant. The defendant retained Fox on its pay roll, granting him the exclusive right to sell on commission any real estate in the San Joaquin valley belonging to defendant, of which it wished to dispose, and also the duty of supervising its various properties, including the ranch here in question. Apparently no change was made after the sale from Fox to defendant in the outward management of the ranch. It was operated by the same foreman and continued to be known as the Fox ranch and seemingly in every way was carried on as formerly. It is true that Fox did not reside on the ranch, but neither had he prior to the transfer, but continued to visit the property and oversee its operations and bought and sold its products and supplies as he had while title vested in him.

In May of 1931, Fox took plaintiff to the ranch and exhibited to him the live stock on the ranch, claiming to be the owner thereof and executed the chattel mortgage here involved, as further security for a deed of trust then matured in the sum of $5,000. Plaintiff caused the records of the personal property transfers of Madera county to be examined, but found nothing of record except a chattel mortgage from Fox to Drew, which Fox caused to be paid off from proceeds from the ranch. Nothing pertaining to any rights of defendant in the stock was found of record, and upon inquiry both Fox and his foreman stated the property proposed to be included in the mortgage, consisting of certain sheep and hogs, belonged to Fox. This note and chattel mortgage not being paid at maturity plaintiff demanded payment thereof or possession of the live stock. This demand was apparently the first intimation to defendant that Fox had mortgaged the property as his own. Possession being refused, plaintiff commenced this action and no undertaking to retain possession being filed, plaintiff took the property which was later sold under stipulation as hereinbefore mentioned.

[1] The action was tried upon the theory that where one of two innocent purchasers must suffer through the act or negligence of a third person, the loss shall fall upon the one who by his conduct created the conditions which enabled the third party to perpetrate the wrong or cause the loss. Civ. Code, § 3543. In other words, the defendant herein was estopped to dispute the claim of plaintiff. As is set forth in the case of Western States Acceptance Corporation v. Bank of Italy, 104 Cal. App. 19, 285 P. 340, 341: "It is well settled in this state that if personal property is delivered to a buyer who is engaged in the business of selling property of the same kind and, with knowledge of the seller, is placed on display for sale with such other property, the holder of the reserved title is estopped to assert it as against a bona fide subvendee for value. In such a case the rights of the innocent subvendee do not depend upon the actual title or authority of the party with whom he deals directly, but are derived from the act of the real owner, which precludes such owner from disputing, as against the innocent party, the existence of the title or power which, through negligence or mistaken confidence, he has caused or allowed to be vested in the party making the sale. Pacific Finance Corp. v. Hendley, 103 Cal. App. 335, 284 P. 736 [285 P. 1048]."

So, also, does the case of Schumann-Heink & Co. v. U. S. National Bank, 108 Cal. App. 223, 291 P. 684, 686, 292 P. 547, support the contention of plaintiff. In that case the plaintiff, a corporation, engaged in buying and selling securities, furnished money to one Clare, secretary-treasurer of the corporation, for the purpose of buying certificates for the benefit of plaintiff, which were issued in the name of Clare. Clare subsequently represented these certificates to be his own personal property and pledged them with defendant as security for a past-due personal note of Schumann-Heink & Co. held by defendant. The plaintiff sought damages against defendant for the conversion of the stock, claiming to be the owner thereof at the date of the pledge. The trial court found plaintiff was the owner of the stock at all times from and after its purchase to date of sale. The appellate court, reviewing the issues, said:

"In our view, when what is really incidental is eliminated, there are two questions and only two to be here decided: First, whether, taking the case as a whole, appellant's conduct has been such as to subordinate its rights in the stock to those of a bona fide pledgee in the ordinary course of business, without notice of its claims, and for value; and, second, whether respondent was such a holder for value. It is, of course, the rule, with certain exceptions that do not here concern us, that a mere thief can pass no title to that which he has stolen. The same thing is not necessarily true where he who wrongfully undertakes to deal with property has been, by the act or neglect of the true owner, clothed with the indicia of ownership. The law is, generally, that 'where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer.' Civ. Code, § 3543. In National Safe Deposit & Trust Co. v. Hibbs, 229 U. S. 391, 57 L. Ed. 1241, 33 S. Ct. 818, 820, it was said:

" 'The qualification of the rule, as not applying when the instrument is stolen, is not based upon the name of the agent's crime, but upon the fact that, in the ordinary and typical case of theft, the owner has not intrusted the agent with the document, and therefore is not considered to have done enough to be estopped as against a purchaser in good faith. He certainly has not done enough if the estoppel is based upon the principle that when one of two innocent persons is to suffer, the sufferer should be the one whose confidence put into the hands of the wrongdoer the means of doing the wrong. But in a case like the present, the agent has been intrusted with the converted property, and it is totally immaterial whether, by a stretch which extends largely beyond the true field of trespass, his wrong has been brought within the criminal law or not. The ground of the estoppel is present and the estoppel arises. The distinction is not new.' "

Where as here the respondent bases his claim upon his belief that a man with whom he dealt was the owner of the property at the time of the mortgage, the case last cited holds: "Where the bona fide recipient of the property, in due course, and for value, grounds his claim to retain it, not on the apparent representation by the agent of the true owner, but rather claims estoppel of the latter to insist on his ownership because he has intrusted the property to the agent to enable the agent to deal with it for him, and thereby placed the agent in a position to deceive third persons as to its ownership, then, on proof of that, he has made out his case, regardless of whether he has known anything about the relation of the principal to the transaction or not."

Not only does respondent claim estoppel by statements made by Fox, but also upon the surrounding circumstances and incidents of possession and ownership which appellant sanctioned and allowed to exist, which would, as the record discloses, have led a reasonably prudent man to believe Fox was the owner of the live stock mortgaged.

[2] It is urged by appellant that there was no consideration for the note and the chattel mortgage in question, in that it was given as additional security for a note and mortgage then due, with no agreement as to an extension of time for payment of the original obligation, and therefore plaintiffs gave up no rights in acquiring the chattel mortgage and were not injured or prejudiced by relying upon the representations of Fox. It is, however, well established that an antecedent indebtedness constitutes not only a valuable consideration for a transfer in satisfaction and discharge of an indebtedness, but is also a valuable consideration, within the protection of the equitable doctrine of bona fide purchase, for a transfer merely as security for a pre-existing debt. 2 Pomeroy's Equity Jurisprudence (4th Ed.) § 749; Schumann-Heink & Co. v. U. S. National Bank, supra.

[3] Appellant also claims that plaintiffs, knowing their claim must ultimately rest upon estoppel, should have pleaded it in the first instance. While it is the general rule that a party, who has an opportunity to plead an estoppel upon which his cause of action or defense depends, must do so, nevertheless if the party in whose favor the estoppel exists is without knowledge that his claim must ultimately rest upon it, he is then excepted from the rule.

"Since under simplified procedure the plaintiff's pleadings begin and end with a complaint, he may without pleading interpose evidence of an estoppel to overcome any affirmative matter set up in the answer. As he is not advised of the defense that may be pleaded, he is not required to plead the estoppel in the first instance." 10 Cal. Jur. 655. It does not necessarily appear from the record here before us that plaintiffs knew their cause of action would depend upon an estoppel.

[4] Appellant also urges that as the chattel mortgage here in question was not recorded in accordance with the provisions of section 2959 of the Civil Code, it is void as against any creditor or subsequent innocent transferee or mortgagee of the property. There can be no doubt that even if the chattel mortgage were not recorded nor executed in accordance with the formalities of the statute, it still was a valid and existing obligation as between the parties, and the court was not in error in refusing to sustain the objection to the chattel mortgage at the time of its introduction, and defendant is not in a position to urge the objection at this time. Washington Lumber & Millwork Co., a corporation, v. McGuire, 213 Cal. 13, 1 P.(2d) 437.

[5] The appellant claims that the finding of the court in regard to the possession of the live stock involved is conflicting and not supported by the evidence, but as was said in Bunting v. Saltz, 84 Cal. 168, 24 P. 167, 169: "The possession which the law requires the vendee to have after a transfer to him of personal property is not sufficient if it amounts simply to constructive possession, or the mere possession which the law attaches to the ownership of land. Therefore, if the personal property so sold is located on land to which the vendee obtains a title then or thereafter, the mere transfer of ownership of the land is not sufficient to constitute a change of possession of the personal property so sold. The possession of the personal property must be in some way so changed as to indicate by the change that the former owner no longer owns it." Mosgrove v. Harris, 94 Cal. 162, 29 P. 490.

Appellant also insists that the judgment is not supported by the evidence or the findings, but without setting forth the testimony to support the conclusions, we are of the opinion that this contention is without merit. Neither do we find that the court committed error in its rulings upon the admission of evidence, it being clear that the court awarded to plaintiffs the value of the property as of the commencement of the action; and the property having been sold in accordance with the stipulation, a judgment for its return would have been an idle act. 5 Cal. Jur. 201; Financial Insurance Corp. v. Brockton, 96 Cal. App. 179, 273 P. 829; Egan v. Parks, 111 Cal. App. 415, 295 P. 866; Peterson v. First National Bank, 101 Cal. App. 532, 281 P. 1104.

[6] Appellant claims that respondents having possession of the personal property before judgment the court should have omitted any order as to value; but this cannot be, for respondents were entitled to possession or the value as of the date of trial, and not as of the date of judgment. Nelson v. Yonge, 73 Cal. App. 704, 239 P. 67. Here almost a year intervened between the trial and judgment and it is conceivable that the values may have changed in that time.

The judgment of the trial court is affirmed.

We concur: PLUMMER, J.; THOMPSON, J.

220 Cal. 271

HAWLEY v. RECLAMATION DIST. NO. 730 (SNOWBALL et al., Interveners).

H. W. MEEK ESTATE, Inc., v. SAME.

RIVER FARMS CO. OF CALIFORNIA v. SAME.

KNIGHTS LANDING RIDGE DRAINAGE DIST. v. SAME.

Sac. 4737–4740.

Supreme Court of California.
March 1, 1934.

Rehearing Granted in 4740 March 29, 1934.

1. Levees and flood control 🔑25.

In actions against reclamation district to cancel assessments, superior court had jurisdiction (Pol. Code, § 3456).

2. Levees and flood control 🔑25.

Benefits from reclamation works are fact questions to be determined first by reclamation district and then by trial court (Pol. Code, § 3456).

3. Levees and flood control 🔑25.

In actions against reclamation district to cancel assessments, court in determining benefits and proper apportionment of assessments acted in judicial, not legislative, capacity (Pol. Code, § 3456).

4. Levees and flood control 🔑25.

In actions against reclamation district to cancel assessments, court could reduce assessments to correspond with benefits and annul excess, as against objection that court reapportioned assessments (Pol. Code, § 3456).

5. Levees and flood control 🔑25.

Reapportionment of old or levy of new assessment must be made by reclamation district, not court (Pol. Code, §§ 3456, 3466½).

6. Levees and flood control 🔑25.

In levying assessment according to benefits from reclamation works, existing conditions of land at time of assessment should be considered (Pol. Code, § 3456).

7. Levees and flood control 🔑22.

Benefits from reclamation works should be measured by degree of protection against floods (Pol. Code, § 3456).

8. Levees and flood control 🔑22.

Benefits from reclamation works are only those springing from system of works for which assessment is levied (Pol. Code, § 3456).

9. Levees and flood control 🔑25.

In determining benefits accruing from river levee to landowners within reclamation district situated within drainage district, fact that drainage district's canal, with levees, lay between western landowners and river, *held* properly considered in levying most of assessment against eastern landowners (Pol. Code, § 3456).

In Bank.

Appeals from Superior Court, Yolo County; J. O. Moncur, Judge.

Four separate actions by Stuart S. Hawley, by H. W. Meek Estate, Incorporated, by the River Farms Company of California, and by the Knights Landing Ridge Drainage District, against Reclamation District No. 730, were consolidated, and in each case Emma Snowball and others intervened. Judgments for plaintiffs, and the interveners appeal.

Affirmed in part and reversed in part.

Devlin & Devlin & Diepenbrock and H. B. Wulff, all of Sacramento, for appellants.

Arthur C. Huston, Jr., Stephen W. Downey, Downey, Brand & Seymour, and Frederic R. Pierce, all of Sacramento, and Rutledge & Rutledge, of Colusa, for respondents.

WASTE, Chief Justice.

Reclamation District No. 730, one of the defendants in these consolidated cases, was organized in 1902 under the provisions of the Political Code applicable to the formation of reclamation districts (section 3446 et seq.). In 1907, an assessment (the first) was levied under a plan which called for the "raising" of a levee along the Sacramento river which apparently was in existence when the district was formed. In 1909, a new (second) assessment was spread under plans for securing additional rights of way for the district's levee system, to further raise the river levee, and to provide for a district drainage system.

Thereafter, in 1911, the Sacramento Valley flood control plan was adopted (St. 1911, Ex. Sess., c. 25, p. 117). Pursuant to, and as a component part of, this comprehensive plan, the Knights Landing Ridge Drainage District was formed for the purpose of constructing a canal or cut to carry overflow, drainage, and "run-off" waters from Colusa basin, on the north, through and over the territory embraced in Reclamation District No. 730, to the Yolo by-pass, on the south. The drainage district embraces within its borders Reclamation District No. 730 and other territory, none of which lands could be successfully reclaimed without the construction of the canal. Its construction, to which the Reclamation District No. 730 gave consent, divided that dis-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

trict into two approximately equal parts, the easterly unit lying between the canal and the levees along the Sacramento river. The lands of these plaintiffs are situated in the westerly unit of the reclamation district. The canal, or cut, is a surface canal of sufficient proportions to give it a capacity of 20,000 cubic feet per second, and is protected by a levee of substantial construction and dimensions on either side.

In 1917, and after the canal and its protecting levees were constructed, Reclamation District No. 730 adopted another (third) plan calling for bringing the district's river levee up to specifications required by the general flood control plan, supra. Two drainage systems—one for each side of the canal—were included in the contemplated improvement. Pursuant to the statutory requirements, assessors to determine the benefits were appointed in 1918 to spread an assessment amounting to $110,386 on the lands in the district. They did so, assessing for the drainage systems separately, the east side of the district paying for the east side drainage works, and the west side paying for the west side works. The cost of raising the river levee was charged 80 per cent. to the lands constituting the east side, and 20 per cent. to the west side. The work was done, and a considerable portion of the assessment was paid, but a large deficiency remained, for the payment of which, and for certain other purposes, a fourth assessment, the one here in question, was levied. Included in this assessment, which amounted to $225,000, was $108,414.23 for work on the river levee, and $98,606 for deficiencies under the 1918, or third, assessment.

Assessors, who appear from the record to have been experienced and qualified experts, well acquainted with the various projects concerned, viewed the lands affected, studied the plans for the work, and in 1928 spread a supplemental assessment (the fourth) according to their estimates of the benefits derived. They unanimously spread the assessment for the river levee improvement 80 per cent. to the east side, and 20 per cent. to the west side, assessing for certain expenditures authorized by the plan on the two drainage systems separately. In other words, in determining the benefits, these assessors arrived at the same results as did the commissioners who spread the original assessment of 1918. As will later appear, the determination of the benefits by these assessors is the same determination of benefits later approved by the court in its findings and in support of its judgment, which gave rise to these appeals.

When presented to the board of supervisors, as provided for in section 3456 of the Political Code, that board, after objections filed and hearings had, directed that the assessment of $108,414.23 for work on the levee be modified and "reapportioned in accordance with the benefits derived therefrom," and that "fifty-five per cent (55%) thereof be levied and assessed against the lands lying east of the center of the Knights Landing Ridge Drainage District Canal, and that forty-five per cent (45%) thereof be levied and assessed against the lands lying west of the center of the Knights Landing Ridge Drainage District Canal." Following the final order approving and establishing the assessment as reapportioned, the actions authorized by section 3456 of the Political Code and now here on appeal were commenced in the superior court. The plaintiffs, other than Knights Landing Ridge Drainage District, are parties owning lands on the west side of Reclamation District No. 730. Their purpose is to cancel and annul the assessment (No. 4) as reapportioned by the board of supervisors, and to have their property in Reclamation District No. 730 assessed according to the actual benefits derived by the lands by reason of the works of reclamation and drainage called for by the plan for additional and supplemental works leading to the assessment. The Knights Landing Ridge Drainage District, the other plaintiff, contends that it has derived no benefit, and also that any assessment against it in the premises is without authority of law and is null and void. Reclamation District No. 730 was made the defendant to the actions, for the reason that it represented all the landowners in the district. A number of landowners on the east side of the reclamation district intervened in support of the defendant district and the legality of the supplemental assessment as approved by the board of supervisors. After a comprehensive hearing, at which considerable evidence was introduced and many exhibits submitted, the trial court made findings to the effect that the board of supervisors acted arbitrarily and abused its discretion in making and approving the assessments, and as already noted, fully supporting the contentions of the plaintiffs that the assessments complained of exceeded the benefits derived from the work. Judgment was entered in their favor. A new trial was denied, and the interveners appeal from the judgment.

It was the contention of the respondents, other than the Knights Landing Ridge Drainage District, in the court below, and is here, that their lands on the west side of the Knights Landing Ridge Drainage District canal and levees received no benefit from the work on the river levee, because if that levee should break and the east side of the reclamation district be flooded, the waters would flow out of the district over its south levee and into the Yolo by-pass without endangering the two strong levees of the Knights Landing Ridge cut, and without reaching or imperiling the west side lands. There was much evidence to support this contention. Testimony supporting a contrary contention advanced by the interveners only served to raise a contradictory situation in the evidence, which the trial court decided in favor of the plaintiffs' cause. We therefore deem it unnecessary to dwell on the facts brought out in support of the respective contentions of the parties. The only result would be to emphasize the correctness of the court's findings on the question of the lack of benefits to plaintiffs' properties.

[1-3] That the superior court had complete jurisdiction to entertain and to proceed and hear the causes of the plaintiffs is determined by the provision in section 3456 of the Political Code, which provides that: "Any person aggrieved by the decision of the board of supervisors may commence an action in the superior court of the county in which the greater part of the said district is situate, to have said assessment valuations corrected, modified or annulled." In the cases here, the judgment corrected and modified the assessments levied on plaintiff landowners' lands by reducing the amounts approved by the supervisors to the amounts originally fixed by the assessors, declaring the amount of the assessments in excess of the assessments as modified to be illegal and invalid, and annulling them to that extent. We find nothing in the judgment exceeding the power the court is given by the statute. The interveners, who are the only appellants here, may not complain that they have not had their day in court, for, in addition to being represented by the district, which answered and defended the actions, they intervened as defendants to resist the claims of the respective plaintiffs, and were actual and active parties to the actions in court.

That the superior court sitting in these cases had jurisdiction, and that it acted judicially and not in any legislative capacity, is well established by the decisions of the courts of this state. It had jurisdiction and power to determine for itself whether, and to what extent, the landowners before it had been benefited by the works of reclamation covered by the assessment in question, and had power to declare an assessment invalid in so far as it purports to create a charge against their lands. Reclamation Dist. 108 v. Evans, 61 Cal. 104. In Richardson v. Browning, 61 Cal. App. 110, 214 P. 281, the court held that in enacting in section 3462 of the Political Code a provision for a court action like that provided in section 3456, supra, it was undoubtedly the purpose of the Legislature to provide an exclusive remedy for the landowner against an excessive or illegal assessment. Therein a tribunal is designated [the board of supervisors] for the hearing and determination in the first instance of any objection that might be made by a landowner, and in case of an adverse decision an action may be brought in the superior court to correct or annul the assessment. The benefits that are derived are questions of fact to be determined by the district in the first instance and finally by the trial court. Hershey v. Rec. Dist. 108, 200 Cal. 550, 571, 254 P. 542. In Abel v. Rec. Dist. 2047, 201 Cal. 451, 257 P. 504, this court held actions like those now here to be judicial. At page 455 of 201 Cal., 257 P. 504, 505, the court said: "Much must be left to the sound judgment and discretion of the officers appointed by law to determine the question of benefit in reclamation and drainage matters and finally to the court which makes a *judicial review* of the proceedings." (Italics supplied.) The court, in determining questions relating to the proper apportionment of the assessment, was acting judicially. In re Sutter-Butte By-Pass Assessment, 190 Cal. 532, 538, 213 P. 974. See, also, Athearn v. Nicol, 187 Cal. 86, 95, 200 P. 942.

[4, 5] It is contended by the appellants that the court below had no power or jurisdiction to change the assessment levied against any tract of land in the district, or to reapportion the entire assessment. We do not interpret the judgment as doing more than reducing the assessments in question to correspond with the benefits accruing in each case, and declaring the excess invalid and void. By such action it has corrected the assessments under the power conferred by the section (3462, supra), but has gone no further. It has not attempted to reapportion the old, or to levy or spread a new assessment. If that is to be done, Reclamation District No. 730 must do it. Section 3466½ of the Political Code (the first section bearing that number) provides that in all cases in which an assessment levied for reclamation purposes upon lands embraced within a district is thereafter adjudged invalid by any court of competent jurisdiction, or shall be adjudged invalid as to any tract or tracts of land within such district, a new assessment may be levied on the lands of the

district in the form and manner provided by the section. Such subsequent assessment, or new assessment, shall be made by commissioners appointed by the board of supervisors, as provided in section 3456 of the same Code, and must be made and approved in the same manner as other assessments. The judgment of the court in these cases does not purport to do what "officers appointed by law" must do.

[6-9] Finally, the appellants urge the contention that the presence of the cut and canal banks (the latter consisting of the two substantial levees or retaining walls already referred to) of the Knights Landing Ridge Drainage District must be ignored in spreading or equalizing the supplemental assessment. Therefore, they claim, the court's judgment, predicated in part on the fact that the canal and banks protected the west side lands of respondents, thereby lessening the danger of floods in case of the breaking of the river levee, was erroneous. The canal and accompanying works were completed years before the assessment was levied. The statute requires that the commissioners shall apportion the assessment "according to the benefits that will accrue to each tract of land in said district, respectively, by reason of the expenditures of said sums of money." Pol. Code, § 3456. This means that existing conditions of the land at the time of the assessment should be taken into consideration. Reclamation Dist. 537 v. Burger, 122 Cal. 442, 447, 55 P. 156; Reclamation Dist. 108 v. West, 129 Cal. 622, 62 P. 272; Riverdale Rec. Dist. 805 v. Shimmin, 24 Cal. App. 595, 141 P. 1070. Benefits to be derived from reclamation works are to be measured by the degree of protection such work affords from the menace of floods. Such benefits are those only which spring from the system of works which such assessment is levied to construct or maintain. Reclamation Dist. 108 v. West, supra. Shortly after Reclamation District No. 730 gave consent to and authorized the construction of the canal by the drainage district, and the canal was constructed, the district, in spreading the third assessment, that of 1918, to cover the costs of raising the river levee, took into consideration the presence of the canal and works. It was proper to do so again when it came to levy the present, or supplemental, assessment.

Appellants have attacked the judgments from many points of view, along many lines of argument, and angles of approach. We have given due consideration to what we deem the important questions raised by the appeals in the cases instituted by the plaintiff landowners of the west side. The judgments in their favor, and each of them, should be affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; THOMPSON, J.

Knights Landing Ridge Drainage District
v. Reclamation District No. 730
(Sac. No. 4740).*

WASTE, Chief Justice.

The petition of Knights Landing Ridge Drainage District, plaintiff and respondent in the above-entitled cause, is hereby granted.

All of that portion of the opinion in the consolidated cases under the title of Hawley v. Reclamation District No. 730, etc., to wit, Sac. Nos. 4737, 4738, 4739, 4740, following the caption "Knights Landing Ridge Drainage District v. Reclamation District No. 730 (Sac. No. 4740)," is stricken out, and in lieu thereof is inserted: "The judgment in the three landowners cases (Sac. Nos. 4737, 4738, and 4739) are, and each is, affirmed."

Said cause (Sac. No. 4740) is hereby ordered placed on the calendar of the court in bank, for hearing and argument, at Sacramento on May 1, 1934.

We concur: SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

137 Cal.App. 1

PEOPLE v. GRAVES.

Cr. 2388.

Supreme Court of California.
March 22, 1934.

In Banc.

On Denial of Petition for Rehearing.

For prior opinion, see 29 P.(2d) 807.

PER CURIAM.

Appellant's petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal of the Second Appellate District, Division 2, is denied.

PRESTON and LANGDON, JJ., voting for a hearing.

In denying said petition, we think it appropriate to state that, while we are in accord with the District Court of Appeal in its ruling that it was error for the trial court to refuse to give the instruction regarding circumstantial evidence, we are not entirely satisfied that the error was cured by giving the other instructions referred to in said opinion. However, the court in the closing paragraph of its opinion states that the case is just such a one as is contemplated by the framers of section 4½ of article 6 of the Constitution, which provides that no judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. In our opinion, the evidence in the case points unerringly to the guilt of the defendant. We hardly believe that the verdict of the jury in this case would have been any different had the court given the instruction as to circumstantial evidence. We are of the opinion therefore that no miscarriage of justice has resulted from said error, and that the court properly refused to reverse the judgment on account of said error.

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*On rehearing 34 P.2d 1017.

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220 Cal. 282

MUTUAL BUILDING & LOAN ASS'N OF LONG BEACH v. CORUM et al.

S. F. 14953.

Supreme Court of California.
March 1, 1934.

Judgment Modified on Rehearing
March 30, 1934.

Further Rehearing Denied April 26, 1934.

1. Jury 🔑25(6).

Within statute concerning waiver of jury, cause is first "set upon trial calendar" when cause is "set" for trial, not when memorandum to set cause for trial is filed with clerk (Code Civ. Proc. § 631, subd. 4; Judicial Council Rule 1).

To "set" is commonly understood, in legal parlance, as fixing by court, by order of judge, of definite future date for trial of action.

[Ed. Note.—For other definitions of "Set," see Words & Phrases.]

2. Jury 🔑28(1).

Language of statute and court rule concerning waiver of jury should be given common meaning (Code Civ. Proc. § 631, subd. 4; Judicial Council Rule 1).

3. Trial 🔑9(1).

In court rules, "setting of cause" means presiding judge's fixing definite date for trial (Judicial Council Rules 1–3, 23).

4. Jury 🔑25(6).

"Trial calendar" within statute concerning waiver of jury is "civil trial list" mentioned in court rule, not combination of such list and "civil active list" (Code Civ. Proc. § 631, subd. 4; Judicial Council Rules 2, 3).

5. Jury 🔑12(1).

In action for money judgment for balance allegedly due on note, defendant *held* entitled to jury trial unless waived (Code Civ. Proc. §§ 592, 631, subd. 4).

6. Jury 🔑28(6).

In action for money judgment, defendant timely demanding jury trial did not lose right thereto by going to trial without jury (Code Civ. Proc. §§ 592, 631, subd. 4).

On Petition for Rehearing.

7. Corporations 🔑513(1).

Indorsee's complaint, alleging that note designated payee corporation by former name and alleging corporation's subsequent name, sufficiently identified corporation as against demurrer, since change in name does not affect corporation's identity.

8. Mortgages 🔑375.

Indorsee's complaint, in action for deficiency after trust deed foreclosure, alleging that indorsee acquired note from indorser corporation, *held* sufficient on demurrer to show acquisition of title from payee corporation where complaint alleged that name of payee was merely former name of indorser.

9. Mortgages 🔑342.

Application to substituted trustees for sale under trust deed, application being made after due execution of instrument substituting trustees, *held* not invalid merely because antedating recording of such instrument, where recording subsequently occurred and, under trust deed, conclusively proved proper substitution.

10. Mortgages 🔑375.

In action for deficiency, complaint alleging that indorsee of note, on default, elected to accelerate entire indebtedness as authorized by trust deed and recorded default notice and election to sell property to satisfy obligation, sufficiently showed compliance with deed and statute (Civ. Code, § 2924).

It was contended that complaint failed to state cause of action in absence of allegation of recording of notice of breach because of nonpayment of entire indebtedness as accelerated to maturity.

11. Building and loan associations ⚷41(6).
Allegation that plaintiff building and loan association pursuant to trust deed elected to declare entire indebtedness due on default *held* sufficient as allegation of ultimate fact without alleging that plaintiff's directors so elected (Civ. Code, § 639).

12. Appeal and error ⚷1201(6).
On new trial of action for deficiency, plaintiff *held* entitled to amend complaint to eliminate uncertainty in allegation concerning propriety of sale under trust deed (Code Civ. Proc. § 694).

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the Mutual Building & Loan Association of Long Beach, a corporation, against Augusta Corum and others, wherein defendant named filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed in part, and reversed in part.

Prior opinion, 21 P.(2d) 974.

George D. Collins, Jr., and A. J. Hennessy, both of San Francisco, for appellants.

Fitzgerald, Abbott & Beardsley, of Oakland, and Jones & Douglas, of San Jose, for respondent.

CURTIS, Justice.

This is an appeal by the defendants, upon the judgment roll and a bill of exceptions, from the final judgment in favor of the plaintiff, in an action at law to recover a deficiency judgment in the sum of $28,474.83, claimed to be the balance due the plaintiff on a promissory note executed by the defendants, after crediting upon the note the proceeds of a sale by the trustees under a trust deed given as security for the payment of the note. The note, which was for $65,000, was executed by the defendants on November 21, 1925, to the "Mutual Building and Loan Association of San Jose and College Park," as payee. The deed of trust securing the note was executed concurrently with the note by the appellant Augusta Corum, as trustor, to the trustees therein named, and named as beneficiary, "California Mutual Building and Loan Association." The name of the corporation named as payee in the promissory note had previously, on November 29, 1924, been changed by a decree of the superior court of Santa Clara county to "California Mutual Building and Loan Association." On February 2, 1927, the note was indorsed by the California Mutual Building & Loan Association to plaintiff. On April 4, 1930, the property described in said trust deed was sold by substituted trustees to plaintiff for $50,000, and, there being a claimed deficiency of $28,474.83, plaintiff commenced this action for said amount. The defendant Corum filed an answer and cross-complaint. By the cross-complaint she sought to set aside and vacate the sale upon the ground that said sale was illegal and void. A demurrer to the cross-complaint was sustained, and, upon the refusal of cross-complainant to amend, judgment was rendered for the plaintiff as to the cross-complaint. On September 28, 1931, plaintiff served upon defendants' attorneys a memorandum to set the cause for trial, as required by rule I of the rules adopted by the judicial council of California regulating the business of the superior court, and filed the same with an affidavit of service with the clerk of the court. On December 31, 1931, defendant Corum served and filed a written demand for a jury trial. On January 4, 1932, the date when the cause came before the presiding judge for the purpose of fixing a definite date for the trial of the case, defendant Corum demanded in open court a jury trial of the case, she having previously deposited the necessary jury fees. The demand was denied, and the cause was set for January 28, 1932, for trial without a jury. The trial came on for hearing on said date before the court without a jury, and judgment was entered in favor of plaintiff.

[1, 2] Appellant claims that the denial to her of a jury trial constituted reversible error. She contends that she did not waive her right to a jury trial because she had complied strictly with the requirements of section 631 of the Code of Civil Procedure which specifies the manner in which a jury trial may be waived by a party. Respondent contends that appellant waived her right to a jury trial by noncompliance with rule I of the rules adopted by the judicial council of California regulating the business of the superior court (hereinafter referred to as rule I). It is respondent's position that although rule I does not prescribe a waiver for noncompliance therewith, said rule was enacted by the judicial council to clarify and make more definite the provisions of subdivision 4 of sec-

tion 631 of the Code of Civil Procedure, which does prescribe a waiver for failure to comply with its provisions, and that a noncompliance with rule I is ipso facto a noncompliance with subdivision 4 of section 631, Code of Civil Procedure. In other words, it is respondent's theory that rule I is consistent with and in conformity with said section 631, that the requirements are identical and the time specified in each for the making of a demand for a jury trial is the same. Appellant's position is that rule I prescribes other and different requirements than does section 631, Code of Civil Procedure, and that the time specified in said code section as the proper time to make a demand for a jury trial is different from and subsequent to the time specified in rule I, and that a demand made at the time specified in section 631, Code of Civil Procedure, effectively preserves a litigant's right to a jury trial, irrespective of whether such litigant has failed to fulfill the requirements of rule I. Appellant concedes that perhaps a compliance with rule I may be sufficient to prevent a waiver of the right to a jury trial, but points out that under her theory the question of whether it does or does not is not here involved, but merely the question of whether her demand satisfactorily fulfilled the requirements prescribed by section 631 of the Code of Civil Procedure.

There can be no doubt that the defendant failed to comply with rule I. In fact, it is expressly conceded that she did not. Rule I provides that: "For the purpose of setting a civil cause for trial, there shall be filed by a party to the cause a memorandum which shall state that the cause is at issue, and which shall set forth the number and title of the cause, the nature of the cause, the time estimated for the trial thereof, whether a jury trial is demanded, and the respective names, addresses, and telephone numbers of the attorneys for the respective parties. Prior to the filing thereof, a copy of said memorandum shall be served upon the attorneys for all parties, and unless admission of service is indorsed upon the memorandum filed, the same shall be accompanied by an affidavit showing such service. No cause shall be set for trial unless the memorandum herein mentioned shall have been served and filed; provided, however, in the event the cause shall be set upon stipulation, the latter shall be accompanied by a corresponding memorandum. In case a jury trial is not demanded by the party filing such memorandum, any other party to the cause desiring a jury trial shall have five (5) days, after service of such memorandum, within which to file and serve his written demand for a trial by jury." Subdivision 4 of section 631, Code of Civil Procedure, provides that a trial by jury may be waived by a party "by failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation."

The controversy therefore resolves itself into a question of the proper interpretation of subdivision 4 of section 631 of the Code of Civil Procedure. Just what does the language, "at the time the cause is first set upon the trial calendar" mean? Does it mean, as respondent contends, at the time the memorandum to set the cause for trial is first filed with the clerk of the court as required by rule I? Or does it mean, as contended by appellant, at the precise time the case first comes before the judge to be set for trial at a definite, fixed future date?

We are of the opinion that the language used in section 631, Code of Civil Procedure, "at the time the cause is first set upon the trial calendar" is synonymous with the words, "at the time the case is set for trial." In matters of court procedure it is most important that the steps to be taken should be easily ascertainable and readily understood and that the rights of clients to jury trials, or other aids to the administration of justice, should not be jeopardized by a strained construction of a statute prescribing judicial practice and procedure. A strained construction should, therefore, be avoided and the words given the meaning they commonly convey.

Prior to the very existence of the judicial council and prior, of course, to the promulgation of rule I, it was assumed and taken for granted that the time specified in subdivision 4 of section 631, Code of Civil Procedure, at which a demand for a jury trial must be made if the right to a jury trial was to be protected and preserved, was at the time a definite date was assigned by the presiding judge for trial. Hertter v. Addis, 89 Cal. App. 160, 265 P. 298, 300. In that case some time prior to December 6, 1922, the case "was set down for trial," at which time the appellants demanded a jury trial. The question involved in that case was whether a noncompliance with certain rules of court operated as a waiver of a party's right to a jury trial in the absence of a provision in such rules that such noncompliance would constitute a waiver thereof, provided said party had complied with the provisions of section 631, Code of Civil Procedure. The court there held such noncompliance did not operate as a waiver, and in so holding said, referring to the proper payment of jury fees and to the demand for a jury trial having been made in the proper manner on the date of the setting of the cause for trial, "It is apparent that appellants' rights to a trial by jury were not waived in any of the manners provided by the section from which we have just quoted." Section 631, Code Civ. Proc. Since that decision, other cases have accepted this construction as the true one and have postulated their conclusions upon the premise that the time "the cause is first set upon the trial calendar" is synchronous with the time "the case is first set for trial." Hoffman v. Southern Pacific Co., 101 Cal. App. 218, 281 P. 681; Stern v. Hillman, 115 Cal. App. 156, 300 P. 972, 973; McGregor v. Wright, 117 Cal. App. 186, 3 P. (2d) 624; and Dunham v. Reichlin, 217 Cal. 289, 18 P.(2d) 664. In Hoffman v. Southern Pacific, supra, the court in holding that a demand for a jury trial sufficed to preserve the party's right to a jury trial upon the second trial of the case, was referring to a demand made on October 24, 1927, on which date, "the case was set for trial." The record in the case of Stern v. Hillman, supra, shows that the point was made by the respondent there as here that the cause was first set upon the trial calendar when the clerk filed the memorandum and that appellant had waived his right to a jury trial because he had failed to file his written demand for a jury trial within five days after the service upon him of the memorandum. In that case, the court declined to consider the question at all of whether appellant had or had not waived a right to a jury trial by a failure to comply with the provisions of rule I, and, after pointing out that the written demand by appellant for a jury trial was made two days prior to the time when the cause came before the judge to have a definite date assigned to it for trial, held that inasmuch as appellant did not, on the day the case came up to be set for trial, announce that a jury trial was demanded, he had by such noncompliance with Code section 631, Code of Civil Procedure, waived his right to a jury trial. In McGregor v. Wright, supra, the appellant had failed to comply with the provisions of rule I and also had failed to be present and demand a jury trial on February 17, 1930, the date the cause was set for trial for March 14, 1930. The court there held that a jury trial might be waived, "by failing to announce that a jury trial is required at the time the cause is first set for trial if set upon notice." In Dunham v. Reichlin, supra, the court in holding that each party must make a proper demand for a jury and one party is not entitled to rely upon the demand made by the opposing party, stated that on August 15, 1930, "the cases were first put upon the trial calendar" and later that "on August 15, 1930, the cases were first set upon the trial calendar to be tried on October 6, 1930," thereby obviously construing section 631, Code of Civil Procedure, as referring to the fixing of a definite date for trial rather than the filing of the memorandum to set the cause for trial with the clerk. It is apparent that this is the construction commonly given to this Code section by the bench and bar, and the fact that this meaning has been so unhesitatingly accepted as the true meaning is a cogent argument for holding that it is the correct one. In Stern v. Hillman, supra, the court in holding that the appellant had waived his right to a jury trial by failing to demand a jury at the time the case was set for trial for a definite future date and immediately following a direct quotation of subdivision 4 of section 631, Code of Civil Procedure, said, "the language clearly fixes the time, place, and manner of demanding a jury trial. Since the language is unambiguous and certain, there is no need for construction or interpretation."

[3] Moreover, we are of the opinion that a consideration of the rules in their entirety, adopted by the judicial council for the regulation of the business of the superior court, will indicate that the filing with the clerk of the memorandum to set a cause for trial is not a setting of the cause upon the trial calendar. Rule II provides that the clerk shall prepare a list of all civil cases not yet set for trial and wherein a memorandum to set the same has been served and filed, and shall on the same day post a copy of said list in a conspicuous place in his office, where the same may be available for examination by attorneys. Said list shall be known as the "Civil Active List." Rule III, which is applicable to Alameda county, provides that thereafter on certain designated days, "there shall be set for trial under the supervision of the Presiding Judge, during the next succeeding calendar month, as many civil cases as can reasonably be disposed of by the Court during said period." The cases thus set shall be taken from the "Civil Active List." The superior court shall cause to be published on the day next following every setting of causes for trial, in a newspaper of general publication published at the county seat, a list of

all cases thus set for trial. On the same day, the clerk shall cause a copy of said list to be posted in a conspicuous place in his office, where the same may be available for examination by attorneys. Said last-mentioned list shall be known as the "Civil Trial List." Rule XXIII provides that, "all civil causes shall be set for trial upon the calendar of the department of the Presiding Judge." Obviously, in these rules, the "setting" of a cause means the fixing of a definite future date by the order of the presiding judge for the trial thereof, and the time therein when a cause is "set for trial" is the time when the cause comes up to have a future date fixed and assigned by the judge for the hearing of said cause.

[4] Respondent points out that the Code section does not say, at the time the cause is "first set for trial," but does say at the time the cause is "first set upon the trial calendar," and insists that the "trial calendar" is not the "Civil Trial List" referred to in rule III, but is composed of both the "Civil Active List" and the "Civil Trial List." We cannot agree. The Civil Active List is prepared by the clerk only once a month and it may well happen that a considerable number of days may elapse between the filing of the memorandum to set and the preparation by the clerk of the "Civil Active List." If the case is first set upon the trial calendar, as claimed by respondent, at the time of the filing of the memorandum to set with the clerk, the Civil Active List is not yet then in existence, and if the "trial calendar" consists of the "Civil Active List" and "Civil Trial List," of necessity the "trial calendar" is not yet in existence. Moreover, since subdivision 4 of section 631, Code of Civil Procedure, was enacted in 1915, and rule I was not promulgated until 1929, it is plausible to suppose that the term, "trial calendar" referred to in the code section referred not to some calendar to be devised in the future, but to the calendar in existence, the calendar upon which the cases were set down for trial for a certain definite future date. To hold that the language, "at the time the cause is first set upon the trial calendar" refers to the filing of the memorandum to set with the clerk requires us to define the verb, "to set," commonly understood in legal parlance as the fixing by the court by an order of the judge of a definite future date for the trial of an action as meaning "to file with the clerk" the memorandum to set. It also leaves us in doubt as to what is meant by a "trial calendar." Other difficulties might be pointed out to an acceptance of the construction claimed by respondent for section 631, Code of Civil Procedure, but these we think are sufficient.

[5, 6] The action being one to recover a money judgment on a balance alleged to be due on a promissory note, the defendant was entitled to a trial by jury unless she had in some manner waived said right. Section 592, Code Civ. Proc. We have held that having complied with the requirements of section 631 by demanding a jury trial on January 4, 1932, at the time the presiding judge set the case for trial for January 28, 1932, appellant did not waive that right. And in the absence of such waiver, she did not lose that right by going to trial without a jury, but is entitled to a reversal of the judgment. Farrell v. City of Ontario, 39 Cal. App. 351, 178 P. 740; Stern v. Hillman, supra; Hertter v. Addis, supra.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

On Petition for Rehearing.

PER CURIAM.

The petition of the appellants for a rehearing in this cause is denied. It is hereby ordered that the words, "The judgment is reversed," contained in the decision in said action, are hereby stricken out and the following is added to and made a part of said decision:

Upon the ground that the complaint failed to state a cause of action, the appellants raised certain objections which involved the validity of the sale of the property which should be here disposed of to guide the trial court in the event that a further trial may be had. These objections, briefly stated, are as follows: (1) The note being made payable to the Mutual Building & Loan Association of San Jose and College Park, whereas the name of said corporation had been changed to California Mutual Building and Loan Association, there was in existence at the time of the execution of the note no corporation of that name, and the note was therefore a nullity; the assignment by the California Mutual Building & Loan Association in its own name was void and plaintiff took no title to said note; and the notice of default given by the plaintiff, who by reason of said void assignment held no title thereto, was ineffective. (2) The application to sell said property having been made to substituted trustees prior to the recordation of their substitution was ineffective. And (3) the notice of breach and of the election to cause said property to be sold to satisfy said obligations was fatally defective, in that it failed to allege that the breach of the obligation was the failure to pay the entire sum due after an election by the plaintiff to accelerate the maturity date of the note for failure to pay one installment, but restricted said notice of breach and default to failure to pay the installments and interest due for the months of April, May, and June, 1929. The District Court of Appeal has held that these objections are not tenable, and we adopt with some slight modification that portion of the opinion of the District Court of Appeal which deals with this phase of the case as correctly disposing of these objections:

[7] "The note was made payable to the Mutual Building & Loan Association of San Jose and College Park; and it appeared that the name of this corporation had previously been changed to California Mutual Building & Loan Association, but that it was designated therein by its former name. This we think was sufficient as against either a general or special demurrer, as a change in name does not affect the identity of a corporation, although it may have the effect of requiring additional averments in pleading for the purpose of showing such identity. 14 Cor. Jur. Corporations, § 386, pp. 321, 322. Here the averments were sufficient to identify the corporation.

[8] "The complaint alleged that plaintiff recorded the notice of default, and it is contended that this was insufficient as there was nothing therein to show that plaintiff acquired title to the note and deed from the Mutual Building & Loan Association of San Jose and College Park, the allegation being that title was acquired from California Mutual Building & Loan Association. As heretofore stated, the change of name by the payee corporation was alleged, and the fact that the note was taken by its former name was not material.

[9] "There was a substitution of trustees under the deed, and the complaint alleged an application to the new trustees to sell the property after default. The point is made that the application was made before the recordation of the substitution of trustees, and that consequently the application was invalid. It appears that an instrument was duly executed substituting new trustees before the application was made and that this instrument was subsequently recorded. Under the trust deed the recordation of the instrument was made conclusive proof of proper substitution, and its validity was not dependent thereon. Under the deed its due execution was sufficient.

[10] "The trust deed provided that if default should be made in any payment on the note whether of principal or interest, the beneficiary might consider the note as immediately due and payable, and record in the office of the recorder of the county wherein the property is situated 'a notice of such breach and of its election to cause said property to be sold to satisfy said obligations.' The complaint alleged that the plaintiff did elect to consider the entire principal and interest of the note due and payable, and recorded 'a notice of default and election to cause said property to be sold to satisfy said obligation.' Defendant contends that in the absence of an allegation that a notice of breach for nonpayment of the entire debt as accelerated to maturity was recorded, the complaint failed to state a cause of action. Section 2924 of the Civil Code provided that when a power of sale was conferred upon a trustee or any other person, to be exercised after the breach of the obligation secured, there should be recorded a notice of such breach and of his election to sell or cause to be sold such property to satisfy the obligation. The recorded notice does not appear in the record, but the complaint shows sufficiently a compliance with the provisions of the deed and the code section.

[11] "There was no allegation that plaintiff's board of directors exercised the option to declare the entire indebtedness due. Section 639 of the Civil Code provided that the directors of a building and loan association might so elect in case of default. Here it was alleged that plaintiff elected to declare the entire indebtedness due. This was sufficient as an allegation of ultimate fact."

[12] Appellants also objected that the amended complaint contained no allegation that the sale of the property had been conducted as required by law (section 694, Code Civ. Proc.), and by the provisions of the trust deed. Although the allegation with respect to the sale of the property is not as clear as might be desired, it is, in our opinion, susceptible of the construction that the sale had been properly conducted. The special demurrer did not raise this point. Upon the new trial of the case, the plaintiff may, if it is so advised, amend this pleading to eliminate any uncertainty as to its correct meaning.

As practically the same objections were set forth in and formed the basis of defendants' cross-complaint, it follows that the trial court properly sustained a demurrer to said pleading. The judgment rendered for the plaintiff on said cross-complaint is therefore affirmed. For the failure of the trial court to grant to defendants a jury trial, the judgment, other than that part based upon said cross-complaint, is hereby reversed.

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220 Cal. 362

TITLE GUARANTEE & TRUST CO. v. FRATERNAL FINANCE CO.

L. A. 13941.

Supreme Court of California.
March 21, 1934.

1. Appeal and error 🔑1078(1).

Appellate courts will notice only those assignments pointed out in brief of appellant; all others are deemed to have been waived or abandoned.

2. Pleading 🔑359.

Where mortgage note sued on provided whole sum should become due at holder's option, on default in payment of any installment and interest, and complaint alleged default in interest payment, answer raising as only material issue that time of payment of note had been extended was properly stricken as sham.

3. Bills and notes 🔑468.

Holder suing on note containing acceleration clause need not allege exercise of option to declare principal sum due, since commencement of action is sufficient to show exercise of such option.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by the Title Guarantee & Trust Company against the Fraternal Finance Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Van Lee Hood and Tudor Gairdner, both of Los Angeles, for appellant.

Hamish B. Eddie, of Los Angeles, for defendant Gauntlet Lodge No. 129, Knights of Pythias (sued as One Doe).

Robert M. Porter, of Los Angeles, for respondent.

CURTIS, Justice.

[1] This is an appeal from a judgment based upon an order striking out the answer of the appellant on the ground that the same was sham and irrelevant and granting plaintiff's motion for judgment on the pleadings. The action was to foreclose a mortgage given to secure a promissory note executed by the appellant, the Fraternal Finance Company, in the sum of $100,000, no part of which has been paid, except the sum of $5,000. According to the complaint, the interest on the promissory note due February 28, 1932, had not been paid. The complaint was filed April 18, 1932. The answer of the appellant contains various denials and an affirmative allegation that the plaintiff had extended the due date of said promissory note from August 30, 1931, to August 30, 1934. Respondent contends that each and every one of the allegations of the answer is sham and irrelevant and that its motion for judgment on the pleadings was properly granted. Appellant evidently has abandoned any reliance upon the denials contained in its answer and rests its case solely upon the affirmative allegation contained therein as to the extension of the time of payment of said promissory note. We make this last statement for the reason that appellant in its brief makes no attempt to show that any allegation of its answer, except the affirmative allegation above referred to, raised a material issue upon which appellant was entitled to a trial. Appellate courts will notice only those assignments pointed out in the brief of an appellant; all others are deemed to have been waived or abandoned. Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 179, 175 P. 690; Roberts v. Krafts, 141 Cal. 20, 25, 74 P. 281; 2 Cal. Jur. p. 728.

[2, 3] As to the affirmative allegation in appellant's answer to the effect that the payment of said promissory note had been extended for a period of three years, the record shows that the promissory note sued upon contained the usual provision that "should default be made in the payment of any installment of interest when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note." In the complaint it was alleged that "no interest has been paid

upon said note and mortgage, except interest to August 30, 1931, and that in accordance with the terms thereof interest is payable semi-annually and a default has occurred in the semi-annual payment due February 28, 1932." It will thus be seen that even if the due date of said promissory note had been extended as claimed by appellant from August 30, 1931, to August 30, 1934, still the appellant was in default in the payment of the semiannual installment of interest due February 28, 1932. Respondent, therefore, was entitled to institute foreclosure proceedings upon said note and mortgage immediately after said default in the payment of said interest installment, and this would be so even if the maturity of said note had been extended to August 30, 1934. The allegation therefore of the answer as to the extension of the time of payment of the principal of said note was of an immaterial fact and presented no defense whatever to the action of foreclosure. The allegation was clearly irrelevant. While there is no allegation in the complaint that plaintiff exercised its option to declare the principal sum of said promissory note due and payable, such allegation was not necessary. It has been repeatedly held that the commencement of the action itself is sufficient to show the exercise of such option. Williams v. Gordon, 205 Cal. 590, 592, 271 P. 1070.

We are therefore of the opinion that the answer raised no material issue upon which appellant was entitled to a trial and that the order of the trial court granting respondent's motion for judgment on the pleadings was properly granted.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

* * *

136 Cal.App. 375

JACKSON & PERKINS CO. v. BYRON-BETHANY IRR. DIST. et al.

Civ. 9201 (1-2).

Supreme Court of California.

March 26, 1934.

In Bank.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

On Petition for Rehearing.

For prior opinion, see 29 P.(2d) 217.

John J. Jones, of San Jose, for appellant.

Dennett & Zion, of Modesto, for respondents.

PER CURIAM.

Appellant's petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal of the First Appellate District, Division 2, is denied. In denying said petition we withhold our approval of the last paragraph of the opinion of the appellate court, as the statements therein are not necessary to said decision.

* * *

220 Cal. 340

VANDEGRIFT, Director of Finance, v. RILEY, Controller.

Sac. 4841.

Supreme Court of California.

March 3, 1934.

1. States 🔑127.

Conferring of power on executive officer of department of finance to administer emergency appropriation *held* not inconsistent with budget plan, but justifiable as permitting practical operation of budget plan (Pol. Code, §§ 654, 655, as re-enacted by St. 1927, p. 449; St. 1929, p. 96; Const. art. 4, § 34, as amended in 1922).

2. States 🔑127.

Question whether emergency exists authorizing use of emergency appropriation involves questions of fact determinable by department of finance (St. 1931, p. 318; Const. art. 4, § 34, as amended in 1922).

3. States 🔑127.

Department of finance's exercise of discretion in determining whether emergency exists authorizing use of emergency appropriation will not be disturbed by courts unless lack of power to exercise discretion or abuse of discretion appears (St. 1931, p. 318; Const. art. 4, § 34, as amended in 1922).

4. States 🔑133.

Expenditure of money transferred to state department from emergency appropriation does not violate statute rendering state officer personally liable for expenditure in excess of fiscal year budget (St. 1933, pp. 838, 839, §§ 1, 4; Pol. Code, § 677a, as added by

St. 1931, p. 847, § 9; Const. art. 4, § 34, as amended in 1922).

> Expenditure of money transferred to department of state from appropriation for emergency fund does not violate Pol. Code, § 677a, as added by St. 1931, p. 847, § 9, since when transfer is made the department or officer receiving the supplemental allowance from the emergency appropriation is legally entitled to expend the original appropriation plus the additional amount assigned to it, and furthermore since under St. 1933, pp. 838, 839, §§ 1 and 4, appropriation for emergency fund is exempt from provisions of Pol. Code, § 677a, allocations from the emergency fund are not subject to limitations of such section.

5. Statutes 🔑245.

Budget enactment must be considered as whole.

6. States 🔑133.

Department of finance, through its executive officer, has power to determine whether "emergency" exists and in case thereof to transfer money from emergency appropriation for proper state purpose when no specific appropriation has been made therefor, or when specific appropriation is insufficient (St. 1933, p. 814, and pp. 838, 839, §§ 1, 4; Pol. Code, §§ 654, 655, as re-enacted by St. 1927, p. 449; Const. art. 4, § 34, as amended in 1922).

> This was so as against contention that the word "contingencies," as used in St. 1933, p. 814, and p. 838, § 1, defining "emergencies" as contingencies for which no appropriation or insufficient appropriation has been made by law, could not comprehend the usual, current necessary expenses of a department or office even though the specific appropriation made was entirely insufficient, since the language of the definition indicated that the Legislature had in mind that some of the specific appropriations might be insufficient for the purpose intended. The noun "contingency" means the quality of being contingent or casual; the possibility of coming to pass; an event which may occur; a possibility; a casualty. The adjective "contingent" is defined as possible, or liable, but not certain to occur; incidental; casual; dependent on that which is undetermined or unknown; dependent for effect on something that may or may not occur.
>
> [Ed. Note.—For other definitions of "Contingency," "Contingent" and "Emergency," see Words & Phrases.]

7. States 🔑133.

Supplemental allowance could be made by department of finance from emergency appropriation for additional expenses of conference of governors, for division of narcotic enforcement, for division of social welfare and for department of public works, division of water resources (St. 1933, pp. 838, 839, §§ 1, 4; Const. art. 4, § 34, as amended in 1922).

8. States 🔑133.

Whether amount allowed by department of finance from emergency appropriation for proper governmental purpose is too large or too small does not present justiciable question (St. 1933, pp. 838, 839, §§ 1, 4; Const. art. 4, § 34, as amended in 1922).

9. States 🔑133.

Where item of budget bill prohibited payments from appropriations made thereunder for salary and expenses of chief of division of service and supply, such officer's salary could not be paid from emergency appropriation (St. 1933, p. 819, § 1, Item 38; Pol. Code, § 663, as re-enacted by St. 1927, p. 451; and section 656, as re-enacted by St. 1927, p. 450, and as amended by St. 1931, p. 843, § 1; § 1029; and § 664a, as added by St. 1933, p. 40; Const. art. 4, § 34, as amended in 1922).

10. States 🔑133.

Where item of budget bill prohibited payments from appropriations made thereunder for support of bureau of commerce, allowance could not be made from emergency appropriation for support of such bureau (St. 1933, p. 819, § 1, Item 38; Pol. Code, §§ 378–378g, as added by St. 1929, p. 1888; Const. art. 4, § 34, as amended in 1922).

LANGDON, J., dissenting; WASTE, C. J., and CURTIS, J., dissenting in part.

In Bank.

Proceedings on application for writ of mandate by Rolland A. Vandegrift, as Director of the Department of Finance of the State of California, against Ray L. Riley, as Controller of the State of California.

Writ of mandate denied in part, and granted in part.

Webb Shadle, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., and Jess Hession and W. R. Augustine, Deputy Attys. Gen., for respondent.

SHENK, Justice.

The petitioner, as state director of finance, seeks a writ of mandamus to compel the respondent state controller to audit and approve six demands transferring certain amounts from the emergency fund to the funds of the departments in whose favor the demands are drawn. The demands may be briefly referred to as follows:

(1) For salary and expenses of chief of division of service and supply, for the eighty-fifth fiscal year, $6,500.

(2) For the support of the bureau of commerce, $2,415.

(3) For additional expenses of conference of governors, $3,000.

(4) For the division of narcotic enforcement, $36,570.

(5) For division of social welfare, $38,000.

(6) For department of public works, division of water resources, $12,500.

As to the first two items no specific appropriations were made by the Legislature in 1933. As to the remaining four items appropriations for the several departments or purposes were made in 1933, but were found by the director of finance to be insufficient. Each item of transfer from the emergency fund was accompanied by an executive order of the department of finance, by the director of finance as its executive officer. Each order recited that a contingency had arisen in the administration of the particular department or purpose and that the transfer was "imperative for the protection of the public welfare."

The primary consideration is a determination of the power of the department of finance in the premises. This consideration involves in a general way the legislative history of the emergency fund as employed in the fiscal arrangements of the state and the application of that fund in connection with the budget plan of the expenditures of the state.

An emergency fund was first established in the general appropriation act of 1911 (Stats. 1911, p. 1370), wherein it was provided: "For emergency fund to be expended only upon unanimous vote of the board of control, approved by the controller, seventy-five thousand dollars." An identical appropriation was included in the general appropriation act of 1913 (Stats. 1913, p. 1334). In 1915 the amount appropriated for this purpose was $100.000 (Stats. 1915, p. 627). In 1917, $1,000,000 (Stats. 1917, p. 507). In 1919, $250,000 (Stats. 1919, p. 1329). In 1921, $400,000 (Stats. 1921, p. 1717). In 1923, $700,000 (Stats. 1923, p. 257). In 1925, $1,000,000 (Stats. 1925, p. 59). In 1927, $1,000,000 (Stats. 1927. p. 277). In 1929, $1,000,000 (Stats. 1929, p. 96). In 1931, $1,500,000 (Stats. 1931, p. 318). The 1933 appropriation for emergency fund will be specially noted later on.

Every general appropriation act prior to 1923 was entitled: "An act making appropriations for the support of the government of the State of California" for the particular biennial period. In November, 1922, section 34 of article 4 of the Constitution was amended to provide for a state budget and a budget bill. Thereafter and commencing in 1923 the title of the general appropriation act has been entitled: "An act making appropriations for the support of the government of the State of California and for several public purposes in accordance with the provisions of section thirty-four of article four of the constitution." The title of these general appropriation measures will become significant in connection with certain contentions of the respondent to be hereinafter noted. Prior to 1923 every general appropriation act, in section 4 thereof, provided that "not more than one twenty-fourth of the amount appropriated under this act for each department or institution for the two years * * * shall be expended during any one month without the consent of the state board of control, and not more than one half of such appropriation shall be expended during [each] fiscal year, unless the same has been expressly authorized by this act." In 1923 said section 4 was worded so as to insert after the words "department or institution" the words "for support and salaries," and the language of the 1923 statute was contained in the act of 1925. In 1927 the words "for support" were used and the words "for salaries" were eliminated. In 1929 and 1931 the section carried the same language as in 1927, except that the prohibition against the expenditure of not more than one twenty-fourth of the appropriation in any one month was eliminated.

Prior to 1921 the prohibitions contained in section 4 of each act were applicable to each item of appropriation, including the emergency fund. In the act of 1921 and in each subsequent act the expenditures from the emergency fund have been expressly exempted from the provisions of section 4.

The 1933 appropriation for the emergency fund is as follows:

"Item 201—For emergency fund, five hundred thousand dollars............$500,000.00 (exempt from section 4 of this act) to be expended only on written authorization of the State Department of Finance for emergencies. Emergencies within the meaning of this provision are hereby defined as contingencies for which no appropriation, or insufficient appropriation, has been made by law.

"Item 202—For special emergency fund, two hundred fifty thousand dollars...... $250,000.00 (exempt from section 4 of this act) to be expended only on written authorization of the State Department of Finance for augmentation of the appropriations for support of the State prisons, State hospitals, and other State institutions, when and if commodity prices increase during the eighty-fifth and eighty-sixth fiscal years." Stats. 1933, pp. 814, 838, § 1. Section 4 of the act of 1933 provides: "The appropriations under this act shall, unless otherwise provided, be subject to the provisions of section 677a, of the Political Code. * * *"

By the budget amendment to the Constitution in 1922 (Const., § 34, art. 4), the Governor was required, within the first thirty days of each session of the Legislature to submit to the Legislature a budget containing a complete plan and itemized statement of all proposed expenditures of the state provided by law or recommended by him, and of all its institutions, departments, boards, bureaus, commissions, officers, employees, and other agencies, and of all estimated revenues for the ensuing biennial period, and to submit with the budget a budget bill covering the proposed expenditures. Obviously the preparation of a budget so required involved great detail, as well as a high degree of judgment and discretion. Prior to 1929 the Governor was assisted, in the preparation of the budget, by the department of finance, then under the management of the state board of control. In 1927 article XVIII of part III, title I, chapter III (sections 654–691) of the Political Code was redrafted (St. 1927, p. 449). It was therein provided (section 654), that the department of finance "shall have general powers of supervision over all matters concerning the financial and business policies of the state." In section 655 it was provided that "the department shall be conducted under the control of an executive officer to be known as director of finance, which office is hereby created." Since that time the department of finance and the director thereof have assisted in the preparation of the budget.

By the foregoing legislation, enacted prior to 1933, the director of finance has been given broad powers of supervision over state expenditures and by such legislation has become an important factor in preparing the budget and in enforcing the budget provisions of the Constitution and statutes. In fact his department is an integral and essential part of the budget machinery of the state. The preparation of the budget by the Governor with the assistance of the department of finance forms the foundation of the appropriation bill thereafter to be considered by the Legislature and to be enacted. In the preparation and enactment of such a budget and budget bill absolute precision in the amount which many departments of the state will require during the ensuing biennial period is an impossibility and cannot be expected. In many instances it is only an estimate. The inclusion of a substantial sum in each appropriation bill enacted in the last twenty-five years and specially designated "for emergency fund" was undoubtedly with the idea in mind that it would in all probability eventuate that an appropriation for a particular department or purpose would be insufficient, or that a necessary public purpose for which no appropriation had been made would have to be provided for prior to the enactment of the next budget bill. To provide for such event the emergency fund has been established in each succeeding appropriation bill, to be allocated and expended with the approval of the executive officers and fiscal agents of the state, first in 1911 with the approval of the state board of examiners, then with the approval of the state board of control and now by the department of finance, through its executive officer, the director of finance, who is the successor in authority as to such matters of the state board of control.

Between 1909 and 1933, emergency funds in the aggregate amount of $7,100,000 were included in the regular appropriation bills and were allocated to the several departments of the state government or for necessary state purposes by and under the authority of the fiscal agents of the state, in many instances to supplement the appropriations regularly made to said departments or purposes and in some instances for state purposes where no appropriations had been made. When allowances have been made from the emergency fund to supplement the appropriation made by the appropriation bill to a state department for maintenance and support, which appropriation was found by the fiscal agencies of the state to be insufficient, such allowance from the emergency fund has been expended by such departments the same to all intents and purposes as if the supplemental allowance had been made a part of the regular appropriation for said departments. The establishment and distribution of an emergency fund under this plan and procedure was no doubt in recognition of the fact that without such a method of balancing the funds required for the several departments of the state and for other state agencies and purposes, the appropriations under the old plan were inflexible and the new plan was intended, at least in part, to avoid the enactment of separate and independent contingent expense bills and appropriations found necessary under the old system. The emergency funds thus established have been allocated and disbursed during the last twenty-five years on the authority and order of the fiscal agents of the state government without let or hindrance on the part of the courts, and, so far as we are advised, without question, until a controversy arose between the then director of finance and the then and present state controller as to whether premiums on insurance policies to indemnify the state against liability for damages arising out of the negligence of officers, agents, and employees of the state and other public agencies in the operation of motor vehicles could be paid from the emergency fund. It appeared in that case that section 1714½ of the Civil Code, establishing such liability on the part of the state and the other enumerated public agencies, had been enacted by the Legislature after the final adoption of the general appropriation bill in 1929, and no appropriation had been made therein for that purpose. No fund was therefore available out of which to pay premiums on indemnity insurance policies. The director of finance ordered the policies and directed that the premiums therefor be paid from the emergency fund. The controller refused to approve the claim on the ground that no appropriation had been made in the general appropriation bill for that purpose, and that the emergency fund carried in the general budget bill could not be drawn upon for such payment. In passing upon the contention this court quoted the language of the 1929 item of the general appropriation measure "for emergency fund," which item is in the same language (except as to the amount), as the item in the appropriation for emergency fund in the 1933 statute, and through the chief justice stated: "It has been the practice in this state for many years for the Legislature to include a similar provision in the general appropriations act, thus providing for the payment of emergency claims against the state and its activities, rather than subject the departments of the state and its officers to embarrassment in the administration of the state's business, and put claimants to the annoyance and uncertainty of having to depend upon subsequent Legislatures for reimbursement for services and supplies furnished. The purpose and policy of such an appropriation in the general budget bill has gone unquestioned during the time many Legislatures have met. The plan seems meritorious, and, so far as we are given to understand, it has not been challenged heretofore in its general application. We see no good reason, therefore, for now saying that it is not a proper plan to pursue, provided, of course, the demands against the emergency fund are just and reasonable. The definition in the act of what circumstances shall be sufficient to give rise to an 'emergency,' subjecting the emergency fund to a valid demand, seems to us to be logical and reasonable. We see no reason why it may not be held that the present situation presents an 'emergency' within the intent and definition of the Legislature. * * * In the instant case the Legislature has set aside a definite sum, to wit, one million dollars, for the payment, among other things, of 'contingencies for which no appropriation has been made.' We think the use of the word 'contingencies' is sufficiently general to include a situation like the one here presented. As to the wisdom of such a course—a question suggested by the respondent—of reposing such a power in the hands of an executive officer of the state, that is a matter resting solely with the Legislature." Heron v. Riley, 209 Cal. 507, 289 P. 160, 164.

Prior to 1927 the state board of control, under section 680 of the Political Code, had power, with the consent of the Governor, to authorize the creation of deficiencies in any appropriation made by law in cases of necessity; and to authorize the payment of such deficiencies out of any other money which might be legally appropriated in aid of the proper functioning of the department in whose behalf the deficiency was declared. In a controversy between the board of fish and game commissioners and the state controller, wherein the board of control acting under said section 680 had authorized the creation of a deficiency in behalf of said board, and had ordered for its support and maintenance substantial sums in excess of the amount appropriated to it in the regular appropriation act for the current year, this court held that the purpose of said section 680 was to empower the board of control with the Governor's consent to render legal the expenditure of money by boards and officers of the state for their proper functioning and in excess of the specific amount provided by the Legislature in the regular appropriation measure when the budget allowance was exhausted and the necessity for such further expenditure appeared. It was also held that it was within the power of the Legislature to confer authority on the board of control thus to transfer moneys from one fund to another in order that the several departments and officers of the state might properly function. Board of Fish and Game Commissioners v. Riley, 194 Cal. 37, 227 P. 775. Section 680 of the Political Code was repealed in 1927, but was continued in effect by its re-enactment the same year as section 661 of the Political Code, except that the powers vested in the board of control under the repealed section were vested in the director of finance by the re-enactment. The authority granted in that section is analogous to the power vested in the director of finance by item 201 of the budget enactment of 1933 (St. 1933, p. 838, § 1).

[1-3] That the amount set aside "for emergency fund" during the successive sessions of the Legislature is an appropriation within the contemplation of the budget amendment to the Constitution and statutes enacted pursuant thereto, cannot be doubted. When so appropriated it becomes part of the funds set aside for the proper functioning of the state government and its several departments, offices and purposes. The administration of the emergency fund prior to 1929 was committed to the discretion of the state board of control under specific provisions contained in the appropriation for that purpose. In 1929 that power was transferred to the department of finance (Stats. 1929, p. 96), and the executive officer of that department appears to be the sole state official to whom the Legislature has delegated the power to administer the fund. There is nothing inconsistent with the budget plan in conferring such power upon this officer. In fact the power to apportion the fund, through the exercise of a sound discretion on his part, would seem to permit a flexibility in the handling of the state's funds not otherwise attainable and thus tend to assure a practical operation of the budget plan. It is in the exercise of his discretion that the petitioner is now attempting to transfer funds from the emergency appropriation to the funds of the several offices, departments, and agencies enumerated in the petition pursuant to an allegation, admitted by the demurrer of the respondent, filed as a return to the alternative writ, that in the judgment of the director of finance an emergency has arisen in that no appropriation or an insufficient specific appropriation has been made for the proper functioning of those state agencies by the Legislature in 1933. It is not contended by the respondent that discretion has been improperly exercised by the petitioner, provided he has the power in each particular instance to exercise that discretion. It is conceded by the respondent that the determination of whether an emergency exists involves questions of fact. The ascertainment of those facts naturally devolves upon the department of finance. When the facts are ascertained the exercise of discretion thereunder will not be disturbed by the courts unless a lack of power to exercise the same or an abuse of discretion is made to appear. And it is apparently conceded that the state board of control, at least prior to 1927, had the power and discretion now sought to be exercised by the petitioner in the distribution of the emergency fund. But it is insisted that by reason of the definition of "emergencies" contained in the statute, the power has been denied the department of finance to allocate that fund or any part thereof to the support of the several departments of the state government for whose support a specific appropriation has been made in the budget enactment.

Prior to 1927 the statute did not define the term "emergencies." That term was first defined in the item of appropriation for emergency fund by the Legislature in 1927 as follows: "Emergencies within the meaning of this provision are hereby defined as contingencies for which no provision or insufficient provision has been made by the appropriations herein contained." St. 1927, p. 277, § 1. During the succeeding biennial period the board of control administered the emergency fund in accordance with the definition thus laid down. In doing so the board very naturally first ascertained whether no provision had been made by the specific appropriations in the budget enactment or whether an appropriation had been made for the particular purpose and was insufficient. It then determined in the exercise of its discretion whether the transfer from the emergency fund was necessary to the proper functioning of the state government.

The respondent's contention resolves itself to this: That the word "contingencies" cannot comprehend the usual, current, necessary expenses of a department or office, even though the specific appropriation made be obviously and entirely insufficient. The foregoing definition in the 1927 statute would not justify the limited application of the term thus sought to be placed upon it. On the contrary, the definition in plain terms presupposes cases where no appropriation has been made for necessary state purposes or where an insufficient appropriation has been made in the budget enactment itself.

The argument of the respondent is that the contingency must be an event which the Legislature in the enactment of the budget bill did not have in mind and consider, and that all items of expense which were specifically considered must be excluded from consideration. As indicated the language of the definition of the term "contingencies" in the statute of 1927 definitely discloses that the Legislature had in mind that some of the specific appropriations made would be insufficient for the purpose intended without any limitation which would exclude support and maintenance and provided for such contingencies by placing the emergency fund at the disposal of the department of finance to be used in all proper cases.

Item No. 202 of the 1933 budget enactment (St. 1933, p. 838, § 1), providing for a special emergency fund, confirms the conclusion that the use of the general emergency fund —item No. 201—for support was not excluded. In making the appropriation of this special emergency fund it was contemplated that commodity prices might increase during the two years next ensuing and that the specific appropriation for the "support" of the state prisons, state hospitals, and other state institutions might be insufficient. To provide against such a depletion of the general emergency fund during the ensuing biennial period as would jeopardize the proper support from that fund of such state institutions, in the event of a rise in commodity prices, this special emergency fund was in terms set apart for the "support" of those institutions, to meet such a contingency. The language of item 202 is a distinct recognition that emergency funds might be used for "support" if the specific appropriation should fail. Furthermore, the purposes of every appropriation act since the establishment of the emergency fund, as expressed in the title, has been "for the support of the government of the State of California."

We are not without definite judicial pronouncement in this state of the definition of the term "contingencies," to meet satisfactorily the case in hand. The meaning of that term was involved in the case of Verdier v. Roach, 96 Cal. 467, at page 474, 31 P. 554, 556, wherein the court said: "There seems to be very little room for controversy as to the meaning of the adjective 'contingent' or the noun 'contingency.' Webster defines the noun as follows: '(1) The quality of being contingent or casual; the possibility of coming to pass. (2) An event which may occur; a possibility; a casualty.' And defines the adjective 'contingent' as follows: '(1) Possible, or liable, but not certain to occur; incidental; casual. (2) Dependent on that which is undetermined or unknown. (3) (Law.) Dependent for effect on something that may or may not occur.' The law dictionaries and the Century Dictionary give substantially the same definitions. Among those given in the Century Dictionary are the following: 'Not existing or occurring through necessity; dependent upon a foreseen possibility; provisionally liable to exist, happen, or take effect in the future.' Indeed, the word 'possibility' is defined (in law) to be 'a contingency.' See Webster, Bouvier, Burrill, and Anderson." When the word "contingencies" is given the authorized meaning of "events which are liable to occur," or events "provisionally liable to exist, happen, or take effect in the future," the term is appropriate to describe the events contemplated by the statute and by the action of the director of finance.

In 1929 the definition of emergencies was slightly changed. The word was then defined as follows: "Emergencies within the meaning of this provision are hereby defined as contingencies for which no appropriation or insufficient appropriation has been made by law." Stats. 1929, p. 96, § 1. This same definition was included in the 1931 statute (Stats. 1931, p. 318, § 1), and in the 1933 enactment (Stats. 1933, pp. 814, 838, § 1). The definitions laid down since 1927 did not have the effect of restricting the application of the emergency fund. If anything, they had the opposite effect, namely, to make the emergency fund available by proper order of the director of finance, to supplement not only the specific appropriation in the budget enactment, but also to supplement the appropriations *made by law* in addition to the specific appropriations of the budget statute. This enlargement of the definition would enable the department of finance to supplement the funds of a so-called self-supporting department when its funds are depleted and the transfer from the emergency fund is found necessary, and thus make the law applicable to the situation presented in Board of Fish and Game Commissioners v. Riley, supra.

[4, 5] In support of the claim that each department of the state government must be held to the expenditure in each fiscal year of not more than one-half of the specific appropriation for the department in the budget enactment, it is argued that if the expenditure of more than one-half be per-

mitted, a violation of section 677a of the Political Code, enacted in 1931 (St. 1931, p. 847, § 9), will take place. So far as pertinent that section provides: "Any officer or employee [of the state] who incurs any expenditure in excess of the provisions of the fiscal year budget, as approved by the department of finance, shall be liable both personally and on his official bond for the amount of such expenditures."

There are at least two reasons why the foregoing provisions of said section 677a are not violated in the expenditure by any department of the state of the moneys transferred to its fund by order of the director of finance and in excess of the specific budget appropriation. In the first place, the budget enactment must be considered as a whole. When so considered we find a specific appropriation for each department, office and purpose, and likewise a specific appropriation for emergency fund to be distributed at the discretion of the department of finance not only for purposes not mentioned in the budget enactment but also for the relief of the several departments, offices, and purposes specifically mentioned but whose appropriations have been found by the department of finance to be insufficient. When allocation has been made by proper order of the director of finance the specific budget allowance as thus supplemented is in law the valid appropriation for such department, office or purpose, the same to all intents and purposes as if the sum so transferred from the emergency fund had been included in the original and specific budget allowance. In other words, when the transfer is made the department or officer receiving the supplemental allowance is legally entitled to expend the original appropriation plus the additional amount assigned to it by order of the director of finance. Taken together the sum of the two amounts is the appropriation authorized by law.

In the second place every appropriation for emergency fund since 1919, including 1933, has contained the provision exempting such appropriation from section 4 of the act. Section 4 of each act covers the same subject matter but they are not in identical language. Generally they provide, and the 1933 act specifically provides (St. 1933, p. 839) that not more than one-half of the appropriation made shall be expended during each fiscal year covered by the appropriation measure. Section 4 of the act of 1933 also provides: "The appropriations under this act shall, unless otherwise provided, be subject to the provisions of section 677a, of the Political Code. * * *" Since the appropriation for emergency fund in 1933 is in terms exempted from the provisions of said section 677a, it would necessarily follow that allocations from the emergency fund are not subject to the limitations of said section, and it would also follow that it was the intention of the Legislature in exempting the use of the emergency fund from the provisions of said section that the use of the supplemental allowance by the department to which it is transferred should not be subject to said section; for it would be absurd to say that the supplemental allowance could be made but could not be used for the purpose intended.

[6] We therefore conclude that the department of finance, through its executive officer, has the power to determine, in the exercise of a sound discretion, whether an emergency exists as contemplated by item 201 of the budget enactment (St. 1933, p. 838, § 1), and as herein construed, and to order the transfer of money from the emergency fund for a necessary and proper state purpose when no specific appropriation has been made therefor, or when a specific appropriation has been made to a state department, office or purpose and the same has been found to be insufficient.

[7, 8] We come now to a consideration of the specific orders involved in this proceeding. As to demands (3), (4), (5), and (6), above enumerated, there can be no doubt that they fall within the classification of governmental purposes for which a supplemental allowance may be made on the record here presented. The emergency and necessity for the same are set forth in the orders of the director of finance. Whether the amounts therein specified are too large or too small does not now present a justiciable question. The determination thereof is left to the sound discretion of the department of finance and, as stated, the respondent does not contend that, if the department has the power to make those allowances from the emergency fund, such discretion has been abused.

[9] As to demand No. (1) a more difficult question is presented. Item No. 38 in the budget amendment of 1933 is as follows (St. 1933, p. 819, § 1): "For support of Department of Finance, nine hundred nine thousand eight hundred six and 35/100 dollars; provided that no money hereby appropriated shall be used for salary and expenses of Chief of the Division of Service and Supply, or Bureau of

Commerce, or Bureau of Publications and Documents ...... $909,806.35." Considered alone this appropriation would evidence a specific intention that no money appropriated by the item be spent for salary or expenses of the chief of the division of service and supply; and on the theory upon which we have proceeded, i. e. that the appropriation specifically made is subject to augmentation by an allowance from the emergency fund in proper cases and that the sum of the two amounts is the amount finally and legally appropriated, it would seem that the specific appropriation above quoted had effectually cut off any expenditure of money appropriated by the budget measure for such salary and expenses. By this prohibition the following anomalous situation is disclosed: In 1927, when the department of finance was reorganized (Stats. 1927, p. 449), section 656 of the Political Code was enacted, which provides: "For the purpose of administration, the department shall be forthwith organized by the director, with the approval of the governor, in such manner as shall be deemed necessary properly to segregate and conduct the work of the department. The work of the department is hereby divided into at least three divisions, to be known respectively as the division of budgets and accounts, the division of service and supply and the division of motor vehicles. * * * The chief of the division of service and supply shall be appointed by and hold office at the pleasure of the governor. * * * The director of finance may also be chief of the division of budgets and accounts without additional compensation." Under said section effective since 1931, the chief of each division receives such annual salary as may be fixed by the director of finance, with the approval of the Governor. Stats. 1931, p. 843, § 1. By section 663 of the Political Code as enacted in 1927 (St. 1927, p. 451) and now in effect a board of control was created to consist of the director of finance, the chief of the division of service and supply of the department of finance, and the state controller, all acting ex officio. The director of finance is the chairman of the board and none of the members thereof may receive additional compensation for so acting ex officio as a board of control. By other sections of the same chapter in the Political Code the board of control is given extensive executive and administrative powers. The concurrence of two members is necessary in any decision or determination. In certain matters the board acts as a board of review over the action of the controller. The foregoing was the law when the Legislature of 1933 inserted in item 38 of the budget bill the prohibition against any payment from the appropriations made thereunder for salary and expenses of the chief of division of service and supply. We are therefore confronted by a situation wherein a state officer is provided for by statute, his salary is fixed in the manner prescribed by law, his service is required in order that one of the most important departments of the state may function, yet the budget enactment purports to say that his salary and expenses shall not be paid from any appropriation made for the support of the department of which he is a constituent member. We are at a loss to know why this condition of the law was permitted to stand. It certainly was not designed, for it cannot be assumed that the Legislature would intentionally create a situation where an officer of the state, whose duties are necessary to the operation of the state government, should receive no compensation. It may have been that bills were introduced in the last Legislature looking to a reorganization of the department of finance and the abolishment of the office of chief of the division of service and supply and that such bills failed of passage. Be that as it may, we take the law as we find it, and in doing so we do not look alone to the form of the words used in the item of appropriation but to the whole statute and other statutes as well. Irelan v. Colgan, 96 Cal. 413, 31 P. 294; Riley v. Johnson (Cal. Sup.) 27 P.(2d) 760. We then find an office created and existing which is a necessary part of the functioning of the department of finance. We further find an officer duly appointed to that office and acting as such, and with compensation for his services fixed as provided by law. He is a de jure officer and as such is entitled to compensation for his services as fixed by law. The question may be asked: From what fund is he to be paid? Item No. 38 answers the question so far as the general appropriation enactment is concerned. And the prohibition therein contained applies also to the emergency fund. Section 1029 of the Political Code provides: "Unless otherwise provided by law, the salaries of officers must be paid out of the general fund in the state treasury, monthly, on the last day of each month." The time of payment was changed in 1933 by section 664a of the Political Code (Stats. 1933, p. 40), but section 1029 was not otherwise disturbed. We do not decide the question whether the salary of the chief of the division of service and supply should be paid from the general fund, as that question is not before us. We refer to section 1029 in passing as indicating that the Legislature has provided for the payment of salaries from different funds, and item No. 38 has definitely excluded the payment of the salary of the chief of the division of service and supply from the budget appropriation and its emergency fund.

[10] With reference to demand No. 2 the same general statutory situation is disclosed as obtains in connection with the chief of the division of service and supply. Sections 378 to 378g, inclusive, of the Political Code, as added by St. 1929, p. 1888, providing for the establishment and operation of a bureau of commerce, were continued in effect notwithstanding the prohibition in item No. 38 of the appropriation measure of 1933. Nevertheless the prohibition must also be held to have effectively foreclosed the use of the emergency fund for the purposes of that bureau.

From the foregoing discussion it follows that the department of finance has exceeded its powers in making executive orders referred to in demands Nos. (1) and (2) above enumerated; that as to the executive orders referred to in demands Nos. (3), (4), (5), and (6) above enumerated, said department has properly exercised its power.

It is therefore ordered that the peremptory writ be denied as to demands Nos. (1) and (2) and that a peremptory writ of mandate be issued directing the respondent to audit and approve demands covering items Nos. (3), (4), (5), and (6) above enumerated.

We concur: THOMPSON, J.; PRESTON, J.; SEAWELL, J.

WASTE, Chief Justice (dissenting).

I concur in the majority opinion and in the judgment denying issuance of the writ as to items one (1) and two (2). I dissent from the opinion and judgment relating to items three (3), four (4), five (5), and six (6), and ordering issuance of the writ as to them.

Petitioner, as director of finance of the state, petitions for a writ of mandate requiring the respondent, as state controller, to approve certain claims, and, in order that they may be paid, to augment the specific appropriations made by the Legislature for the support and maintenance of the departments and activities against which the claims are made by making transfer of money from the emergency fund created by the general appropriation act. The petition presents for our consideration the question: Does an "emergency" exist within the meaning of the appropriation act (Stats. 1933, c. 278, p. 814) creating the "emergency fund," and which provides (Item 201) as follows: "For emergency fund, five hundred thousand dollars ...... $500,000.00 (exempt from section 4 of this act) to be expended only on written authorization of the State Department of Finance for emergencies. Emergencies within the meaning of this provision are hereby defined as contingencies for which no appropriation, or insufficient appropriation, has been made by law"?

The respondent, on the advice of the Attorney General, rejected the claims on the ground that no such emergency exists. The claims, six in number, are:

(1) In favor of the chief of the division of service and supply of the department of finance.

(2) For the support of the bureau of commerce of the same department.

(3) Support of the Governor's office—expense of conference of governors in California.

(4) Division of narcotic enforcement.

(5) Division of water resources, department of public works.

(6) Department of social welfare.

As to the first two, the petitioner, as director of finance, issued his executive orders, finding as to each that a "contingency has arisen * * * that *no appropriation* [italics supplied] has been made by law for the purpose during the fiscal year," and authorizing a sufficient expenditure from the emergency fund to cover the claims. As to these claims, I agree with the majority opinion that consideration is foreclosed by the provisions of the appropriation act (Item 38) providing for the support of the department of finance. That item reads (St. 1933, p. 819, § 1): "For support of Department of Finance, nine hundred nine thousand eight hundred six and 35/100 dollars; *provided that no money hereby appropriated shall be used for salary and expenses of Chief of the Division of Service and Supply, or Bureau of Commerce, or Bureau of Publications and Documents ...... $909,806.35.*" [Italics supplied.] I find no other items in the appropriation act applicable to the chief of the division of service and supply or to the bureau of commerce.

The "executive orders" of petitioner applicable to the remaining four claims, and authorizing their payment out of the emergency fund, recite that "a contingency has arisen * * * in that *insufficient appropriation* [italics supplied] has been made by law for expenses, etc. * * *" These recitals imply, and the provisions of the appropriation act show, that the Legislature, as required by the Constitution (article 4, § 34), considered the budget bill submitted by the Governor, and finally enacted it as the appropriation act, making provision for the usual current expenses of the state for the biennial period, including the fiscal year in which accrued the claims here under consideration.

"Emergencies" which call for demands on the "emergency fund" are defined by the act (supra) "as contingencies for which no appropriation, or insufficient appropriation, has been made by law." We obtain no help from the decisions of other states in considering this provision. The financial set-up of our own state, under its Constitution and laws, affords a sufficient answer, in my opinion, to the efforts of petitioner to supply appropriations in two cases and to augment appropriations in the other cases. We have noted the express prohibition by the Legislature against the use, for the first two claims, of any money appropriated.

I cannot agree that it was the intention of the Legislature in enacting the loosely worded definition of an "emergency" to thereby permit an increase out of the "emergency fund" of appropriations made by it for the usual and ordinary expenses of the regularly constituted departments of state or state institutions. Neither am I persuaded that, because in the past transactions similar to those here under review have been permitted, they were legal. Our own decision in Heron v. Riley, 209 Cal. 507, 289 P. 160, does not apply here. We were there considering the statute (Stats. 1929, c. 260) making the state liable for the negligent operation of its motor vehicles, and authorizing the state to insure against such liability. The statute was passed after the budget bill had been enacted. No appropriation for payment of the necessary insurance premiums was made in the appropriation act or by subsequent special statutes, yet it was made the duty of the proper authority to secure the proper insurance against liability. That was done, and we had no hesitancy, under the situation there disclosed, in holding that an "emergency" existed which permitted payment of the premiums out of the emergency fund.

The alternative writ of mandate heretofore issued should be discharged, and the petition for a peremptory writ should be denied in toto.

I am authorized to state that Mr. Associate Justice CURTIS concurs in this dissenting opinion.

LANGDON, Justice (dissenting).

I dissent. In addition to the reasons given by the chief justice in his concurring and dissenting opinion, I desire to point out that the effect of the majority opinion is practically to remove the word "contingencies" from the statute under consideration, and to make the emergency fund available in situations where the Legislature did not intend it to be used. It is obvious that the words "emergencies" and "contingencies" are employed for a purpose, and while it may not be possible or necessary to lay down a definite, fixed meaning for these terms, it is nevertheless plain that they imply something that *was not foreseen* by the Legislature at the time of making the regular appropriations. In other words, no matter how broadly they are construed, they cannot comprehend the usual, current operating expenses of a department of the government when the Legislature has, with full knowledge of the functions of said department, made a specific appropriation therefor. The words "insufficient appropriation" cannot be isolated from the rest of the statutory language, so as to justify resort to the emergency fund merely because the regular appropriation has been exhausted, for in such case the legislative appropriation would have little meaning, and the requirement of a budget might well be dispensed with. The "insufficient appropriation" which calls for a tapping of the emergency fund must be one where the insufficiency arises from a contingency. Hence, where a department pursuing its normal and proper functions exceeds its appropriation, it has disregarded the legislative mandate, and I do not believe that the Legislature intended that the emergency fund should be used as a convenient method of evasion of the restrictions of the regular appropriation. Indeed, if the fund is to be so readily available for normal expenses, it will in all likelihood be found too depleted to take care of genuine emergencies.

I am perfectly willing to concede that the question is, in the first instance, one for petitioner as director of finance; and some weight is to be given to his conclusion regarding the existence of an emergency. But while his opinion is significant in the determination that an emergency *exists*, it cannot be conclusive as to what *constitutes* an emergency. In other words, his determination of the existence of an emergency must be tested by the proper meaning of the term as used in the statute, and under that test, it fails to justify the order demanded. The record contains nothing to show that the contemplated expenditures are for purposes that were not foreseen. The showing made is simply that the regular appropriation has been exhausted, and that petitioner has concluded that an emergency exists. To grant relief on such a record is to thwart the clear legislative intent.

The writ should be discharged and the proceedings dismissed.

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137 Cal.App. 771

MARTIN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1089.

District Court of Appeal, Fourth District, California.

March 16, 1934.

Master and servant 🔑**364.**

Unemployed and indigent resident of city given "made work" to provide him with means of support, with compensation paid in form of purchase orders for supplies, was not "employee" within compensation act though purchase orders were paid from funds of county raised by taxation for relief purposes (St. 1917, p. 835, § 8).

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Proceeding under the Workmen's Compensation Act by E. P. Martin, opposed by the County of San Diego and State Compensation Insurance Fund. To review an order of the Industrial Accident Commission denying compensation, claimant applies for certiorari.

Order affirmed.

Davies & Wallace, of San Diego, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

MARKS, Justice.

This is a proceeding to review an order of the Industrial Accident Commission denying compensation to petitioner for injuries received on April 7, 1931, while he was working in Balboa park in the city of San Diego. It appears that he received compensation up to March 1, 1933, when it was terminated by the commission on the ground that he was not an employee of the county of San Diego as that term is defined in the Workmen's Compensation Act (St. 1917, p. 835, § 8).

Petitioner was an unemployed and indigent resident of the city of San Diego, and to provide him with means of support he was given "made work" for two days a week at a compensation of $4 per day, which was paid in the form of purchase orders for supplies. The bills incurred by the use of these orders were paid out of the outside indigent fund of the county of San Diego, which was raised by general taxation for relief purposes.

In the case of McBurney v. Industrial Accident Commission (Cal. Sup.) 30 P.(2d) 414, an order denying compensation under similar circumstances, made upon the ground that the laborer was not an employee as that term is defined in the Workmen's Compensation Act, was affirmed by the Supreme Court. Under authority of that case a like conclusion must be reached here.

The order is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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137 Cal.App. 346

PEOPLE v. SPINOZA et al.

Cr. 1748.

District Court of Appeal, First District, Division 1, California.

March 14, 1934.

1. **Indictment and information** 🔑**11(3).**

Failure to file amended information within time allowed by court order sustaining demurrer to original information did not deprive court of jurisdiction of offense charged, where defendants did not plead until after amended information was filed (Pen. Code, § 1008).

2. **Poisons** 🔑**9.**

Evidence *held* sufficient to warrant conviction for selling narcotics (St. 1929, p. 380).

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Joseph Spinoza and Joseph Silvestri were convicted for unlawful sale of narcotics, and they appeal.

Affirmed.

Nathan C. Coghlan and Vincent W. Hallinan, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

TYLER, Presiding Justice.

Appellants herein were accused by information of violations of the State Narcotic Act (St. 1929, p. 380). A demurrer to the original information was interposed and sustained, and ten days allowed in which to file an amended pleading. The date of this order was February 23, 1933. The time allowed to amend expired March 6, 1933. No extension of time was sought, or ordered by the court. On March 7th an amended information was presented and filed, containing four counts, each one of which charged violations of the State Narcotic Act. The amended information was also demurred to and demurrer sustained as to counts three and four. Subsequently the court ordered the second count dismissed. The remaining first count charged defendants with the unlawful sale of narcotics. The jury found both defendants guilty as charged in the first count. This is an appeal from the order of the court denying appellants' motion for a new trial and from the judgment.

As grounds for reversal, appellants claim that the court erred in disallowing the demurrer to the first count of the information on the ground that the court had no jurisdiction of the offense therein charged. It is further urged that the court erred in denying defendants' motion for a new trial, for the reason that no sale of narcotics was proved at the trial. Error is also complained of in the giving of certain instructions.

[1] Appellants' first assignment of error involves the claim that by reason of the failure of the prosecution to file an amended information within the time allowed, the court lost jurisdiction of the offense charged and the demurrer should accordingly have been sustained. In this connection it is claimed that the authority to amend was derived from the order of the court alone as the statutory right to amend was never invoked. Whether or not the amendment was filed within the time allowed by the court is of no consequence. Section 1008 of the Penal Code provides that an indictment or information may be amended by the district attorney without leave of court at any time before the defendant pleads. Defendants did not enter their pleas until March 17, 1933, which time was subsequent to the date when the amended information was presented and filed.

[2] The second contention, that there is no evidence in the record to show a sale of narcotics, for which reason the court erred in denying defendants' motion for a new trial, is also without merit. It appeared in evidence, in substance, that two inspectors of the division of narcotic enforcement of this state were informed that defendants were engaged in selling morphine. They had arrested a man and his wife, who were narcotic addicts, for a violation of the Narcotic Act, and had agreed not to prosecute them if they would divulge the names of those from whom they purchased their supplies. Thereafter, negotiations were entered into between defendants and the woman to make a purchase of an ounce of morphine for the sum of $75. The informer was asked by defendant Silvestri if she had the money to pay for the same. She assured him that she had. Defendants then left in an automobile but shortly thereafter returned. The informer had previously been given the required sum of money with which to make the purchase. The informer approached the automobile in which defendants were seated and she was seen to obtain a package which contained morphine. The inspectors thereupon attempted to arrest defendants but they escaped in their machine. The money given to the informer was no longer in her possession after she made the purchase. This evidence was amply sufficient to warrant the jury in concluding that there had been a sale of narcotics.

Nor is there any merit in the claim that the court erred in instructing the jury. Appellants have referred us to isolated parts of certain instructions which it is claimed incorrectly state the law. We do not deem a recital of the portions of the instructions claimed to be erroneous to be necessary. They have to do with the law in relation to aiders and abettors and the amount of evidence necessary to establish an alibi. We have read the instructions carefully as a whole and we find nothing therein which constitutes reversible error.

The judgments and orders appealed from are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

137 Cal.App. 221

NURMI, et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 1310.

District Court of Appeal, Fourth District, California.

March 6, 1934.

Hearing Denied by Supreme Court May 3, 1934.

Master and servant 🔑373.

Injury to driver of bakery truck caused by accidental discharge of shotgun carried under cushion of seat, where gun was carried for protecting driver and employer's money and property, *held* compensable as "arising out of employment" (St. 1917, p. 831, as amended).

[Ed. Note.—For other definitions of "Arising out of Employment," see Words & Phrases.]

Certiorari to Industrial Accident Commission.

Application by R. Nurmi, doing business under the name and style of Nurmi's Bakery, and another, for a writ of certiorari to review an order of the Industrial Accident Commission awarding compensation to Chester T. Moore, an employee.

Award of the Industrial Accident Commission affirmed.

Colding, Hale, Crawford & Myers, of San Francisco, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

MARKS, Justice.

For about seven years prior to February 10, 1933, Chester T. Moore had been employed as a truck driver, salesman, delivery man, and collector by Nurmi's Bakery in Fresno. His duties were to solicit sales of and make delivery of bakery products and mayonnaise and make collections. His route ran from Fresno along the highway paralleling the railroad tracks and into Tulare county. He usually left the premises of his employer at about 4:30 o'clock in the morning, returning late in the afternoons with collections amounting to between $50 and $70. He usually traveled alone.

He was required to make deliveries in premises which were dark and secluded. For a considerable time he had been accosted daily by from fifteen to twenty men who asked gifts of bread. A bakery truck had been held up near the town of Goshen on his route and on numerous occasions bread had been stolen from his truck. He testified further concerning those requesting bread: "If you don't give them a loaf they act as if they would knock you in the head, and they give you a cussing if there is two or three of them. They are bad business." About a year before he was injured he provided himself with a 410-gauge breech-loading single-barrel shotgun. The bottom of the seat of his truck was a metal plate and upon it rested two separate leather cushions. He kept the shotgun between the cushions with the top of the barrel down and the muzzle pointing toward the dash. He testified that he had procured the gun to protect himself from injury and his employer's property from being stolen. Neither Nurmi nor his wife, the owners of Nurmi's Bakery, had any knowledge that he carried the gun. Lynn L. Huron, an employee of Nurmi's Bakery, knew that appellant carried the gun for the protection of himself and his employer's money and property and that the gun was loaded. He also knew the place and position in which the gun was carried in the truck. Huron bore the title of route foreman for Nurmi's Bakery and had charge of all route drivers.

On February 10, 1933, Moore drove his truck off the left-hand side of the highway upon which he was traveling to make a delivery at the store of a customer. After making the delivery he re-entered the truck and proceeded to the left edge of the highway, where he stopped, slid over to the right side of the seat, looked back to see if there were any other drivers approaching from the rear, and slid back to the left side of the seat preparatory to driving onto the highway. In sliding along the seat the shotgun was cocked and discharged, the charge striking him on the outside of one of his legs about three inches below the knee, causing powder burns and a gunshot wound which became infected. The Industrial Accident Commission awarded compensation to Moore, and this proceeding is taken to review this award.

The petitioners admit that the injury was received in the course of Moore's employment and while he was on the business of his employer, but urge that the injury did not *arise out of his employment*, as he had provided the gun and had carried it without the knowledge or consent of his employer. Respondents reply: "That there is a direct causal connection between the condition under which the work of the employee was required to be performed and the resulting injury and

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

that, therefore, the injury must be said to have arisen out of his employment."

We have been cited to no case in which a similar state of facts has been considered in any court within the United States, and as counsel have been diligent in their citation of authorities, we assume there is none.

Petitioners urge that the case of Ward v. Industrial Accident Commission, 175 Cal. 42, 164 P. 1123, L. R. A. 1918A, 233, is authority for our annulling the award made to Moore. In that case John Ward had a contract to dig post holes on land several miles distant from the city of Santa Barbara. William Ward, who was employed by his brother John to do general labor, was directed by John to drive a team and wagon which contained tools to the place where the post holes were to be dug. Thomas Ward, a nephew of John and William, was employed by John to accompany William to the scene of the work and to take care of the horses while the work was in progress. Thomas took a shotgun with him, intending to hunt rabbits after working hours. This gun had no connection with nor bearing upon any part of the work which the two were employed to perform. John saw the two depart with the shotgun, which was accidentally discharged during the progress of the journey, injuring William. In this case the Supreme Court annulled the award of compensation to William. But this case is easily distinguishable from the instant case. The shotgun was taken by Thomas, not to be used in any manner in connection with the employment of either William or himself, but to be used for his own pleasure and in accomplishing a purpose of his own after his hours of employment had ceased. In the instant case Moore obtained the gun and took it with him at least in part for the protection of his employer's property against theft.

Moore was intrusted with the possession of his employer's truck, personal property, and the money which he collected. Thefts from his truck were proven and his duties took him into places where it was not unreasonable to have presumed he might have been subjected to robbery. He was also confronted with groups of men whose attitude toward him was threatening. We do not think it unreasonable that he feared possible injury to himself and a major theft of the property under his control, even though it affirmatively appears that during the fifteen years' operation of the system of deliveries by the Nurmi Bakery no such event had occurred. The fact of his being intrusted with his employer's property and money made him to a certain extent responsible for its safety. That he took steps which he thought would aid him in protecting this property, without first consulting his employer, but with the knowledge and tacit consent of his immediate superintendent, should not of itself demonstrate that his injury did not grow out of a risk of his employment even though this risk was created by himself, but in the interest of his employer. The occasion for Moore's carrying the gun was brought on by the conditions surrounding his employment and under which he was required to work. He carried it to assist him in performing a duty which he owed to his employer, namely, that of protecting its property. This being the case, his carrying the gun was connected with a duty of his employment and was not entirely an unreasonable, though perhaps an inadvisable, act connected with it.

We therefore conclude that under the terms of the Employers' Liability Act (St. 1917, p. 831, as amended) the award must be affirmed. It is so ordered.

We concur: BARNARD, P. J.; JENNINGS, J.

137 Cal.App. 769

Harry J. WEEKS, Plaintiff and Appellant, v. George C. SOTHMAN, Defendant and Respondent.

Civ. 8926.

District Court of Appeal, Second District, Division 2, California.

March 12, 1934.

Hearing Denied by Supreme Court May 10, 1934.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

W. C. Dalzell, of Los Angeles, for appellant.

McAdoo & Neblett and B. H. Neblett, all of Los Angeles, for respondent.

HAHN, Justice pro tem.

This appeal is from an order vacating and setting aside a sale under execution of 3,933 shares of stock of the Airway Laundry, Limited, a corporation, property of the judgment debtor. The order appealed from was made after hearing upon an order to show cause why the sale in question should not be vacated.

Inasmuch as the material facts here involved, as well as the legal questions raised, are similar to those considered and decided in the case of Haish v. Hall, 90 Cal. App. 547, 265 P. 1030, in which case a hearing was denied by the Supreme Court, it would seem to serve no useful purpose in this case to reiterate the views and conclusions there expressed upon the same questions.

In the interests of economy of time and space we feel that reference to the opinion in that case will meet the needs of our decision in this case.

Judgment affirmed.

We concur: STEPHENS, P. J.; CRAIG, J.

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137 Cal.App. 415

MACFARLAND v. CITY OF LOS ANGELES et al.

Civ. 8993.

District Court of Appeal, First District, Division 2, California.
March 19, 1934.

1. **Appeal and error 🔑544(1).**
Sufficiency of evidence to support findings is not reviewable, absent exceptions thereon in bill of exceptions (Code Civ. Proc. § 648).

2. **Vendor and purchaser 🔑57.**
Option to purchase land within thirty days after "final determination" as to ownership of adjoining land did not require final determination by a court, but such determination could be made by acts of parties (Civ. Code, § 1644).

3. **Specific performance 🔑28(2).**
Option to purchase land within thirty days after "final determination" as to ownership of described adjoining land, and only if such determination was in favor of purchaser and not vendor, *held* not so indefinite as to prevent specific performance thereof.

4. **Contracts 🔑9(1).**
That is certain in contract which can be made certain.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by John C. MacFarland, as executor of the estate of Hancock Banning, deceased, against the City of Los Angeles, a municipal corporation, and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Erwin P. Werner, City Atty., and Frederick Von Schrader and Loren A. Butts, Asst. City Attys., all of Los Angeles, for appellants.

Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (Ira C. Powers, of Los Angeles, of counsel), for respondent.

STURTEVANT, Justice.

From a judgment in favor of the plaintiff enforcing the specific performance of a written contract the defendants have appealed and have brought up the judgment roll and a bill of exceptions.

The plaintiff commenced the action as executor of the estate of Hancock Banning, deceased. During his lifetime Hancock Banning, Esperanza Sepulveda de Davis, and Lucy Banning Ross entered into a tripartite contract which was the subject-matter of the action. In his complaint the plaintiff pleaded the written instrument in hæc verba. The trial court made a full set of specific findings of fact on which the decree was based.

The contract as found by the court is as follows:

"This Indenture, made and entered into this 30th day of March, 1923, by and between Lucy Banning Ross, daughter of Mary Banning, deceased, party of the first part, and Esperanza Sepulveda de Davis, one of the heirs of A. W. Sepulveda, deceased, party of the second part, and Hancock Banning, party of the third part,

"Witnesseth:

"That, whereas, the party of the first part brought an action against the parties of the second and third part and other persons in the Superior Court of the State of California, in and for the County of Los Angeles, being Case No. 104011, to quiet title to certain lands more particularly described in the complaint in said action and in the Lis Pendens filed in said action in the office of the County Recorder of Los Angeles County; and

"Whereas, the party of the second part has filed her answer asserting claim to all the portions of said property hereinafter described, and the party of the third part has asserted title to portions thereof; and, "Whereas, the respective claims of the parties hereto to said property hereinafter described have been adjusted and settled by agreement between themselves;

"Now, Therefore, in consideration of the premises and of the mutual covenants and agreements on the part of the others each of the parties hereto agree as follows, towit:

"First—That the first party herein is the owner of ¼ undivided of all that portion of said property described in the complaint in said action lying Southerly of the Southerly line extended of the United States Pierhead line as now established for the Inner Harbor of San Pedro, and the party of the second part is the owner of the other undivided ¾ interest in said property, all of which property herein described lies East of and outside of Tide Land Location No. 154;

"Second—It is further stipulated and agreed that the party of the second part is the owner of all that portion of the said property described in said complaint which lies between the Southerly line of said Government Pierhead line extended to the East line of said tide land location No. 154 and the South line of Lot 18, Sheet No. 4, Tract No. 3192 extended north 85 degrees 41′ 14″ West to the Westerly line of the property described in the complaint, and in consideration of the release and waiver by the said party of the third part of his claim to the lands above described the second party hereby gives to the said party of the third part the option as hereinafter set forth to purchase that portion of the land hereinabove described which lies between the Northerly and Southerly Government Pierhead lines extended above referred to, the price for said property to be at the same rate per acre that the property which lies Southerly of the Southerly pierhead line may be sold for by the second and third parties, to be paid cash upon delivery of a good and sufficient deed conveying said property to the said third party; reserving, however, right of way 100 feet in width across the North and South ends of said last described property adjoining said pierhead lines respectively for navigation purposes and for an extension across said strips of the Government channel, with the right at all times to excavate or cause the same to be excavated to the same depth as the said Government channel, with the right to use the same for shipping purposes, said option to be exercised within 30 days after the final determination as to ownership of the east 285 feet of Tideland location No. 154, and not before, and only in the event that such determination is in favor of the third party. If in favor of the second party said option shall not be exercised, and said property shall remain the property of the second party, but subject to the 100 foot strip easement for channel purposes for the benefit of the other two parcels above described.

"In consideration of the premises the second party agrees with the first party that in the event the said third party or any party shall purchase said land, she will pay the first party one-quarter of the purchase price as the same may be received by her; provided, however, if said parcel shall be sold by her in conjunction with that part of Tide Land location No. 154 adjoining same the price shall be the average price of all the land so sold. It is understood that in the event the second party shall lease said parcel in conjunction with any part of Tide Land location No. 154 the first party shall have no rights to any part of the rental.

"Third—The parties hereto further agree that they will proceed with diligence to execute the necessary conveyances from each to the other to consummate this agreement.

"Fourth—It is further agreed between the first and second parties hereto that they will proceed diligently with the sale of those portions of said property lying South of the said Southerly Government pierhead line extended for the best price obtainable as it is the desire of all the owners thereto to sell the same."

[1] The defendants state several points each of which is, in effect, an attack on the findings. In reply, the plaintiff makes a preliminary objection as to the scope of the hearing in this court on such attacks. He calls to our attention that in the bill of exceptions there are no exceptions on the ground of the insufficiency of the evidence to justify the findings or any portion of them. He then asserts that this court may not extend its examination into the evidence. The plaintiff's objection is supported by the statute and by the decisions. Code Civ. Proc. § 648; Mills v. Brady, 185 Cal. 317, 196 P. 776; Schultz v. City of Venice, 200 Cal. 50, 54, 251 P. 913; 2 Cal. Jur. 708 et seq. In what follows we will confine our attention to a consideration of the face of the findings.

[2] With meticulous care the court prepared findings reciting in detail the acts showing that the option in favor of Hancock Banning was duly exercised in accordance with the terms of said instrument. In those findings the facts show that the "final determina-

tion" was made by the acts of the parties in exchanging certain conveyances. The defendants complain because there was no showing of a final determination by any court having jurisdiction of the subject. We think it sufficient to remark that the written instrument did not call for a final determination by a court. The trial court expressly so found. In doing so it acted entirely within the law. Civ. Code, § 1644. It follows that the first point made by the defendants may not be sustained.

[3, 4] In the second point made by the defendants it is asserted that the contract is indefinite. Thereupon they propound the following queries: (a) What was meant by the parties when they used the words "final determination" in the option agreement? (b) What was meant by the parties when they used the phrase, "and only in the event the final determination is in favor of third party"? (c) What was meant by the parties when they used the phrase, "if in favor of second party said option shall not be exercised"? (d) What was meant by the parties when they used the wording, "said option to be exercised within thirty days after the final determination as to the ownership of the east 285 feet of tide land location No. 154, and not before"? The first query we have already answered. The second, third, and fourth do not call for answers. The passages quoted are very definite statements. Why they were made is immaterial. However, the answers appear on an inspection of the record. If the "final determination" had been made in favor of Mrs. de Davis, Mr. Banning would not have had title to any adjoining lands and would have had no inclination to exercise the option to purchase a strip irregular in shape, 300 feet long, and containing less than four-tenths of an acre, entirely disconnected from any other lands owned by him. In the same event Mrs. de Davis would have had reasons to retain title because she would have held lands immediately adjoining the option lands. The answer to the remaining question is plainly this, that the best of business methods called upon the parties to act promptly as soon as the conflicting rights to the adjoining lands had been determined. As part of this same point the defendants state: "The court is also required to determine whether or not the option agreement refers to 'ownership of the east 285 feet of tide land location No. 154,' or does it mean something else, to-wit: that portion of tide land location No. 154 which lay immediately west of the option property?" That is certain which can be made certain. The contract refers to documents which would no doubt make the description plain. We must assume they did. The question as propounded is answered in specific terms by the last paragraph in finding No. II, which is as follows: "The said property being specifically described as bounded on the north by said Northerly Government Pier Head Line extending Westerly and on the East by the line of high tide of Wilmington Bay, as established by decree of the court in the tide land cases. On the South by the said Southerly Government Pier Head Line extended Westerly, and on the West by the East line of Tide Land Location No. 154." As stated above the record is such that we are not at liberty to enter into an examination of the additional question as to whether the evidence supports the finding.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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137 Cal.App. 319

SALVADOR v. YORK et al.

Civ. 7960.

District Court of Appeal, First District, Division 1, California.

March 12, 1934.

Appeal and error 🔑794.

Appeal was dismissed where no brief was filed or response made to order to show cause why appeal should not be dismissed (Supreme Court and District Courts of Appeal Rule 5, § 1).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Morris Salvador against C. M. York and another. Decision for plaintiff, and defendants appeal.

Appeal dismissed.

Theodore Hale, Barry J. Colding, and Carroll B. Crawford, all of San Francisco, and B. P. Gibbs, of Los Angeles, for appellants.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Henry Heidelberg, of San Francisco, for respondent.

PER CURIAM.

The appeal herein to all intents and purposes has been abandoned. The transcript was filed on May 20, 1931, but thereafter no steps were taken in furtherance of the appeal. No briefs have been filed nor extensions of time applied for or granted; nor was any response made to the order heretofore issued to show cause why the appeal should not be dismissed. Therefore, under the authority granted by section 1 of rule V for the Supreme Court and the District Courts of Appeal, the appeal is dismissed.

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137 Cal.App. 337

CITRUS PACKING CO. v. MUNICIPAL COURT OF CITY OF LOS ANGELES.

Civ. 9590.

District Court of Appeal, Second District, Division 2, California.
March 13, 1934.

Hearing Denied by Supreme Court May 10, 1934.

1. Attachment 🔑307.

Where court made no order regarding attached property which marshal released on stipulation between attachment creditor and third party claimant, court on petition had jurisdiction to determine title under statute (Code Civ. Proc. § 689).

2. Prohibition 🔑10(1).

Though contemplated action may be erroneous or unwise, prohibition does not lie where court has jurisdiction.

Petition by the Citrus Packing Company for a writ of prohibition against the Municipal Court of the City of Los Angeles, etc., to prohibit respondents from taking certain proceedings in an action brought in such court, wherein petitioner had filed a third party claim to property on which a writ of attachment had been levied.

Writ of prohibition discharged.

Leo R. Kasviner, of Los Angeles, for petitioner.

Everett W. Mattoon and Beach Vasey, both of Los Angeles, for respondents.

CRAIG, Justice.

The petitioner herein sets forth that in a certain case pending in the municipal court of the city of Los Angeles a writ of attachment was secured by the plaintiff and on the 18th of September, 1933, was levied on certain citrus fruits and supplies. On the 19th of September, 1933, the petitioner herein filed a third party claim with the marshal of the municipal court, who had levied the writ, and on the same day the latter released said attached property pursuant to a stipulation between the attorney for plaintiff and the attorney for the third party claimant, petitioner herein, to the effect that said property should be released forthwith with the same effect as though the marshal had held the property for the period of five days and had then released it due to the failure of the plaintiff to bond against the third party claim. No order of court was made regarding the property. On the 16th of January, 1934, the plaintiff in that action petitioned the lower court for a hearing to determine title under the provisions of section 689 of the Code of Civil Procedure, and it is for the purpose of testing the jurisdiction of the court to conduct such proceeding under these circumstances that the writ of prohibition is here sought.

[1, 2] Both sides agree that the case of Duncan v. Superior Court, 104 Cal. App. 218, 285 P. 732, is the only decision in this jurisdiction upon the subject which is at all applicable. It appears to us that it is in fact determinative. However, it is a proceeding of a different nature than the instant one. In the Duncan Case it was sought to require the superior court by writ of mandate to conduct a hearing under the provisions of the same section, and the gist of the opinion is that to compel such action by the superior court would be considering the facts of that matter, to require an idle and unnecessary act. There is no indication that the court regarded it as one beyond the jurisdiction of the superior court, but inferentially it must be regarded rather as indicating an opinion that the superior court had jurisdiction, but that, because its exercise would be of no appreciable advantage to the petitioner, a mandate would not be issued by the upper tribunal.

But here we have a superior court about to proceed to hear evidence and determine title to the property in question. As we have pointed out, the cited case does not hold that the trial court has no jurisdiction to do this, and we are referred to no authority which does so hold. It is elementary that prohibition does not lie where the court has jurisdiction, regardless of whether or not its contemplated action may be erroneous or the unwise use of discretion. We think in this instance the trial court is acting within its jurisdiction.

The writ is discharged.

I concur: STEPHENS, P. J.

137 Cal.App. 474

KOCHER v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

Civ. 9360.

District Court of Appeal, First District, Division 1, California.

March 21, 1934.

1. **Appeal and error** 🔑**348(1).**
Service of notice of entry of judgment is not necessary to start time for appeal running (Code Civ. Proc. § 939, and § 660, as amended by St. 1929, p. 842, § 5).

2. **Appeal and error** 🔑**345(1).**
Where new trial motion was not filed within 60 days after filing of notice of intention to move for new trial, new trial was denied by operation of law without further order, and failure to file notice of appeal within 30 days after such sixty-day period required dismissal of appeal (Code Civ. Proc. § 939, and § 660, as amended by St. 1929, p. 842, § 5).

3. **Appeal and error** 🔑**356.**
Statute limiting time for appeal is jurisdictional and mandatory (Code Civ. Proc. § 939).

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Paul Kocher against the Fidelity and Deposit Company of Maryland and Carl H. Abbott, as Sheriff of the County of Monterey, for damages for an alleged unlawful release of attachment. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

J. G. Stamp, for appellant.

Thomas E. Davis, of San Francisco, for respondent Fidelity & Deposit Company of Maryland.

Garth V. Lacey, of Salinas, for respondent Carl H. Abbott.

KNIGHT, Justice.

Respondents move to dismiss this appeal upon the ground that the notice of appeal was not filed within the time required by law. No brief has been presented in opposition to the motion, and the matter was submitted without oral argument. We are of the opinion that the motion must be granted.

[1] Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a judgment within sixty days from the entry thereof; but "if proceedings on motion for a new trial are pending, the time for appeal from the judgment shall not expire until thirty days after entry in the trial court of the order determining such motion for a new trial, *or other termination in the trial court of the proceedings upon such motion.*" And the third paragraph of section 660 of the same Code as amended in 1929 (page 842, § 5) declares: "The power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment, or if such notice has not theretofore been served, then sixty (60) days after filing of the notice of intention to move for a new trial. *If such motion is not determined within said sixty (60) days, the effect shall be a denial of the motion without further order of the court.*" (All italics ours.) Furthermore, it is well settled that service of notice of entry of judgment is not necessary to start the time running within which an appeal may be taken. Lawson v. Guild, 215 Cal. 378, 10 P.(2d) 459; Fruit Supply Co. v. Title G. & T. Co., 127 Cal. App. 91, 15 P.(2d) 194.

[2, 3] In the present case, judgment in favor of respondents was entered on June 20, 1933. Notice of entry thereof was not given; but on the following day, June 21, 1933, appellant served and filed his notice of intention to move for a new trial. Accordingly the sixty-day limitation within which the trial court had power to pass on said motion expired on August 20, 1933. No proceedings were had within said period of time; consequently on August 20, 1933, said motion was denied by operation of law, without further order of court (section 660, Code Civ. Proc.), and in order to appeal it was necessary for appellant within thirty days there

after to file notice of appeal. This he failed to do. After filing his notice of intention to move for a new trial on June 21, 1933, he took no further steps in the matter until September 25, 1933, on which date he presented his motion for a new trial; and the trial court held, in conformity with the well-established rule, that it was without jurisdiction in the matter; that the motion had been denied by operation of law, without further order of court, on the sixtieth day after filing the notice of intention to move for a new trial (Payne v. Hunt, 214 Cal. 605, 7 P.(2d) 302; Holquin v. Allison, 97 Cal. App. 126, 274 P. 1037; Shepherd v. Superior Court, 54 Cal. App. 673, 202 P. 466), and upon those grounds the trial court refused to hear the motion. Thereafter and on October 21, 1933, appellant filed his notice of appeal.

It is apparent, therefore, that said notice was not filed as required by said Code section 939 within thirty days after the statutory denial of the motion for a new trial, and for that reason it was ineffectual for the purpose intended. Iske v. Stockwell-Kling Corp., 128 Cal. App. 192, 17 P.(2d) 203. As said in Lawson v. Guild, supra, the statute limiting the time within which an appeal may be taken is jurisdictional and mandatory; and if the appeal is not taken within the time allowed therefor, the appellate court is without power to entertain it.

The appeal herein is therefore dismissed.

We concur: TYLER, P. J.; CASHIN, J.

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137 Cal.App. 328

STEPHENS v. KAUFMANN et al.

Civ. 1227.

District Court of Appeal, Fourth District, California.

March 12, 1934.

1. Appeal and error ⇨1011(1).

Appellate court cannot reverse judgment because of conflicts in evidence or because different judgment might have been rendered if court had tried case.

2. Appeal and error ⇨1008(1).

Whether plaintiff's car entered obstructed intersection first so as to render owner and driver of colliding car guilty of negligence for not yielding right of way *held* for trial court (St. 1927, p. 1436, § 113 (b), subd. 2; St. 1929, p. 541, § 131).

3. Automobiles ⇨171(4).

One who fails to yield right of way to another car first entering obstructed intersection is negligent (St. 1927, p. 1436, § 113, subd. 2; St. 1929, p. 541, § 131).

4. Appeal and error ⇨1008(1).

Whether driver of plaintiff's car took sufficient precautions in looking for approaching vehicles before entering obstructed intersection *held* for trial court (St. 1927, p. 1436, § 113, subd. 2; St. 1929, p. 541, § 131).

Appeal from Superior Court, Fresno County; T. R. Thomson, Judge.

Action by Bettie B. Stephens against Ben Kaufmann and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

Harris & Hayhurst, of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment for $1,000 damages awarded plaintiff for injuries to her automobile and her person suffered in a collision at the intersection of Moroa and Floradora avenues in the city of Fresno during the noon hour of January 6, 1931.

Defendants urge two grounds for a reversal of the judgment: (1) That the evidence fails to show any negligence on the part of E. A. Fries, the driver of the car owned by Ben Kaufmann; and (2) that it conclusively shows that Willie L. Smith, the driver of plaintiff's car, was guilty of contributory negligence as a matter of law.

Floradora avenue runs in an easterly and westerly direction and is sixty feet in width with curb lines twelve feet from the property lines. Moroa avenue runs in a northerly and southerly direction and is forty feet in width with curb lines eight feet from the property lines. Both streets are paved between the curbs.

Fries was in the employ of his codefendant Ben Kaufmann, and was on his employer's business and acting within the scope of his employment at the time of the accident. He was driving a 1929 model Ford roadster southerly on Moroa avenue. Willie L. Smith was a chauffeur employed by plaintiff and was driving her westerly on Floradora avenue at the time of the collision. The intersection was an obstructed one as defined in subdivision 2 of section 113 (b) of the California Vehicle Act (St. 1923, p. 553, § 113, subd. 2, as amended by St. 1927, p. 1436). Each driver testified he entered the intersection at a speed not exceeding fifteen miles an hour.

[1] From a study of the record we find the following observation made in the case of Kienlen v. Holt, 106 Cal. App. 135, 288 P. 866, 868, to be applicable here: "The trial court might have easily found that both parties were negligent in the operation of their automobiles. * * * If it had been held that each driver was guilty of negligence in not looking and seeing the other, there would have been ample evidence to support such a finding, and this court would certainly not have disturbed it. However, the trial court found that the respondents were free from any negligence, and that appellant was guilty of the negligent operation of his automobile and solely responsible for the accident and the ensuing damage. If there is any evidence in the record, or any reasonable inference to be drawn from such evidence, to sustain the findings of the trial court they cannot be disturbed here." We cannot reverse a judgment because of conflicts in the evidence nor because we might have rendered judgment in favor of the losing parties had we been sitting as trial judges.

[2, 3] The defendant Fries fixed the point of the impact as twenty-two feet southerly from the north property line of Floradora avenue and twenty-six feet westerly from the east property line of Moroa avenue. The evidence shows that the left wheel and bumper of his Ford struck plaintiff's car at about the center of its right-hand side, which was about eight feet from its front. Accordingly plaintiff's automobile traveled approximately thirty-four feet after crossing the east property line of Moroa avenue and the automobile Fries was driving traveled twenty-two feet after crossing the north property line of Floradora avenue. There is also evidence to the effect that the Ford approached and entered the intersection at a speed considerably in excess of fifteen miles per hour. While the testimony to which we refer is far from conclusive, it appears in the record, was accepted by the trial court as true, and is binding upon us. This evidence justified the conclusion by the trial court that the plaintiff's automobile entered the intersection first. Under such a circumstance the defendant Fries should have yielded the right of way to plaintiff's car. Section 131, California Vehicle Act (St. 1923, p. 560, § 131, as amended by St. 1929, p. 541). His failure to do so was negligence on his part.

[4] Defendants urge that Smith was guilty of contributory negligence. They assert he approached and entered the intersection without looking for vehicles approaching from his right. On cross-examination Smith testified as follows:

"Q. That is, when you were going west on Floradora you looked north and you could see 25 or 30 feet north on Moroa? (No answer.)

"Q. The reporter does not get your nod. I can, but the reporter doesn't. A. Yes.

"Q. Then you looked to the south to see if there was any traffic coming? A. I did.

"Q. You continued to look to the south until you got to the center of the intersection? A. About that point.

"Q. At the center of the intersection this car was on top of you? A. No, sir.

"Q. Where was it standing? A. When I looked back, it was like a flash.

"Q. Yes. A. Then it was on me.

"Q. That is the first time you ever saw him? A. Yes, sir."

In Kienlen v. Holt, supra, quoting from White v. Davis, 103 Cal. App. 531, 284 P. 1086, it is said: " 'The question as to whether a given state of facts constitutes contributory negligence, as a matter of law, or whether it is a matter that should go to the jury, as a question of fact, is often a close one. The solution depends entirely upon the existing circumstances in each particular case. Unusual circumstances may determine in a given case whether or not reasonable minds might legitimately draw different conclusions on the question of negligence. * * * Where the injured party fails to look at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, or, in other words, where he takes no precaution at all for his own safety, it is usually a question for the court. Where he looks but does not see an approaching automobile, or, seeing one, erroneously misjudges its speed or distance, or for some other reason assumes he could avoid injury to himself, the question is usually one for the jury.' "

It appears from the testimony of Smith that he did look to his right when approaching the intersection and did not see the oncoming automobile driven by Fries. Therefore, having taken some precaution for his own safety and that of the plaintiff, the question of his contributory negligence was one of fact to be decided by the trial court, and that court having held that he took sufficient precautions for his own safety and that of his employer, we cannot disturb this conclusion on appeal.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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137 Cal.App. 396

WHITAKER v. WHITAKER et al.

Civ. 5032.

District Court of Appeal, Third District, California.

March 16, 1934.

Hearing Denied by Supreme Court May 14, 1934.

1. Husband and wife 🔑262(1).

Presumption that any interest in real property acquired by married woman by instrument in writing is her separate property is rebuttable by direct or indirect evidence (Civ. Code, § 164; Code Civ. Proc. § 1961).

2. Husband and wife 🔑262(1).

Rebuttable presumption exists that husband made gift of one-half of community property to wife who claimed property as her separate estate (Civ. Code, § 164; Code Civ. Proc. § 1961).

3. Appeal and error 🔑1010(1).

On issue whether husband made gift of one-half of community property to wife, trial court's finding is conclusive if supported by evidence.

4. Husband and wife 🔑264.

Evidence that community property was purchased with husband's separate estate, in itself, did not rebut presumption that husband made gift of one-half of property to wife who claimed it as her separate estate (Civ. Code, § 164; Code Civ. Proc. § 1961).

5. Husband and wife 🔑264.

Credible testimony of husband that he did not intend to make gift to wife of property purchased in her name with his separate estate is sufficient to rebut presumption that property is separate property of wife (Civ. Code, § 164; Code Civ. Proc. § 1961).

6. Husband and wife 🔑264.

Evidence supported finding that husband did not make gift to wife of one-half of real property which was purchased with his separate estate, and title to which was taken by spouses as joint tenants or tenants in common (Civ. Code, § 164; Code Civ. Proc. § 1961).

7. Appeal and error 🔑994(3).

Credibility of witness is for trial court, and not appellate court.

8. Divorce 🔑253.

Circumstances in divorce action *held* to warrant trial court in disregarding uncontradicted testimony of wife relative to property transactions between husband and wife.

9. Evidence 🔑594.

Rule that uncontradicted testimony of witness cannot be disregarded is subject to limitation that trial court may disregard such testimony when surrounding circumstances afford probable justification therefor.

10. Evidence 🔑594.

Fact that witness who gave uncontradicted testimony is directly interested in outcome of litigation is important circumstance in weighing his testimony.

11. Divorce 🔑253.

In divorce action, evidence warranted finding that instruments whereby husband agreed to transfer stock to wife and acknowledged indebtedness owing to her were without consideration.

12. Husband and wife 🔑262(1).

Presumption exists that wife was vested with a half interest in note wherein husband and wife were payees, and which was given for real property standing in names of both spouses (Civ. Code, § 164).

13. Divorce 🔑253.

In divorce action, evidence *held* to show that yacht, which trial court adjudged to be joint property of spouses, was separate property of wife (Civ. Code, § 164).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action for divorce by Margaret P. Whitaker against Francis Whitaker and another, wherein named defendant filed a cross-complaint. From that part of the judgment awarding named defendant property claimed by plaintiff as her separate estate, plaintiff appeals.

Judgment modified and, as modified, affirmed.

William A. Barnhill, Barnhill & Tripp, and Roger Marchetti, all of Los Angeles, for appellant.

W. I. Gilbert and George Bouchard, both of Los Angeles, for respondent Whitaker.

Benjamin S. Crow, of Los Angeles, for respondent Plato.

LEMMON, Justice pro tem., delivered the opinion of the court.

On this appeal attack is made upon that part of a judgment in a divorce action which awarded to respondent property claimed by appellant as her separate estate.

The parties to this action were married in 1920. At the time of the marriage, the husband, respondent herein, was possessed of property valued at approximately $500,000, and shortly after the marriage he inherited other property of about the same value. During their married life the properties were acquired and the transactions had, which are here involved. At the time of the marriage appellant was possessed of little, if any, property and acquired no separate estate during the marriage other than corporate securities given to her by respondent and which the parties admit amounted to the approximate value of $140,000.

The trial court awarded to respondent eleven parcels of real property, the title to which had been taken by several deeds to respondent and appellant either as joint tenants or as tenants in common. Appellant contends that presumptively an undivided one-half interest in each of the parcels vested in her as her separate property, that the burden of overcoming the presumption was on the respondent, and that he failed to overcome the presumption arising from the face of the deeds.

[1] The presumption declared by section 164 of the Civil Code, applicable to the situation here presented, is disputable. The court is bound to find in accordance with the presumption only in the absence of evidence tending to overcome it. The presumption "may be controverted by other evidence, direct or indirect." Section 1961, Code Civ. Proc.

[2, 3] There is evidence in the case from which the trial court might find, as it necessarily did find, that the separate estate of respondent furnished the funds for the acquisition of the properties in dispute. To that fact respondent definitely testified. In order to make any portion of the disputed property the separate property of the wife, it was necessary that it should have been given to her by her husband. A gift will be presumed under the statutory presumption where a gift is essential to the theory that the property is the wife's separate property. Alferitz v. Arrivillaga, 143 Cal. 646, 77 P. 657. But again the presumption of gift may be controverted and the conclusion of the trial court in this regard is final if it has support in the evidence.

In addition to the circumstance that the property was acquired through and from respondent's separate estate, respondent testified that he did not intend to give to appellant any interest in the properties. In substantiation to some extent of this, and in explanation of why the deeds were thus executed, he stated that at the time of the acquisition of the first parcel of property in question, he was informed by a title company official that it was necessary in this state that the property be taken in the names of both husband and wife.

[4] Standing alone, the fact that the husband's separate estate was the source from which the funds came, which were used in the acquisition of the properties, is not evidence to overcome the presumption of gift (Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913), but in the light of respondent's testimony that he did not intend a gift, it is a circumstance which the court might consider with the other evidence in determining whether the presumption had been overcome.

[5] Where title is taken in the name of the wife, the testimony of the husband that he did not intend to make a gift of his separate property or of his interest in the community is sufficient, if believed by the court, to overcome the presumption declared by section 164 of the Civil Code. Eaton v. Locey, 22 Cal. App. 762, 136 P. 534; Pabst v. Shearer, 172 Cal. 239, 156 P. 466; Fanning v. Green, 156 Cal. 279, 104 P. 308; Stephenson v. Brand, 122 Cal. App. 543, 10 P.(2d) 476.

[6] The trial court believed respondent's testimony that he did not intend a gift, and held that the presumption had been successfully overcome and, while a different conclusion might well have been reached, this court cannot say that the finding is without substantial support in the evidence.

[7] It is claimed that respondent gave further and other testimony which indicates that he did intend to make a gift of the properties to his wife. It suffices to say in reply that his statement in one part of his testimony that he had no such intention was a positive assertion and that it is not within the province of this court to pass upon the credibility of the witness. The doubt, if any, to be cast upon that statement by his later utterances was a matter to be determined solely by the

trial court. Jennings v. Weibel, 204 Cal. 488, 268 P. 901.

[8] Appellant testified that early in their married life respondent gave to her $7,000, which sum was used in the purchase of properties, the proceeds from which were employed in the purchase of the real property here in dispute. This testimony finds no direct refutation in the record. During the married life of the parties, certain instruments were executed by respondent to appellant. By the terms of two of these instruments, respondent agreed to transfer to his wife certain corporate stock and the other three documents are in the nature of acknowledgments of indebtedness owing from him to her. The trial court found that the promises in each instance were without consideration and ordered the instruments canceled. Appellant testified they were executed by her husband to represent her one-half interest either in money drawn by him from the bank to be used by him in separate ventures, or to adjust the rights of the two parties in stock purchases. Respondent admitted that he had not discharged the obligations under these documents and stated that he did not know the consideration for either one of his promises contained therein. He does not directly deny the conversations testified to by appellant as having occurred at the times the several instruments were executed.

We are therefore to consider the right of the trial court to disregard the testimony of the one witness who testified directly upon facts necessarily in issue.

In this action respondent filed a cross-complaint charging adultery. The court found appellant guilty of seven separate offenses under this charge and also found against appellant upon all of the issues relating to the causes of action of both parties for divorce. The testimony upon those issues is not set forth in the transcript for the reason that the findings thereon and that portion of the judgment which dissolves the marriage status of the parties is not attacked. We may assume, however, that the testimony given by appellant in substantiation of the charges in her complaint was disbelieved by the trial court in its entirety, and that the court therefore put no credence in the further testimony given by her, and which related to the property transactions between the parties. The trial judge heard the evidence, and had the opportunity of observing her manner as a witness upon the stand, and her deportment under examination. Having found that she was not to be believed in a part of her testimony, the court was warranted in concluding that credence was not to be placed in other of her testimony.

[9] The rule that the uncontradicted testimony of a witness cannot be disregarded is subject to the limitation that the trial court or jury may discard such testimony when the surrounding circumstances of the case afford probable justification for such action. Otten v. Spreckels, 24 Cal. App. 251, 141 P. 224. The rule was expressed by Mr. Justice Lorigan in the case of Davis v. Judson, 159 Cal. 121, 128, 113 P. 147, 150, in these words: "The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

Reviewing courts are slow to overturn the trial court's findings, even when contrary statements which are uncontradicted appear in the testimony of witnesses. Blanc v. Connor, 167 Cal. 719, 141 P. 217.

"Unless the action of a trial court or jury in repudiating testimony given before it appears to be inherently erroneous or upon its face as involving an arbitrary disregard of such testimony, an appeal court must assume and, in deed, presume, that upon sufficient reasons the testimony was deemed to be wanting in verity, and therefore without probative or evidentiary force or value." Pacific Coast, etc., Fruit Co. v. Sheriffs, 31 Cal. App. 131, 137, 159 P. 986, 989.

[10, 11] The fact that the witness who gave the uncontradicted testimony is directly interested in the outcome of the litigation is a circumstance important in weighing the testimony given. County of Sonoma v. Stofen, 125 Cal. 32, 57 P. 681. By the provisions of the documents respondent had obligated himself to appellant for $80,000 in cash, and corporate stock the value of which does not appear in the record. Appellant testified that the total of the principal of the promissory notes and the stock value represented one-half

of the fund available from profits arising from the sale of real estate. Under an appointment made by the court, an audit was made by an accountant of the financial transactions of the parties. The report returned by the accountant discloses that the total net profit accruing from purchase and sale of all property during the period to be $96,380.34. The inconsistency between this report and appellant's testimony was another circumstance which the court might and undoubtedly did take into consideration in refusing credit to her statements. It was proper to take into consideration the falsity of testimony given by her upon the issues relating to the causes of action for divorce. The fact that she swore untruthfully in a part of her testimony is a circumstance warranting the trier of the case to distrust and disregard her statements in other parts of her testimony. Other circumstances may be noted which cast discredit upon her testimony. Her assertion that she had managed the properties and attended to all of the details thereof, and that her husband was unable to care for the same, was weakened by her inability to give the details of the various transactions and the production of the books kept by her husband which minutely and carefully detailed the different transactions.

In view of the foregoing we cannot say that the trial court acted arbitrarily or without circumstances in the case sufficient to warrant findings contrary to appellant's testimony.

[12] The sale of a parcel of real property which had been taken in the names of both parties brought in part payment a promissory note in the principal sum of $40,000 executed by Annie W. Stimson. Appellant and respondent are the payees therein. The judgment awarded the note to respondent as his separate property. Respondent did not testify that he did not intend to effect a gift of a half interest in the note to his wife. The presumption arising from the taking of title to the note in the names of the parties that appellant thereby became vested with a half interest therein is unchallenged by any evidence in the case.

[13] Finally, appellant complains that a certain yacht known by the name "Marguerite" and claimed by her as her sole and separate property was adjudged to be joint property of the parties. Respondent makes no mention of this property in his brief, and impliedly confesses error by his silence in this regard. It appears that the purchase price of the yacht was $13,500, $4,000 of which amount was paid as an allowance on another boat owned by appellant and transferred to the sellers. The balance of the purchase price was paid by checks drawn by appellant upon her own bank accounts, and in which accounts was deposited the income from securities given to her by her husband. These checks were produced and offered in evidence. There is nothing in the record showing that respondent claimed any interest in the yacht or questioned the authenticity of the checks. The checks were made payable to the vendor of the yacht and the last of the checks has the notation thereon, "Payment in full for Margaret." All of the facts and circumstances show conclusively that the yacht is appellant's separate property.

The judgment is modified by awarding to appellant an undivided one-half interest in the promissory note executed by Annie W. Stimson in the principal sum of $40,000, together with an undivided one-half interest in the deed of trust given to secure the payment of said note and by awarding to appellant the yacht Marguerite. As so modified, the judgment appealed from is affirmed, appellant to recover her costs on appeal.

We concur: PULLEN, P. J.; PLUMMER, J.

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137 Cal.App. 369

EDWARDS v. SERGI et al.

Civ. 4928.

District Court of Appeal, Third District, California.

March 14, 1934.

Rehearing Denied April 13, 1934.

1. **Fraud** ⇨13(2).

Person selling his own land is presumed to know its area and boundaries, and purchaser may recover damages for owner's misrepresentation thereof.

2. **Records** ⇨19.

Record of instrument is constructive notice of its contents, but not of mistakes therein.

3. **Fraud** ⇨13(2).

Agent is not justified in making untrue statements concerning character of land to induce another to purchase it, even if he honestly believes such statements to be true (Civ. Code, § 1572, subd. 2).

4. Fraud ⚷22(1).

Woman to whom landowner's agent falsely represented that wooded land, which he knew that she desired to purchase, was included in land sold to her, had right to rely on such representation and was not obligated to make independent investigation of facts.

5. Limitation of actions ⚷96(2), 100(6).

Running of statute of limitations against action for fraud or mistake, inducing purchase of land by one lulled into sense of security by reliance on vendor's positive statements, will be postponed until actual discovery of fraud or mistake (Code Civ. Proc., § 338, subd. 4).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by Ada Cornelia Edwards against Emile Sergi and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Henry C. McPike, of Oakland, for appellants.

Lowell Palmer and J. H. Morris, both of San Francisco, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

In 1927 plaintiff purchased from defendants 160 acres of land in Napa county. Approximately three and one-half years later she brought this action against defendants for damages for mistake, alleging that a 19-acre tract of timber had been represented by defendants as a part of the 160-acre tract, whereas it was not so contained, and if the particular 19 acres of wooded land had been a part of the larger tract, it would have been of a greater value. The jury awarded plaintiff $2,500 as damages therefor.

Appellants by demurrer and answer set up subdivision 4 of section 338 of the Code of Civil Procedure as a bar to the action and now urge that point as ground for reversal.

Plaintiff, in response to an advertisement, communicated with Joseph Sergi, one of the defendants and appellants herein. Thereafter by agreement, plaintiff and defendant Joseph Sergi, who at all times was acting upon behalf of and by authority of appellant Emile Sergi, the undisclosed owner, met and examined the 160-acre tract of land and spent approximately the entire day in viewing the property. Plaintiff had on several occasions told defendant Joseph Sergi she was particularly interested in a wooded tract suitable for summer homes, and defendant Joseph Sergi assured her the place he had was suitable for that purpose. While on the tract plaintiff observed a strip of heavily wooded land lying adjacent to certain orchard lands which defendant Joseph Sergi then represented to plaintiff as being a part of the property included in the deal. Thereafter, plaintiff believing the 19 acres of wooded land was part of the 160-acre tract, purchased the same. In December, 1930, plaintiff caused the tract purchased by her to be surveyed, and then for the first time learned that the 19 acres of wooded land was not embraced in the boundaries of the properties purchased by her. Appellants insist that the metes and bounds set forth in the deed from Sergi were notice to plaintiff of the location of the land and of the actual land within its boundaries and that she had the means at hand of ascertaining what was embraced in the deed. In support of this appellants cited several cases. In the case of Bank of Mendocino v. Baker, 82 Cal. 114, 22 P. 1037, 6 L. R. A. 833, the court held that an intended purchaser of land who has knowledge of facts sufficient to put him on inquiry as to the existence of some right in conflict with that he was about to purchase, was presumed to have made such inquiry, but the vendee there was not in a position where he could rely upon the statements made by the vendor.

[1, 2] Similarly, in Lady Washington Consol. Co. v. Wood, 113 Cal. 482, 45 P. 809; Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; Redpath v. Aagaard, 217 Cal. 63, 16 P.(2d) 998; Consolidated, etc., Power Co. v. Scarborough, 216 Cal. 698, 16 P.(2d) 268, the court was dealing with situations where a party had knowledge of facts of a character which would reasonably put upon inquiry a prospective purchaser. This is not the situation here confronting us. Appellants knew of the nature of the tract desired by respondent and that she wanted wooded land for summer homes. Appellant Joseph Sergi took plaintiff upon the land and there pointed out a tract thickly wooded and told her it was part of the land for which she was negotiating. It is well established that a person selling his own land is presumed to know the area and boundaries thereof, and, if the purchaser suffers damage by reason of any misrepresentation on the part of the owner as to the extent or boundaries thereof, the purchaser may recover damages. Eichelberger v. Mills Land & Water Co., 9 Cal. App. 628, 100 P. 117; Del Grande v. Castelhun, 56 Cal. App. 366, 205 P.

18; Harder v. Allred, 61 Cal. App. 394, 214 P. 1017. So, too, while the record of an instrument is constructive notice of its contents, it is not constructive notice of any mistake contained therein. Davis v. Ward, 109 Cal. 186, 41 P. 1010, 50 Am. St. Rep. 29; Anderson v. Willson, 48 Cal. App. 289, 191 P. 1016.

[3] It may have been that appellant was sincere in his belief that the wooded land was embraced within the boundary of his land, but even if an agent honestly believes his statements as to character of land to be true, he is not justified in making them in order to induce a purchaser to enter into a contract where they are in fact untrue. McMahon v. Grimes, 206 Cal. 526, 275 P. 440; Muller v. Palmer, 144 Cal. 305, 77 P. 954.

Section 1572 of the Civil Code defines actual fraud as, "2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true."

[4] It was known to appellants that respondent was desirous of purchasing the wooded land in question. Appellant Joseph Sergi represented to her that the tract was included in the property he proposed to sell her; she thereupon had a right to rely upon his representation and she was under no obligation to make any independent investigation of the facts.

In the case of Teague v. Hall, 171 Cal. 668, 154 P. 851, 852, defendant, for the purpose of inducing plaintiff to purchase a nursery, falsely represented it contained a given number of budded trees. Plaintiff had no knowledge of the number of trees in the nursery and relied upon the representation of defendant. Defendant contended, upon an action brought by plaintiff, that the plaintiff had opportunity for examining the nursery, and the information containing the exact number of budded trees was available at all times, but the court held: "That where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case no duty in law is devolved upon him to employ such means of knowledge."

In the case of Hargrove v. Henderson, 108 Cal. App. 667, 292 P. 148, defendant sold to plaintiff a certain 4.78-acre tract of land across which the Southern Pacific Railroad owned a right of way 200 feet wide. Plaintiff was taken to the property prior to the sale, shown the boundaries, and was told that defendant owned the entire tract. Some four years after plaintiff went into possession, the railroad brought an action against him in ejectment and recovered judgment and ejected him from its right of way. He then brought an action for damages to recover for the fraudulent representations made as to the quantity and boundary lines of said 4.78-acre tract sold. The court held that the vendor was presumed to know the areas and boundaries of his own land and that the vendee was entitled to rely upon the representations of the vendor as to its extent and under such circumstances was not required to investigate the public records or make further inquiry as to the areas or title or boundaries of the vendor's land.

[5] We are therefore of the opinion that where a purchaser relying upon positive statements of a vendor is thereby lulled into a sense of security, the running of the statute of limitations will be postponed until actual discovery of the fraud or mistake.

The judgment appealed from is therefore affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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137 Cal.App. 320

SCHROEDER et al. v. McCARGAR et al.

Civ. 9391.

District Court of Appeal, Second District, Division 1, California.

March 12, 1934.

1. Appeal and error ⊂⇒994(3).

Where testimony has not destroyed itself by its inherent improbability, credibility of witnesses is question for trial court, and its decision thereon is final.

2. Automobiles ⊂⇒242(8), 245(80).

In action for injuries sustained in automobile collision at street intersection, plaintiffs entering intersection at speed of 20 miles per hour *held* not contributorily negligent as matter of law; defendants having burden of proving that driving at such speed constituted negligence (St. 1931, p. 2120, § 113(b) 2, (d).

3. Appeal and error ⊂⇒766.

Where brief of appellants showed that appeal did not present case calling for new statement of law on disputed legal questions, appeal was dismissed (District Court of Appeals Rule 5, § 3).

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by William L. Schroeder and another against Walter R. McCargar and another. Judgments for plaintiffs and defendants appeal. On motion of defendants to dismiss the appeal or affirm the judgment.

Motion granted and judgment affirmed.

Lon A. Brooks, of Los Angeles, for appellants.

C. Roy Smith, of Long Beach, for respondents.

CONREY, Presiding Justice.

Appellants having filed their brief containing a statement of their grounds of appeal, now come the respondents and move for dismissal of the appeal or affirmance of the judgment, upon the grounds that the appeal was taken for delay only, and that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Rule V, § 3. We shall decide the motion upon consideration of the second ground only.

The injuries of which the plaintiffs complained were received as the result of a collision between an automobile driven by the plaintiff Schroeder and another automobile driven by the defendant Self. Immediately preceding the collision the plaintiffs were traveling in a westerly direction on West Third street in the city of Long Beach, and the defendants were going south on Daisy avenue. The point of collision was at or near the west line of Daisy avenue at some point between the north curb and the south curb of Third street. The judgment was based upon findings that appellant Self was negligent in the operation of the automobile driven by him, and that the plaintiffs were free of contributory negligence. Summarized, in their essential substance the contentions of appellants are that the evidence is insufficient to sustain a finding of negligence on the part of defendants, that the evidence establishes contributory negligence of the plaintiffs as a matter of law, and that the damages assessed in favor of plaintiff Smith are excessive.

[1] We find no merit in the contention of appellants, "that negligence in the operation of defendants' automobile was not proved." Under this heading appellants say: "As we have pointed out heretofore, both of the plaintiffs testified that 'after their Viking automobile was in the intersection they observed the Oakland automobile of the defendants north of the north boundary of the intersection on their right.' If their testimony on the point may be believed, we concede that there would be then a conflict in the evidence." The credibility of witnesses is a subject for determination by the trial court, and its decision is final, except where the testimony has destroyed itself by its inherent improbability. But in this case there is no compelling proof of physical facts making it impossible for the court to have accepted and believed said testimony of the plaintiffs.

[2] We find no substantial reason in favor of the contention that plaintiffs are chargeable with negligence contributing to the accident and injury as a matter of law. Section 113 (b) 2 of the California Vehicle Act (St. 1923, p. 553, as amended by St. 1931, p. 2120) must be read in connection with section 113 (d) of the act (St. 1923, p. 553, as amended by St. 1931, p. 2120). Under this last subdivision, even if the plaintiff did violate said subdivision (b) 2, of section 113, such violation did not constitute negligence as a matter of law, and the burden was "upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence." Therefore, notwithstanding the uncontradicted evidence that the plaintiffs entered the intersection at a speed in excess of that allowed by law (assuming that this was the uncontradicted evidence), the court had a right to find, as it did find upon a consideration of all of the evidence relating to the issue, that the plaintiffs were not negligent in their entry into said intersection at the speed of twenty miles per hour. The other claims of appellants, on the subject of contributory negligence are likewise without merit.

Again, it is contended that the award of $10,000 damages to the plaintiff Smith for the injuries received by her is excessive. There is evidence tending to show that the injuries received by the plaintiff Smith were the injuries which are described in the findings of the trial court. From such description of those injuries we may not properly say that the damages awarded "are so outrageously excessive as to suggest, at the first blush, passion or prejudice or corruption" on the part of the court. We are not warranted in saying that the sum of $10,000 could not have been given except under the influence of passion or prejudice. Therefore we should not interfere on the ground of excessive damages. Hale v. San Bernardino, etc., Co., 156 Cal. 713, 715, 106 P. 83; Lahti v. McMenamin, 204 Cal. 415, 419, 268 P. 644.

[3] In opposition to the present motion it has been suggested by counsel for appellants that the present motion should be denied for the reason that, at all events, the questions presented by their brief are of such substance and importance that they take the case out of the operation of rule V, section 3. In this respect it is perhaps a border line case. Nevertheless it is a case which does not call for any new statement of the law on any disputed legal question; and it is a case wherein, as we think, the fact that the appeal is without merit should have been known to appellants, and is exhibited to the court by an inspection of appellants' brief alone, "without further argument."

The motion is granted, and the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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137 Cal.App. 228

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF LOS ANGELES et al. v. DYSINGER et al.

Civ. 9342.

District Court of Appeal, First District, Division 2, California.

March 7, 1934.

Hearing Denied by Supreme Court May 3, 1934.

1. Appeal and error 🔑1097(1), 1195(1).

Law determined by appellate court's decision on first appeal is binding on both trial and appellate courts, unless facts shown on subsequent trial are essentially different.

2. Appeal and error 🔑1099(3).

Law of case, established in appellate court's previous decision, as to type of church's polity, illegality of amendments to local congregation's constitution, finality of synod's decree establishing lawful congregation, etc., *held* binding on subsequent appeal, in absence of new evidence material to issues.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by the First English Evangelical Lutheran Church of Los Angeles and others against William S. Dysinger and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Salisbury & Robinson and B. R. Ware, all of Los Angeles, for appellants.

Holcomb & Holcomb and Clarence B. Runkle, all of Los Angeles, for respondents.

BURROUGHS, Justice pro tem.

[1] This case was before this court upon a previous appeal. See First English Evangelical Lutheran Church v. Dysinger, 120 Cal. App. 139, 6 P.(2d) 522. A judgment in favor of the defendants was reversed and upon a second trial judgment went for plaintiffs, and the defendants have appealed therefrom. The facts of the first trial are stated in the opinion of the court and substantially the same evidence was introduced on the second trial. In the decision of the Court of Appeal above referred to certain principles of law were enunciated which thereby became the "law of the case," and unless upon the subsequent trial the facts were essentially different, the law as determined by the previous decision is binding upon both the trial and the appellate courts. 2 Cal. Jur., pp. 944, 950, 951, §§ 555, 557. At the second trial the defendants sought to amend their answer, but the application was denied. Thereupon counsel for defendants made an offer of proof of new evidence, which offer was rejected by the court. If the offered evidence was material, then the court erred in rejecting it and the case should be remanded.

[2] Some of the principles of law laid down by the previous decision are concretely stated in respondents' brief as follows:

"First, the polity of this church organization is the type variously called Federated, Associated or Presbyterial. Civil courts, for their purposes, divide church polity into two classes. The other is known as the Congregational or Independent type. In it the local congregations are purely autonomous units, completely independent of any superior body. On the former appeal plaintiffs contended for the Federated polity and defendants for the Congregational. The court sustained plaintiffs. Appellants now say that the decision only inferentially adopts the Federated type. True, it does not say in so many words, 'The polity here is Federated.'

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

"Second, defendants' attempted amendments to the local congregation's constitution were illegal and void.

"Third, the ecclesiastical decree of the Synod establishing plaintiffs as the lawful congregation is binding upon the civil court.

"Fourth, the relative sizes of the two factions, the questions of majority and minority, are wholly immaterial."

An examination of the offered evidence does not disclose anything whatever which tends to bear upon the question that the polity of the church organization is not of the federated, associated, or presbyterial type. Nothing has been offered by way of new evidence which discloses that the attempted amendments to the local congregation's by-laws were other than illegal and void. The offered evidence seems to be intended for the purpose of having this court review the decree of the synod ousting the defendant Dysinger from the pastorate of the church and establishing the plaintiffs as the lawful congregation thereof. The offered evidence relates to the appointment of a special committee by the president of the synod for the purpose of investigating and reporting to him as to the action which should be taken in the factional difficulties existing among the members of the congregation of the church and also recommending that another committee of investigation be appointed. The next document offered consists of the report of the investigating committee recommending two certain plans of action, the first one of which relates to the retirement of the pastor from the church work. The second plan proposed relates to a division of the members of the church into two separate churches and dividing the property of the organization among the congregation according to the membership of each faction. The next offer of evidence is a letter which was written and circulated by certain members of the congregation proposing the adoption of the first plan above referred to, at the annual congregational meeting of the church. This document is followed by a further offer to prove that at the congregational meeting last referred to the plan number one was adopted by a vote of 185 as against 170, but that at least seventy-five of the affirmative votes were cast by nonmembers; that the said congregational meeting was then adjourned until a later date, at which time a motion to rescind the resolution last referred to was made, but the motion was tabled because proper notice thereof had not been given to the members as required by the rules of the church organization; that at said meeting the whole of the report of the synod was rejected; that thereafter another congregational meeting was called by the council to meet on October 14, 1925, at which time the first plan above referred to would be considered; that at said meeting a motion was made and carried to rescind the action previously taken on the first plan by a vote of 205 to 114. Another document offered in evidence is a letter written by one Daniel J. Snyder protesting against the meeting to be held on October 14, 1925. There was further offered a citation issued by the president of the California synod directed to the defendant Dysinger to appear before a committee and answer certain charges of insubordination, etc. There is also set forth an answer to the citation above referred to which, among other things, denied the matters charged in the citation. Many other offers of new evidence were made by the appellants which were rejected by the court, but they were all, so far as their materiality to the issues involved, similar in character to the ones which we have specifically referred to. It is clear that none of these offers is relevant or material to the issue that the ecclesiastical decree of the synod is not final and binding upon this court. First English Evangelical Church v. Dysinger, supra; Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 106 P. 395; Horseman v. Allen, 129 Cal. 131, 61 P. 796; Watson v. Jones, 80 U. S. (13 Wall.) 679, 20 L. Ed. 666. Nothing has been offered in the way of new evidence to show that the holding of the court in the previous decision that the relative sizes of the two factions, that is the questions of majority and minority, are not wholly immaterial.

No new evidence that is material to the issues involved having been offered by the appellants, it is clear that the "law of the case" as established in the previous decision of this court is binding upon us and requires an affirmance of the judgment. Such being the case, it becomes unnecessary to discuss any of the other matters presented by appellants.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

137 Cal.App. 293

BEEMER et al. v. ROHER et al.

Civ. 8988.

District Court of Appeal, First District, Division 1, California.

March 10, 1934.

1. Husband and wife ⊂⊃259.

Husband's deposits in joint tenancy account with brother *held* community assets, where such sums were accumulations from wages earned during marriage, though while separated from wife.

2. Husband and wife ⊂⊃249.

Proceeds of husband's life policy naming brother as beneficiary *held* community assets, where premiums were paid with wages earned during marriage, though while separated from wife.

3. Husband and wife ⊂⊃273(12).

Wife's right after husband's death to recover share of community assets represented by deposits in joint tenancy account with brother, and proceeds of life policy payable to brother, *held* not barred by laches, where wife did not know before husband's death what earnings were, nor what disposition he made of them.

> Husband abandoned wife in 1920 and came to California in 1922, having no property at time. Wife did not know of husband's whereabouts until 1925, when she learned he was in California, and in 1930 she learned of specific employment. He died in October, 1931.

4. Husband and wife ⊂⊃273(1).

Surviving wife *held* entitled to only one-half of community assets represented by husband's deposits in joint tenancy account with brother and proceeds of husband's life policy payable to brother.

5. Husband and wife ⊂⊃273(12).

Where husband's deposits in joint tenancy account with brother were *held* to be community assets, order directing company holding deposits to pay over surviving wife's portion "forthwith" was error (Civ. Code, § 172, and § 161a as added by St. 1927, p. 484).

> Husband was given management and control of community property, and therefore, since husband had right to deposit community funds, right of his administratrix and his surviving wife to recover possession of any portion thereof was subject to whatever statutory provisions and written agreements as would govern husband in withdrawing such deposits.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Grace A. Beemer, as administratrix of the estate of Bert Roher, deceased, and another, against Henry Clay Roher, also known as H. C. Roher, and others. From an adverse judgment, defendants appeal.

Reversed, with directions.

See, also, 30 P.(2d) 549.

Clock, McWhinney & Clock, M. D. Jergins, and John G. Clock, all of Long Beach, for appellants.

Fred Miller, of Long Beach, for respondents.

KNIGHT, Justice.

Plaintiffs, respectively, are the administratrix of the estate and the surviving wife of Bert Roher, deceased. They joined in bringing this action to recover certain funds in the possession of defendants, alleging that the same were community assets, and that upon the death of the decedent, who died intestate, his surviving wife, Sarah Roher, became the absolute owner of the whole thereof, subject to the right of possession thereof by said administratrix for administration purposes. The cause was submitted to the trial court for decision on an agreed statement of facts and decided in favor of plaintiffs. Besides decreeing that the said Sarah Roher was the absolute owner of the whole of said funds subject to the right to possession thereof by the administratrix for administration purposes, the judgment directed the defendants to pay the same "forthwith" to said administratrix for such purpose. The appeal defendants have taken from said judgment presents three main questions for determination; namely, whether the stipulated facts are legally sufficient to sustain the trial court's conclusion that the funds in dispute are community property; if so, whether the surviving wife is entitled to the whole thereof; and whether in any event she is barred from recovering any portion thereof by reason of laches.

[1-4] According to the stipulated facts, four separate sums of money are involved, three of which, consisting of $2,500, $2,500, and $1,400 each, at the time of decedent's death were on deposit with the defendant corporations in joint tenancy accounts theretofore opened by the decedent in the names of himself and his brother, Henry C. Roher, one of the defendants herein. The fourth sum, amounting to $2,000, was paid to the said Henry C. Roher as the proceeds of a life insurance policy issued to decedent about eighteen

months prior to his death, wherein the said Henry C. Roher was named as beneficiary. It is conceded by said stipulated facts that at the time of decedent's death the plaintiff Sarah Roher was, and for approximately 37 years had been, his wife; that the sums of money on joint deposit with said corporations were the accumulations from the decedent's wages earned by him during marriage; that the premium on the life insurance policy was paid with his earnings; and that ever since the year 1920 Henry C. Roher knew that the decedent and Sarah Roher were husband and wife. In this regard the agreed statement of facts shows that the parties were married in Illinois in 1894 and later on moved to Kansas, where they lived together as husband and wife until December 31, 1920, on which date the decedent abandoned his wife and their two minor children, and, after living separate and apart from them in Kansas for about 8 months, moved to Nebraska, then to Colorado, and eventually to California; that he arrived in this state in January, 1922, and, except for a brief visit which he made to the Middle West in July, 1931, he continued to remain here until his death, which occurred on October 24, 1931, working most of the time, in various capacities, for a potash and chemical company at Trona, Cal.; "that at the time the deceased came to California he had no property, either real or personal, and that since coming to this state, and up to the time of his death, he had saved out of his wages while employed at Trona, California," the sums of money on deposit with said corporations at the time of his death. The agreed statement of facts further shows that, after the decedent abandoned his wife, she continued to live in Kansas with the minor children, and that she did not know of her husband's whereabouts until the year 1925, at which time she learned he was somewhere in California; and that in 1930 she learned of his employment in Trona; furthermore, that at no time prior to his death did she know what his earnings were, nor what disposition, if any, he was making thereof. It was also conceded by the stipulated facts that there was no consideration for the creation of the joint tenancy accounts, nor for the naming of Henry C. Roher as beneficiary in the life insurance policy, other than such as may be implied by law therefrom, that decedent and his wife "were estranged and were on unfriendly terms," and that the decedent created said joint tenancy accounts and named his brother as beneficiary in said insurance policy "with the intent and purpose that plaintiff Sarah Roher be prevented from having or obtaining any interest" therein.

The foregoing stipulated facts fully support the trial court's findings that the funds involved, including the proceeds from the life insurance policy, are community assets; and that the right of Sarah Roher, as surviving wife, to recover her legal share thereof, is not barred by laches. But the trial court's legal conclusion that the surviving wife is entitled to the whole thereof cannot be sustained. Under the rule of the following cases she may recover only one-half thereof. Trimble v. Trimble (Cal. Sup.) 26 P.(2d) 477, 479; Dargie v. Patterson, 176 Cal. 714, 169 P. 360; Spreckels v. Spreckels. 172 Cal. 775, 158 P. 537; Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67; Pretzer v. Pretzer, 215 Cal. 659, 12 P.(2d) 429; Rice v. McCarthy, 73 Cal. App. 655, 239 P. 56; Schelling v. Thomas, 96 Cal. App. 682, 274 P. 755. As held in substance in those cases, gifts of the community property made by a husband without the wife's consent "are not void but are voidable as to the wife's half * * * and valid as to the husband's half" (Trimble v. Trimble, supra); consequently the wife's right to assail such gifts after the husband's death is limited to one-half of such property (Spreckels v. Spreckels, supra). And likewise, as held in Travelers' Insurance Company v. Fancher (Cal. Sup.) 26 P.(2d) 482, where premiums on the life insurance policy of the husband are paid out of community funds, the proceeds become community assets, but the surviving wife, upon the death of the husband, is entitled to receive only one-half thereof, and the beneficiary or beneficiaries named in the policy are entitled to the remaining one-half as a gift by the husband of his share of such community assets.

[5] Nor are we able to sustain those provisions of the trial court's judgment directing the defendant corporations to pay "forthwith" to the administratrix the surviving wife's portion of the funds on deposit therewith at the time of her husband's death. As declared in Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003, by virtue of section 172 of the Civil Code, the husband is given the management and control of the community property, and the addition of section 161a to said Code in 1927 (St. 1927, p. 484) did not interfere with the husband's right in this respect. Therefore, in the present case, since the husband had the right to deposit the community funds with said corporations, $1,400 of which was evidenced by the issuance of a so-called "Accumulative Investment Certificate," the

right of the administratrix of his estate and of his surviving wife to recover possession of any portion thereof from said corporation is subject to whatever statutory provisions and written agreements as would govern the husband in withdrawing said deposits; and, that being so, plaintiffs are not entitled to the payment thereof "forthwith" as directed by the trial court's judgment.

For the reasons stated, the judgment is reversed, with directions to the trial court to revise and re-enter the same in conformity with the views herein expressed.

We concur: TYLER, P. J.; CASHIN, J.

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137 Cal.App. 298

BEEMER et al. v. ROHER et al.

Civ. 8988.

District Court of Appeal, First District, Division 1, California.

March 10, 1934.

Hearing Denied by Supreme Court May 7, 1934.

Appeal and error 🔑790(3).

Questions on motion to vacate writ of supersedeas *held* moot, where judgment was reversed with directions on appeal on merits, and motion would be dismissed.

Action by Grace A. Beemer, Administratrix of the estate of Bert Roher, deceased, and another, against Henry Clay Roher, also known as H. C. Roher, and others. From an adverse judgment, defendants appealed. On respondent's motion to vacate writ of supersedeas.

Motion dismissed.

Clock, McWhinney & Clock, of Long Beach, and Orrick, Palmer & Dahlquist, of San Francisco, for appellants.

Fred Miller, of Long Beach, for respondents.

KNIGHT, Justice.

Pending the hearing of the appeal in the above-entitled cause, one of the appellants, Pacific States Savings & Loan Company, applied to this court for, and was granted, a writ of supersedeas to stay the execution of that part of the judgment directing said company to pay "forthwith" a sum of money in its possession, which the trial court by its judgment decreed was the property of one of the respondents. Subsequently the respondents moved to vacate and set aside said writ. The appeal has now been determined on the merits [Beemer v. Roher (Cal. App.) 30 P. (2d) 547], the judgment being reversed, with directions to revise and re-enter the same in accordance with the views expressed in the opinion filed therein. The entry of the revised judgment will supersede the one appealed from, and therefore the questions raised by respondents' motion to vacate and set aside said writ of supersedeas have become moot. Upon that ground respondents' motion is dismissed.

We concur: TYLER, P. J.; CASHIN, J.

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137 Cal.App. 80

COPPOCK et al. v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 4954.

District Court of Appeal, Third District, California.

Feb. 23, 1934.

1. Appeal and error 🔑110.

No appeal lies from order denying motion for new trial.

2. Automobiles 🔑244(36).

In action by passenger of automobile, injured when pitched forward by collision with automobile which had stopped ahead, evidence sustained inference that collision was caused by automobile in which plaintiff was riding being struck in rear by defendants' truck.

3. Automobiles 🔑201(1).

In action by passenger of automobile injured when pitched forward by collision with automobile ahead, negligence of driver in stopping automobile in low gear so that foot on clutch was released when truck struck automobile from rear, driving it forward, *held* not to excuse driver of truck, since proximate cause of collision was impact of truck.

4. Negligence 🔑61(1).

Party is answerable for consequences of his wrongful act ensuing in ordinary course of events, whether caused directly or through intervening cause or condition set in motion by wrongdoer.

5. Automobiles ⚷231.

In action by passenger of automobile for injury sustained when automobile in which she was riding collided with automobile ahead because of impact from truck behind, that owner of automobile paid for damages to other automobile *held* not available as defense to driver of truck.

6. Evidence ⚷588.

Jury may accept solution of circumstances which appear to them to be correct, irrespective of positive statement of some witness.

7. Appeal and error ⚷1001(1).

Where testimony in record supports verdict, appellate court is bound thereby, whether verdict is based on direct testimony or on surrounding circumstances.

8. Automobiles ⚷245(15).

In action by passenger of automobile for injury sustained when automobile in which she was riding collided with automobile ahead because of impact from truck behind, negligence of driver of truck in following close behind automobile and in failing to observe its movements and in colliding with it when it stopped *held* for jury (St. 1931, p. 2116, § 94 (b); St. 1929, p. 541, § 127, subd. (a).

9. Trial ⚷133(6).

In action for injuries in automobile collision, permitting counsel for plaintiff to argue that juryman would feel entitled to compensation if some one came along and crushed his nose in and broke the bone and caused face to swell *held* not prejudicial in view of evidence and instruction that verdict should be on testimony only.

10. Appeal and error ⚷977(5).

Trial court's denial of motion for new trial on ground of passion and prejudice of jury would not be disturbed in absence of showing that appellant was prejudiced.

11. Appeal and error ⚷1060(1).

Improper argument to jury does not require reversal where fair trial has not been prevented.

12. Appeal and error ⚷1004(1).

Verdict, so excessive as to suggest passion or prejudice of jury, justifies reversal; but fact that trial court might properly have reduced verdict or that appellate court would have awarded lesser sum in first instance, does not justify reversal.

13. Damages ⚷130(3).

$4,000 to woman for injuries to back, hip, bruises about head, and broken nose, causing swelling of face for two weeks and requiring operation for deflected nasal septum, *held* not excessive.

14. Automobiles ⚷246(48).

In action by passenger of automobile for injuries sustained when automobile in which she was riding was struck in rear by truck, instruction that truck driver was negligent if he followed automobile more closely than was prudent under traffic conditions on highway *held* proper under evidence (St. 1929, p. 541, § 127, subd. (a).

15. Automobiles ⚷246(48).

In action by passenger of automobile for injuries sustained when automobile in which she was riding was struck by truck from rear, instruction that negligence may be concluded from failure to see what should be seen in exercise of ordinary care *held* proper under evidence.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Ada M. Coppock and another against the Pacific Gas & Electric Company and another. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Thomas J. Straub, W. H. Spaulding, and Clinton F. Stanley, all of San Francisco, for appellants.

C. C. McDonald, of Woodland, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

[1] The plaintiffs had judgment against the defendants in the sum of $4,000 for and on account of personal injuries alleged to have been suffered by the plaintiff Ada M. Coppock, on account of the negligence of the defendants. From this judgment the defendants appeal, and also appeal from the order of the court denying defendants' motion for a new trial. As no appeal lies from an order denying a motion for new trial, that portion of the appeal is hereby dismissed.

Three vehicles were involved in the occurrences leading up to the injury of the plaintiff Ada M. Coppock, to wit: A passenger vehicle driven by a man by the name of Beyer; a passenger vehicle driven by Mrs. Marsie Wallace; and a truck belonging to the defendant Pacific Gas & Electric Company, a corporation, and driven by its employee, K. M. Sather.

The injuries constituting the basis of this action were suffered by Ada M. Coppock in an automobile collision occurring on the 26th day of February, 1932, on the Yolo side of the M street bridge across the Sacramento river. The record shows that just prior to the incidents related, the draw on the M street bridge had been opened so that a line of cars crossing the bridge, moving from the Sacramento to the Yolo side of the river on the north side of the bridge, had been stopped until the closing of the draw. The procession of cars then moved forward, and, owing to some obstruction, the Beyer car, which was in the lead, suddenly stopped. The Wallace car likewise stopped. The truck driven by the defendant Sather for some reason did not stop, came in contact with the Wallace car, which was following the Beyer car, and by this contact, set in motion the Wallace car with considerable speed so that it collided with the rear of the Beyer car with sufficient violence to throw the plaintiff Ada M. Coppock, who was a passenger in the Wallace car, suddenly forward and striking portions of the Wallace car, thereby inflicting injuries complained of in this action. It was on account of these injuries that the jury awarded damages.

[2] Upon this appeal it is insisted that there is no evidence showing that the truck driven by the defendant Sather came in contact with the Wallace car. This contention is based upon the fact that no one saw the truck driven by the defendant Sather, prior to the accident, and that the defendant Sather testified positively that the truck did not strike the Wallace car. The contention is also made that the physical facts corroborate the testimony of the defendant Sather. In this contention, however, the appellants' position appears to be untenable. While the briefs in this case are elaborate, the facts are simple. All that portion of the briefs of the parties relating to inferences based upon inferences do not appear applicable to this case. There is testimony in the record sufficient to justify the jury in coming to the conclusion that the truck driven by the defendant Sather did come in contact with the Wallace car. The occupants of the Wallace car testified that they felt the bump of the truck with the rear of the car in which they were riding. The driver of the Wallace car testified that she was thrown backward by the bump, causing a temporary release of the clutch which had been released when the Wallace car had been stopped upon perceiving the stopping of the car driven by Beyer. This release of the clutch on the Wallace car precipitated it forward until it came in collision with the rear of the Beyer car. The testimony shows that the driver of the Wallace car had left it in low gear with the engine running and the clutch held out by the foot used in operating the clutch lever.

Again, there is testimony showing that the tire rack on the rear of the Wallace car was bent or pushed up against the rear of the car. A few scratches were also upon the rear bumpers. The record does not show any injury to the front end of the truck. Thus, we have a situation where the impact of the truck with the Wallace car was sufficient to cause the temporary release of the clutch on the Wallace car, which sent it forward with sufficient speed to precipitate the plaintiff Ada M. Coppock forward at the time of the impact between the Wallace car and the Beyer car, and which resulted in the physical injuries alleged in the complaint.

The testimony also shows that the witnesses heard a crash in the rear, but that crash is explained by reason of the fact that a car driven by some Filipinos ran into the north railing of the bridge. There is also testimony in the record to the effect that the tire rack on the Wallace car was in an undamaged condition prior to the accident related herein. That no witness testified on the part of the plaintiff that they saw the truck driven by the defendant Sather come in contact with the Wallace car, is not necessary to support the judgment. The fact that the truck was immediately behind the Wallace car after the impact; that the tire rack was pressed out of normal position; and that the occupants of the Wallace car felt a shock or bump coming from the rear, amply supports the conclusion that the truck then and there came in contact with the Wallace car, and there is no room for an argument of an inference being based upon an inference to support such conclusion. The facts which we have briefly summarized clearly establish the causal connection between the impact of the truck with the Wallace car and the injuries suffered by the plaintiff Ada M. Coppock.

[3, 4] While no argument is presented by counsel as to whether it was negligence on the part of the driver of the Wallace car to leave the engine running, the shift-lever set for low gear, and the clutch held out by the (left) foot of the driver, we know by common experience that under such circumstances drivers usually keep the engine in motion in order that the car may not be stalled and the procession of cars unduly delayed. However, if we assume that the driver of the Wallace car was likewise negligent, the defendants are not thereby excused, as the proximate cause was the impact between the truck and the Wallace car. This is clearly

set forth in 22 Ruling Case Law, page 134, to wit: "It is universally agreed that the mere fact that the intervention of a responsible human being can be traced between the defendant's wrongful act and the injury complained of, will not absolve him. On the contrary, the general rule is that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary course of events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated to induce the injurious result." To the same effect is the text in 19 California Jurisprudence, pp. 556–559.

The record further shows that the procession of cars was moving across the M street bridge at a speed of from six to eight miles per hour; that the brakes on the truck driven by the defendant Sather were in good condition and the truck stopped, if going at a speed of six miles per hour, in about six feet, and if going at a speed of eight miles per hour, could be stopped in a distance of eight or nine feet. There is testimony also to the effect that the defendant Sather, just preceding the impact of the truck with the Wallace car, was watching the Beyer car immediately in front of the Wallace car. After the collision, the defendent Sather got out of the truck and came up to the occupants of the Wallace car.

[5] Appellants call our attention to the fact that the owner of the Wallace car paid the owner of the Beyer car for the damages suffered to his car. This, however, though stressed in the briefs, seems to us unimportant, as the owner of the Wallace car might be liable to the owner of the Beyer car without in any manner whatsoever relieving the defendants from their responsibility to the plaintiff in this action, as the negligence, if there was negligence on the part of the driver of the Wallace car, as we have shown, does not constitute any defense to this action.

Another item of testimony from which the jury had a right to draw the conclusion that the injury to the plaintiff Ada M. Coppock was proximately caused by the impact of the truck with the Wallace car, is that the record shows the Wallace car stopped at approximately fifteen feet from the Beyer car, and that after the collision of the Wallace car with the Beyer car, the truck was distant from the Wallace car only about six feet, which shows that the truck, in order to impel the Wallace car forward a distance of fifteen feet, traveled some distance forward after its impact with the Wallace car. Otherwise stated, if the truck had stopped immediately upon the stoppage of the Beyer car, and the Wallace car had gone forward without being struck by the truck, there would have been a distance of several more feet between the truck and the Wallace car, plainly contradicting the testimony of the driver of the truck.

[6] The law is very well established in this state that jurors are entitled to accept the solution of the circumstances which appear to them to be correct, irrespective of the positive statement of some witness. Barham v. Widing, 210 Cal. 206, 291 P. 173; Chalmers v. Hawkins, 78 Cal. 733, 248 P. 727. A search of the record likewise discloses that the plaintiff Ada M. Coppock had no control over the driver of the car in which she was riding as a guest.

[7] We do not need to cite authorities that where there is sufficient testimony in the record to support the verdict of the jury, an appellate court will not interfere or direct a reversal because a different conclusion might be reached, or because there is testimony to the contrary. This is true even though the conclusion reached by the jury is based upon the circumstances surrounding the case, and not upon the direct testimony of any witness. This is supported by the cases already cited. If there is any testimony in the record supporting the verdict, and the jury accept such testimony as true, appellate courts are bound thereby. Citations of authorities to support this statement we deem unnecessary. We may, however, refer to the case of In re Estate of Russell, 189 Cal. 759, 210 P. 249. See, also, Wilson v. Kestenholz, 113 Cal. App. 13, 297 P. 954.

[8] The testimony of the defendant Sather is to the effect that he was about fifteen feet behind the Wallace car when he saw the Beyer car stop, which is in direct conflict with what we have said with regard to the testimony showing the position of the truck after the collision between the Wallace car and the Beyer car, indicating that the jury very properly was authorized to disregard the statement of the driver of the truck.

The testimony is to the effect that the brakes on the truck were in good condition, and had been recently inspected, which brings this case practically within the rule stated in De Temple v. Schafer Bros. Logging Co., 169 Wash. 102, 13 P.(2d) 446, 448, where the court said: "It is a matter of common knowledge that an automobile equipped with good brakes, traveling ten to twelve miles per hour, can be stopped in considerably less than fifteen feet." In subdivision (b) of section 94 of the California Vehicle Act of 1931 (St. 1931, pp. 2115, 2116) the legal distance for stopping a truck traveling at ten miles an hour is twelve and five-tenths feet. In this particular we may say we think it is common knowledge that every addition of mileage to the speed, considerably increases the distance required for stopping the car, from which it follows, if the truck was only making a speed of from six to eight miles an hour, it could have been stopped in a much shorter distance than when traveling at ten miles an hour.

The question then presents itself, Was the driver of the truck guilty of negligence? Subdivision (a) of section 127 of the California Vehicle Act (St. 1923, p. 558, § 127, subd. (a), as amended by St. 1929, p. 541) reads: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard to the speed of such vehicle and the traffic upon and condition of the highway." Whether the driver of the truck was following the Wallace car more closely than was reasonably prudent under the circumstances was a question for the jury. It was also a question for the jury as to whether the driver of the truck, by exercising reasonable diligence, might have perceived that the Wallace car had been stopped, and likewise brought the truck to a standstill before its impact with the Wallace car. The fact that the cars were moving slowly; the fact that the truck was equipped with efficient brakes; the fact that the circumstances were such as to require constant vigilance on the part of every motor vehicle driver at the time in question, were all questions of fact to be taken into consideration by the jury in determining whether the driver of the truck was or was not guilty of negligence.

We think the testimony in the record shows that the jury was amply justified in drawing the following conclusions: That if the driver of the truck had been following the Wallace car at a reasonably safe distance, had been paying attention to the movements of the Wallace car, he could, by reasonable diligence, have stopped his truck before it collided with the Wallace car. Also, that the circumstances justify the conclusion that the driver of the truck was following the Wallace car other than at a safe distance; also, that he was inattentive in observing the movements of the Wallace car; and that he did not diligently or properly apply the brakes with which the truck was equipped.

As stated in 19 California Jurisprudence, page 719, negligence is a relative term, and must always be applied to the circumstances upon which it is sought to be predicated, and, in arriving at its conclusion, the jury had a right to take into consideration all the testimony introduced in the case, and determine what should be accepted and what rejected. 45 C. J. 1261.

The jury in this case, from the circumstances disclosed by the record, was entitled to draw the inference of negligence, not, as claimed by the appellants, an inference based upon an inference, but an inference from the circumstances which we have hereinbefore set forth. 19 Cal. Jur. 719, § 133. And if the circumstances justify such an inference, an appellate court has no jurisdiction to interfere with the action of a jury.

[9] Complaint is likewise made of misconduct on the part of the attorney for the plaintiff in his argument to the jury, in the use of the following language: "If somebody came in and laid down a large sum of money before this happened to you, and said to you, 'Now Bill (or whatever your name is), I am going to hit you a severe blow on top of the nose;' also, if somebody comes along and crushes your nose in and breaks the bone, and your face is all swollen up—you would feel that you were entitled to some compensation." The whole argument of counsel for the respondent is not called to our attention, nor is the argument of counsel for the defendants included in the record, but it is clearly evident that the remarks of counsel for the plaintiff were in refutation of a claim by the appellants that the plaintiff was not entitled to compensation. It may be said in this connection that the court instructed the jury that they were to find a verdict only upon the testimony that was introduced, and not upon remarks of counsel. While apparently this language is used as an illustration, the record shows that the plaintiff, Ada M. Coppock, received a severe blow upon the nose; that one of the bones of the nose was either cracked or broken; and that as a result, her face was badly swollen; and that subsequently to the going down of the swelling, an operation had to be performed upon the broken portion of the nose, from which it necessarily follows that if the negligence of the driver of the truck was the inducing cause of the injuries mentioned, Ada M. Coppock certainly became, was, and is entitled to compensation.

[10, 11] The motion for new trial in this case assigned, among other grounds, passion and prejudice on the part of the jury. This motion having been denied, unless it is made to appear that some prejudice has been suffered, the conclusion reached by the trial court will not be disturbed. Coursault v. Schwebel, 118 Cal. App. 259, 5 P.(2d) 77.

Again, unless it appears that the language used has been such as to cause a miscarriage of justice, or such as to prevent the party from having a fair trial, reversal will not be ordered. Robinson v. Western States Gas Co., 184 Cal. 401, 194 P. 39.

[12] Was the verdict excessive? The fact that the trial court might have been justified in reducing the verdict somewhat, or the fact that this court in the first instance might have awarded a lesser sum, does not justify reversal. It is only when the damages are so exorbitant as to suggest passion or prejudice on the part of the jury. This has been decided so frequently that citation of authorities seems unnecessary.

[13] The injury suffered by the plaintiff Ada M. Coppock caused considerable pain. The testimony of Dr. Tillotson is as follows: "She showed evidence of a fracture of the nose and I checked my examination with the X-ray which showed a fracture of the nasal bone, and she also showed a deflection of the nasal septum, which is the partition between the two sides of the nose, which was apparently secondary to this blow she had received on the nose. I checked over the position of the bone, etc., and told her that in about six weeks following the subsidence of the swelling, etc., of the tissues, and after the fracture had healed, I thought it advisable to correct this deflected septum, and, accordingly, she came back to me in April and that work was done under a local anesthetic. The operation consisted essentially of removing the deflected cartilage and bony portion of the septum, the septum being the partition between the two nasal passages." In answer to a question as to whether the operation was major or minor, the doctor answered: "You can consider it minor or major. If you had it yourself, you would probably consider it major."

The plaintiff Ada M. Coppock testified that her face was badly swollen for about two weeks; that her eyes were almost swollen shut, and her whole head bruised; that she also suffered some injury in her right hip, and also some trouble in the back.

There being nothing in the record sufficient to warrant the conclusion that the damages allowed were the result of passion or prejudice, the mere fact that the trial court and the jury allowed a somewhat larger sum than this court would have been inclined to award in the first instance lays no foundation for a lessening of the amount of the judgment.

[14] Complaint is made by the appellants that the court erred in giving the jury the following instruction: "The court instructs you that the failure of any person to perform a duty imposed upon him by statute is negligence in itself. Therefore, should you find that the defendant, K. M. Sather, immediately prior to and at the time of the collision referred to in the complaint, violated the provisions of subdivision (a) of section 127 of the California Vehicle Act while operating the motor vehicle of the defendant, Pacific Gas and Electric Company, by following the vehicle, in which the plaintiff, Ada M. Coppock, was riding, more closely than was reasonable and prudent, having due regard to the speed of such vehicles and the traffic upon the condition of the highway upon which said cars were traveling, his conduct in so doing would constitute negligence." The contention of the appellants being that there was no evidence in the record to support such instruction. A reference to what we have heretofore said in this opinion shows a conclusive answer to the appellants' contention. The jury had a right to conclude from the circumstances disclosed, that the driver of the truck was following the Wallace car too closely, and that he did not keep at a reasonably prudent distance therefrom, and likewise, as we have shown, did not exercise proper diligence.

[15] Complaint is also made of an instruction in substance, that if one fails to see what he should have seen or hear what he should have heard by the exercise of ordinary care, a conclusion of negligence is warranted.

The facts disclosed by the record show beyond controversy that the driver of the truck should have seen that the Wallace car was stopped, and if he failed to look or to take reasonable care to observe the movements of the car which he was following, under the circumstances a basis is laid for the conclusion of negligence.

Where a number of cars are following each other in close formation, and the traffic is being obstructed and the procession of cars halted at intervals, the care required of each driver is commensurate with such circumstances, and each driver must be reasonably careful to observe the movements of the car he is following, and to keep his own vehicle under control. The record, we think, justified the jury in coming to the conclusion that the driver of the truck did not observe these requirements. We have not set out the testimony, as it would unduly lengthen this opinion, but have simply stated the facts which the record shows that the jury was justified in considering as established, and the conclusions properly to be drawn therefrom.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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137 Cal.App. 467

PEOPLE v. WHITE.

Cr. 2470.

District Court of Appeal, Second District, Division 1, California.

March 20, 1934.

1. Criminal law 🔑423(5).

Ordinarily, proof generally of other offenses, committed in defendant's presence by her alleged companion in commission of offenses charged, would be improper.

2. Witnesses 🔑406.

Evidence as to crimes committed in defendant's presence by another before date on which latter first exhibited gun to defendant and threatened to kill her, unless she accompanied him, according to her testimony, *held* admissible to discredit her testimony in trial for robberies, committed by him in her presence, that she had no knowledge of his criminal activities until such date (Pen. Code, § 26, subd. 8).

3. Criminal law 🔑356.

Evidence as to details of crimes, committed or participated in by defendant and another jointly, *held* admissible in trial for robberies, committed by latter in defendant's presence, to show how much coercion or fear he used to cause defendant to participate in or keep silent as to his or her participation therein (Pen. Code, § 26, subd. 8).

4. Criminal law 🔑356.

Defendant's testimony that she committed crime charged solely because of fear of and duress by another justified admission of evidence of all transactions and acts of both during entire time of their association (Pen. Code, § 26, subd. 8).

5. Criminal law 🔑829(1).

Refusal of instructions on law questions fully covered by instructions given so far as properly presented by those refused was not error.

6. Homicide 🔑340(1).

Instruction to convict of assault with intent to murder, if defendant and another jointly engaged in robbery or attempt to rob, during which latter made assault with deadly weapon on named persons with intent to murder, *held* not prejudicial to defendant, whose sole defense, clearly stated to jury by other instructions, was that she committed acts charged solely because of fear engendered by such other person's threats and intimidations.

7. Criminal law 🔑593.

Refusal to grant defendant continuance on showing that her counsel was in hospital and unable to appear *held* not error, where she was ably represented by counsel throughout proceeding in trial court.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Burmah H. White was convicted of robbery, attempted robbery, and assault with a deadly weapon with intent to commit murder, and she appeals.

Affirmed.

George Francis, Olin N. Mackay, and Donald Mackay, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

YORK, Justice.

Appellant was convicted on eleven counts of an indictment returned by the grand jury charging her with the crime of robbery in seven counts, attempted robbery in one count, and in three counts with assault with a deadly weapon with intent to commit murder.

This is an appeal from the judgments of conviction and from the order denying motion for a new trial.

The questions raised upon appeal to this court are the following:

"1. Was the District Attorney guilty of misconduct, which denied the appellant a fair and impartial trial?

"2. Did the reading of the portions of the statement taken before the District Attorney, referring to acts and offenses not charged in the Indictment, so prejudice the jury that the order of the court striking out such statements failed to cure the error?

"3. Did the court err in permitting the District Attorney, over objection, to establish facts and offenses not charged in the Indictment nor in any way connected with acts so charged?

"4. Did the court err in refusing to instruct the jury, as requested by appellant's instructions appearing at pages 55 and 56, Clerk's Transcript?

"5. Did the court err in giving the instruction set forth at page 48, Clerk's Transcript, Line 22?

"6. Did the court err in refusing to grant appellant's continuance upon a showing that her counsel was confined in the hospital and unable to appear in her defense?"

It was never contended by the appellant that the robberies set forth in the indictment were not in fact committed, nor was it denied by her that on each and every occasion charged she was present and drove the automobile in which one Tom White, who committed the offenses charged in the indictment, came to and left the scenes of the crimes. Each of the counts charged robbery, attempt to commit robbery, or assault with a deadly weapon with intent to commit murder. On each of the robbery counts appellant was found guilty of robbery in the first degree, and, on the counts of assault with a deadly weapon, she was found guilty of assault with a deadly weapon.

The counts of assault with a deadly weapon arose from the fact that, in one instance, while perpetrating the crime of robbery, Tom White shot one Cora B. Withington, the bullet wounding Cora B. Withington, and then striking Crombie Allen. Count 7, charging assault with a deadly weapon, arose from the fact that Tom White shot at C. C. Lewis, whom he was attempting to rob, the appellant being seated in an automobile some distance away.

As stated by appellant in her opening brief, the only contention with regard to the facts of the case is the question of the nature of the participation in the offenses by appellant, Burmah H. White. Tom White, as is disclosed by the record, was a man who had been sentenced to San Quentin prison, had served a part of a term there, and had been transferred to Folsom prison. A short time prior to the offenses here charged he had been paroled. At the time the officers were attempting to arrest him he was shot and killed by the police officers.

By her testimony appellant attempted to show that she accompanied Tom White upon these robberies charged, solely by reason of the fact that the said Tom White compelled her to accompany him by displaying a gun to her and stating that, if she refused to accompany him, he would kill her, and also making threats against her family in case she caused him any trouble.

Appellant generally claims to be entitled to the protection of the provisions of section 26 of the Penal Code, subdivision 8, by reason of such testimony given by her.

[1-3] The probability is that the appellant by questions 1, 2, and 3, above enumerated, means to urge that the district attorney had no right to question her about other offenses which Tom White was supposed to have committed when she was present, and that the district attorney asked her about other offenses of which the defendant had denied any knowledge. Under ordinary circumstances, proof generally of such other offenses would be improper, but in the given case the defendant had testified that, during the time and after these other offenses were committed, she believed the said Tom White to be a respectable man, and that she had no knowledge of any criminal tendencies on his part until after the date of the first offense charged against her, to wit, August 16, 1933, which was the first time that he exhibited a gun to her and threatened her. Such evidence as to other crimes committed before that date was properly admissible to show whether or not her statement was true that she had no knowledge of the criminal activities of said Tom White until said 16th day of August; and all evidence as to the details of the crimes committed by the two of them jointly or participated in by them would tend to show just how much coercion or fear was used by him, to cause her to participate in or keep silent as to his participation therein, or to keep silent as to her forced participation therein.

[4] Appellant objects to certain evidence of other criminal acts alleged to have been committed by her and the said Tom White, but denied by her, which occurred close to the time of the commission of the other criminal acts admitted by appellant; the defense urged by appellant being that she was at all times coerced and in fear of the said Tom White. However, the testimony of the defendant that the acts complained of were committed by her solely by reason of such fear and duress

justified the admission into evidence of all transactions and acts done by both said Tom White and appellant during the entire time of their association together.

[5] The point designated by appellant as No. 4, as to the refusal of the instructions set forth at pages 55 and 56 of the clerk's transcript, is fully met by the fact that such instructions exactly as presented were not proper, but the court, in so far as said requested instructions were proper, fully instructed the jury on each and all of the questions of law properly presented by the refused instructions.

[6] The question numbered 5, as to error in giving the instruction set forth at page 48 of the clerk's transcript, beginning at line 22, to wit: "You are instructed, if you find from all the evidence beyond a reasonable doubt that the defendant, Bermah White, was jointly engaged with one Thomas White in the perpetration or attempt to perpetrate the crime of Robbery, and that during the commission of said crime of Robbery, or attempt to commit the crime of Robbery, Thomas White made an assault with a deadly weapon with intent to commit murder on the person of Crombie Allen, as charged in Count II of the indictment, and/or upon the person of Cora B. Withington, as charged in Count III of the indictment, and/or upon the person of C. C. Lewis, as charged in Count VII of the indictment, then you shall find the defendant, Bermah White, guilty of the offense of assault with a deadly weapon with intent to commit murder, a felony, as charged in the count or counts of which you find the defendant guilty, if you do so find."

This instruction is somewhat involved, as were the two refused instructions, the refusal of which the appellant contends was error. However, in view of all of the instructions given, and in view of the admissions made by defendant, it could have caused no prejudice to the defendant, in that the sole legal question involved, as presented by the testimony of defendant or her defense, and as put to the jury by all of the instructions given, was whether or not, at the time of the commission of the acts charged in the indictment, she was committing the acts she admitted she had committed, freely and voluntarily, or solely and only by reason of fear engendered in her mind by the threats and intimidations of the said Tom White. This proposition was clearly stated to the jury by the instructions given.

[7] The sixth and last point involved in this appeal is: Did the court err in refusing to grant appellant's continuance upon a showing that her counsel was confined in the hospital and unable to appear in her defense?

An examination of the entire transcript shows that she was well and ably represented by counsel throughout the entire proceeding in the trial court.

The judgments and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

137 Cal.App. 404

PEOPLE v. YOUNG.

Cr. 162.

District Court of Appeal, Fourth District, California.

March 16, 1934.

1. Criminal law 🔑600(1).

Denying defendant's motion for continuance for sickness of witness *held* not prejudicial error, where permission was granted to have witness' testimony given at former trial read into evidence, and record showed no prejudice.

2. Criminal law 🔑1144(½).

Every presumption is in favor of regularity of proceedings had in superior court.

3. Criminal law 🔑1141(2).

If defendant fails to produce record showing prejudicial error, presumption of regularity of proceedings and lack of prejudice must prevail on appeal.

4. Criminal law 🔑1037(2).

In burglary prosecution, prosecutor's statements in argument concerning alibi defense of defendant, which statements were not justified by record and were withdrawn upon defendant's counsel assigning them as misconduct, *held* not reversible error, where defendant failed to request instruction that jury disregard statements.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Art G. Young was convicted of burglary, and he appeals.

Affirmed.

See, also, 29 P.(2d) 788.

James M. Thuesen, of Fowler, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

MARKS, Justice.

Appellant was charged by an information filed by the district attorney of Kings county with the crime of burglary and also a prior conviction of a felony. He entered a plea of guilty to the charge of a prior conviction, and not guilty to the charge of burglary. The jury returned a verdict of guilty, and judgment was pronounced upon him. This appeal is taken from the judgment and from the order denying his motion for new trial.

Appellant urges two grounds for a reversal of the judgment: (1) That the trial court erred in denying his motion for a continuance; and (2) misconduct of the district attorney in his argument to the jury.

[1-3] The only portion of the record bearing upon a request for a continuance is contained in the clerk's transcript where a copy of the minutes of the trial court is set forth and the following appears: "The following persons having been called as jurors were sworn to answer questions relative to their qualifications for serving as jurors: (Naming them.) At this time Attorney Thuesen moves for a continuance of the trial on account of sickness of one of his witnesses. The motion was denied and the court grants permission to have witness' testimony given at a former trial, read into the evidence." This record does not contain anything upon which we could base the conclusion that error was committed by the trial court in denying this motion for continuance nor that the appellant suffered any prejudice by reason of the denial of his motion. We cannot presume that the order denying the continuance was prejudicially erroneous or that good cause for making the order was not shown in the trial court. Every presumption is in favor of the regularity of the proceedings had in the superior court. It is incumbent upon the appellant to produce a record on appeal showing prejudicial error during the trial, if such actually occurred. If he fails to do so the presumption of the regularity of the proceedings and the lack of prejudicial error must prevail on appeal. People v. Douglass, 100 Cal. 1, 34 P. 490; People v. Bray, 42 Cal. App. 465, 183 P. 712.

[4] During his argument to the jury the district attorney made statements concerning an alibi defense of appellant, which statements were not justified by the record, and which appellant's counsel assigned as misconduct. The district attorney immediately withdrew his statements, but appellant failed to request the trial court to instruct the jury to disregard them. Under this state of the record the alleged misconduct of the district attorney can furnish no ground for reversal. People v. Edwards, 79 Cal. App. 514, 249 P. 1090; People v. Nakis, 184 Cal. 105, 193 P. 92.

Judgment and order are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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137 Cal.App. 494

COOPER v. AMERICAN FRUIT GROWERS INCORPORATED OF CALIFORNIA.

Civ. 5073.

District Court of Appeal, Third District, California.

March 22, 1934.

Hearing Denied by Supreme Court May 21, 1934.

1. Factors ⚷43.

Evidence sustained findings and judgment for principal suing factor for breaching contract appointing factor exclusive selling agent for pear crop where factor refused request either to release principal or to sell to certain offerer (Civ. Code, §§ 2026, 2027).

2. Factors ⚷1.

Contract appointing exclusive selling agent for pear crop obligated to use best efforts to obtain best possible price created factor-principal relationship (Civ. Code, §§ 2026, 2027).

3. Factors ⚷23.

Regardless of any advance to principal, factor must obey principal's instructions (Civ. Code, §§ 2026, 2027).

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Jennie Duncan Cooper against the American Fruit Growers Incorporated of California. Judgment for plaintiff, and defendant appeals. Motion to dismiss the appeal or affirm the judgment.

Motion to dismiss denied, and judgment affirmed.

Thomas & Thomas, of Ukiah, for appellant.

Mannon & Brazier, of Ukiah, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action for breach of contract between a principal and factor. Plaintiff recovered judgment in the trial court from which defendant appealed, whereupon plaintiff now moves for a dismissal of this appeal, or an affirmance of the judgment. The motion to dismiss being denied, we will now consider the alternative, basing our examination upon the bill of exceptions and the opening brief of appellant.

[1] Plaintiff was the owner of a pear orchard in the county of Mendocino and had entered into a contract with defendant and appellant wherein plaintiff appointed appellant her exclusive selling agent for all fruit grown upon her lands, appellant agreeing to use its best efforts to sell the fruit at the best possible price obtainable.

At the beginning of the picking season respondent notified appellant she had received an offer of $25 per ton, orchard run, for the 1932 pear crop, payment thereof to be made daily upon delivery, together with a sufficient cash advance to enable her to repay to defendant all of her then existing indebtedness to defendant. Respondent communicated this offer to an agent of appellant with the request that she be released from her contract or that defendant sell to the offerer her pears at $25 per ton, but defendant failed and refused to act and the pears were ultimately sold for considerably less than the offered price, whereupon this action was commenced for the loss thereby sustained.

Appellant challenges the sufficiency of the evidence to support the finding of the trial court. It would be of no value to summarize the testimony, but we have read the transcript, and the evidence being accepted and believed by the trial court is ample to support the findings and judgment.

For instance on the question of communication of the offer to appellant and its refusal or neglect to act, respondent testified to the first demand upon the agent of appellant for a release or for a sale to the offerer on the afternoon of Monday, August 1st. On the next morning she again asked for a release and demanded that the offer be accepted, and again on the afternoon of the same day she had a further conversation along the same line. Again on Wednesday, August 3d, about noon, the husband of plaintiff made another demand upon the agent of defendant that they accept the offer and sell the pears, but no action was taken by appellant until perhaps some time Wednesday afternoon after the pear market had broken.

So, also, as to the tonnage, the court found the orchard produced 3070 lug boxes of pears, containing 50 pounds net, in good merchantable condition, and weighing in the aggregate 76.75 tons. On this point plaintiff testified she weighed 10 or 12 boxes of fruit at intervals as they were taken to the packing sheds and from that arrived at the total tonnage. Appellant made no weights upon its own account. We cite thus briefly from the record to show the testimony upon which the questioned findings were based. It is entirely sufficient in every particular.

We need not go into the law applicable to the facts as this case is very closely analogous to the law and the facts in the case of Rhee v. L. K. Small Co., 83 Cal. App. 339, 256 P. 839.

[2, 3] That the parties hereto occupied the relationship of factor and principal cannot be disputed (section 2026, Civ. Code; Betts v. Southern California Fruit Exchange, 144 Cal. 402, 77 P. 993), and regardless of any advance to the plaintiff, it is the duty of the factor to obey the instructions of the principal. Section 2027, Civ. Code.

Appellant attempts to distinguish the instant case with the case of Rhee v. L. K. Small Co., supra, on the ground that in the instant case there was no bona fide offer open and available to the factor. The record, however, to the contrary, discloses an offer made in good faith by men whose financial standing and ability were unquestioned.

Appellant also claims that certain provisions of the contract with respondent takes this case out of the operation of the principles discussed, but this is not borne out by an analysis of the agreement. Appellant also claims a ratification by respondent, but that point is fully answered contrary to the contention of appellant in the case of Rhee v. L. K. Small Co., supra.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

137 Cal.App. 373

PEOPLE v. SEMIKOFF.

Cr. 160.

District Court of Appeal, Fourth District, California.

March 14, 1934.

1. Assault and battery 🔑67.

One assaulted may use such force as reasonable person in similar situation would have deemed necessary to repel assault.

2. Assault and battery 🔑96(3).

Refusal to instruct that defendant, charged with assault with force likely to produce great bodily injury, could kill one attacking him with deadly weapon if reasonably believed by defendant to be necessary and that person attacking another with butcher knife was guilty of a crime *held* not error since belief of reasonable man and not that of defendant was the test, complaining witness was not killed, and instructions given fully covered defendant's rights.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Tony Semikoff was convicted of assault by means of force likely to produce great bodily injury, and he appeals.

Affirmed.

George M. DeWolf, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged with the crime of assault by means of force likely to produce great bodily injury, it being alleged that the assault was committed on one John Nedom by striking him with his fists and kicking him with his feet. He was found guilty by a jury and has appealed from the ensuing judgment and from an order denying his motion for a new trial.

The record shows that the appellant and Nedom had consumed considerable wine together throughout the day of October 8, 1933, at the home of Nedom on a ranch near Kerman, Cal. Some time after dark on the evening of that day the two went, in an old automobile belonging to the appellant, to the town of Kerman. Something happened to the lights on appellant's automobile and the two went to a garage operated by one William Schubin, for the purpose of getting some wire to fix the same. They found the garage closed and went to look for Schubin, finding him at a drug store. There all three drank some beer and became so noisy that the proprietor of the store locked them out. The appellant engaged in an argument with Schubin and seriously objected to the fact that he would not go back to his garage to get some wire with which to fix the appellant's lights. Thereafter, the three went to a pool hall, where another argument and some more drinking took place, and the three became so noisy that the proprietor put them out. Somewhere around 10:30 p. m., Nedom requested Schubin to take him home in his automobile, which he did.

A few minutes after they arrived at Nedom's home, and while they were talking together, the appellant drove into the yard. He testified that he had a "hunch" as to where they had gone and followed them up. On arriving there he got out of his automobile and came over to Schubin and started talking to him about the wire and, as he testified, "the argument got hotter and hotter and I didn't see John Nedom, he was off to one side." Thereupon the appellant struck Schubin twice with his fist, hitting him on the mouth and on the eye, after which he apologized to Schubin for hitting him. As he was doing this Nedom came up, and there is a conflict as to what next occurred. Schubin testified that Nedom ordered the appellant to leave the place and not come back, and that the appellant whirled around and the two began to scuffle. The appellant testified that Nedom came up behind him, grabbed his arm, and turned him around; that Nedom had a knife in his hand; and that he attempted to take the knife from him in order to save himself from bodily harm. Nedom testified that he had no knife; that the appellant hit him on the nose with a knife; that he started to run away; that the appellant grabbed him and began to hit him; and that he then became unconscious. Schubin testified that it was dark and that he did not see a knife in the hands of either of the combatants during the struggle, although after the fight the appellant showed him a knife which he said he had taken from Nedom and asked him what he should do with it. In any event, some sort of a fight took place between the two, during which the appellant struck Nedom at least three times, knocking him to the ground, and then kicked him three times. Nedom suffered severe injuries, was knocked unconscious and did not recover consciousness until some time the next day, and spent the next twelve days in a hospital. The doctor at the hospital testified: "I examined Mr. Nedom when he came in and my diagnosis on admission was a fractured nose with severe laceration. His nose was cut wide open, from the tip to about an inch and a half along the mid-line and lay wide open. His whole face was markedly swollen; he had a swelling on both sides of the head, extending back almost to the midline on both sides. He had several scratches and lacerations about his face and left ear. He was conscious when he came in there. I thought he had a possible skull fracture in addition to his fractured nose; cerebral concussion."

The appellant relies entirely upon a claim of self-defense. While his own story, if believed by the jury, would be sufficient to sustain that defense, there is ample evidence in the record to sustain the verdict reached, with its implied finding to the contrary.

[1] The only point raised by the appellant is that the court erred in refusing to give two instructions requested by him. The first of these was one to the effect that if the defendant reasonably apprehended that Nedom would do him bodily harm, he had the right to repel such assault "with all the force he deemed necessary, and that he was not compelled to retreat from the said John Nedom. * * *" It is argued that this instruction should have been given because the element of standing one's ground and not being compelled to retreat, contained therein, was not covered in any other instruction. However, the instruction offered was erroneous in stating that in resisting he had the right to use any force he deemed necessary. The law is too well settled in this state to require the citation of authorities that the force that may be used under such circumstances is not such as a party may deem necessary but is such as is reasonable under the circumstances. The force that may be used is limited by whether reasonable grounds exist for believing it necessary, and the test is whether the force used would have been deemed necessary by a reasonable person in a similar situation. Since the instruction contained this erroneous statement of law, it was properly refused. People v. Davis, 64 Cal. 440, 1 P. 889; People v. Metzler, 21 Cal. App. 80, 130 P. 1192; People v. Lorraine, 90 Cal. App. 317, 265 P. 893.

[2] The other instruction referred to reads as follows: "You are instructed that if you believe that John Nedom first attacked the defendant, and that in doing so he attacked the defendant with a deadly weapon, to wit, a butcher knife, then the complaining witness, John Nedom, was himself guilty of the felonious crime of an assault with a deadly weapon. And if you believe that such was the case, that the defendant was attacked with a deadly weapon, you are further instructed that the defendant in such a case, if at the time and under all the circumstances, reasonably believed that he was in great danger of injury or death, could defend himself even to the extent of killing his adversary if that extremity reasonably appeared to him to be necessary."

It may be observed that this instruction does not state the law as clearly as it should in that it states that a defendant may act upon facts which appear to him to make his act reasonably necessary, while the law does not permit a defendant to so act unless his action would have appeared to a reasonable man to have been necessary. It is argued that the instruction should have been given because the appellant had a right to have the jury informed that if the complaining witness first attacked the defendant with a knife, he was himself guilty of a felony, and the appellant could then defend himself even to the extent of killing his adversary. It fully appeared in this case that the adversary was not killed and no authority is cited for the proposition that the jury must be informed that if the prosecuting witness first attacked the appellant with a knife, he was himself guilty of a crime. The complaining witness was not on trial and all that was required was that the jury be informed as to the rights of the appellant if they believed that the complaining witness made the first attack, whether that attack was felonious or not. The essential principles were covered in the instructions given. The court gave nine instructions clearly and correctly setting forth the law of self-defense as the same might be applied under the facts disclosed by the evidence. The last two instructions thus given read as follows:

"The court instructs you that you must clearly understand that acts done in self defense alone are not assaults. One person cannot assault another in self defense; and any act done in self defense cannot be an assault. Therefore, if you find that the defendant was acting in defense of his own person, as before described, then you will find him not guilty.

"The Court instructs you that if the defendant had reasonable grounds to believe, and in good faith believed, that his life was in danger, or that he was likely to suffer great bodily harm, he had a right to meet any attack that was made upon him, or which he had reasonable grounds to believe was being made upon him, in such a way and with such force as under all the circumstances he at the moment honestly believed and had reasonable grounds to believe was necessary to save his own life, or to protect himself from great bodily harm."

We think the instructions given were sufficient to fairly apprise the jury as to the law relating to the defense raised, and we find no error in the refusal to give the two instructions referred to.

The order and judgment appealed from are affirmed.

We concur: MARKS, J.; JENNINGS, J.

* * *

137 Cal.App. 349

PEOPLE v. BECKER.

Cr. 2459.

District Court of Appeal, Second District, Division 1, California.

March 14, 1934.

Hearing Denied by Supreme Court April 13, 1934.

1. **False pretenses 🔑5.**
   Intent to defraud constitutes essential element, and is gist of offense of issuing bank check with intent to defraud (Pen. Code, § 476a).

2. **Criminal law 🔑568.**
   Where specific intent with which alleged criminal act is performed becomes controverted fact, existence may be established by circumstantial evidence.

3. **False pretenses 🔑42.**
   In prosecution for issuing bank check with intent to defraud, defendant may rebut or controvert evidence tending to establish specific intent, and may introduce other pertinent, independent evidence to affirmatively establish lack of criminal intent (Pen. Code, § 476a).

4. **Criminal law 🔑390.**
   Intent, motive, or belief of accused may be shown through others by evidence as to accused's acts or declarations, written or oral.

5. **False pretenses 🔑5.**
   In prosecution for issuing bank check with intent to defraud, reasonable expectation of payment constitutes defense (Pen. Code, § 476a).

6. **False pretenses 🔑42.**
   In prosecution for issuing bank check with intent to defraud, excluding testimony showing defendant made arrangements to obtain money and expected to open account in bank on following business day to cover check *held* error (Pen. Code, § 476a).

YORK, J., dissenting.

Appeal from the Superior Court, Los Angeles County; William C. Doran, Judge.

Jerry Becker was convicted of issuing a bank check with intent to defraud, and he appeals.

Judgment and order denying motion for a new trial reversed.

Chauncey G. Kolts and Arthur E. Schifferman, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendant appeals from a judgment of conviction of the crime of "issuing bank check, with intent to defraud," as denounced by the provisions of section 476a of the Penal Code, as well as from an order by which his motion for a new trial was denied.

Essentially, the facts upon which the conviction of defendant depended were that on a certain Saturday afternoon, in payment of the price of a watch which he had purchased, defendant issued a check on a bank in which he had neither funds, an account, nor credit. In his defense, in effect defendant testified that prior to issuing the check he had made an arrangement with a Mrs. Zoll, from whom he was to obtain a specified sum of money largely in excess of the amount of the check in question, and that with such money he had intended to open an account with the bank on the following Monday; which would be the first business day after the check was issued. In attempted corroboration of the testimony of defendant in that regard, the transcript of the proceedings at the trial of the action discloses that defendant introduced Mrs. Zoll as a witness in his behalf, and that after certain preliminary questions had been answered by her, the following occurred:

"Q. (by Mr. Kolts, attorney representing defendant): Did you have any business dealings with him (defendant) at that time? A. Well, we had—

"Mr. Sullivan (Deputy District Attorney): Objected to as immaterial.

"Mr. Kolts: At this time we offer to prove by this witness that she had money to give to the defendant on the following Monday morning, which she stated to the officer at the time of his arrest, which would certainly negative any intent on his part to defraud the bank. * * *

"The Court: The objection will be sustained.

"Mr. Kolts: Q. I call your attention to paragraph 1 of the information, where it says 'With intent then and there to cheat and defraud J. W. Robinson Company, a corporation,' and so forth, and the bank.

"Mr. Sullivan: The matter of intent is manifested when the check is written.

"Mr. Kolts: Mrs. Zoll, did you have any money belonging to John Peterson (defendant) at that time?

"Mr. Sullivan: Objected to as immaterial.

"The Court: Sustained.

"Mr. Kolts: Mrs. Zoll, were you going to open a bank account for John Peterson (defendant) the following Monday morning, at the Citizens National Trust & Savings Bank, Third and Broadway?

"Mr. Sullivan: Objected to as immaterial.

"The Court: Sustained.

"Mr. Kolts: Q. Did you owe the defendant any money at that time, that you had promised to repay him at that time?

"Mr. Sullivan: That is objected to as immaterial.

"The Court: Sustained.

"Mr. Kolts: Q. On the 5th day of August, this year, did you tell the defendant, or the 4th day of August of this year, did you tell the defendant you would deposit funds to his credit the following Monday morning?

"Mr. Sullivan: That is objected to as immaterial, hearsay and self serving.

"The Court: Well, it would not be hearsay, but it is immaterial. Sustained.

"Mr. Kolts: I ask this line of questions for this reason: The evidence by the prosecution's own witnesses showed that this check was presented after the close of the banking hours on Saturday, at which time it would have been impossible for the defendant to make a deposit in the bank until the following business day; I offer this evidence to show that on the following business day and the first time that the check could have been presented to the bank for payment, there would have been funds in the bank to cover the amount of the check, and it most certainly goes toward the intent of the defendant, as to whether or not he intended to defraud the bank or the J. W. Robinson Company. * * *"

It is urged by appellant that prejudicial error was committed by the trial court in sustaining objections interposed by the people to each of the said several questions propounded to said witness, as well as in refusing to permit defendant to introduce evidence in support of his said several offers of "proof."

The pertinent language of section 476a of the Penal Code, which is the statute by which the prosecution of defendant is authorized, is as follows: "Any person who * * * with intent to defraud, makes or draws or utters or delivers any check * * * upon any bank * * * for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer * * * has not sufficient funds in, or credit with said bank * * * for the payment of such check * * * in full upon its presentation, although no express representation is made with reference thereto, is punishable," etc.

[1, 2] It thus appears that the "intent to defraud" is an essential element of the crime. It is the "gist of the offense." People v. Bullock, 123 Cal. App. 299, 11 P.(2d) 441; People v. Wilbur, 33 Cal. App. 511, 514, 165 P. 729; People v. Wilkins, 67 Cal. App. 758, 228 P. 367. So considered, no presumption of law will suffice for its proof. To the contrary, it must be and is the subject of evidence in the same manner, to the same extent, and depending upon the same general rules of procedure as does any other necessary fact in the case (People v. Landman, 103 Cal. 577, 580, 37 P. 518; People v. Johnson, 106 Cal. 289, 295, 39 P. 622); that is to say, that whenever the specific intent with which an act is performed becomes a controverted fact in a case, its existence may be established not only by direct but as well by circumstantial evidence. 8 Cal. Jur. 25 et seq.; 1928 Suppl. thereto, p. 585; and authorities there respectively cited.

[3, 4] In the instant case, it being thus established law that in order to sustain a judgment of conviction of defendant the prosecution was required to prove his specific "intent to defraud," and that in order to establish such fact the introduction of substantial evidence relative thereto was essential, it should follow as a matter of course, not only that by the introduction of evidence defendant was legally entitled to rebut or to controvert any evidence that tended to establish

such alleged intent, but as well that he had a legal right to introduce other pertinent, independent evidence with reference thereto for the purpose of establishing affirmatively his lack of criminal intent in the premises. The general principle of law, as announced in 10 California Jurisprudence, 833, that "aside from proof by the testimony of a person himself as to his intent, motive or belief, these may be shown through others by the introduction of evidence as to his acts, or declarations, written or oral," is applicable. It is manifest that to permit the prosecution, by the introduction of evidence, to prove specific intent of a defendant in the commission by him of an alleged criminal offense, and in the same action to deny an equal privilege to the defendant therein, relative to his lack of criminal intent, would be a poor exemplar of the administration of even-handed justice.

[5, 6] Adverting to the line of questions propounded to the witness who appeared in behalf of defendant, and to the offer of proof made by the attorney who represented defendant on the trial of the action, it may be noted that in effect defendant proposed to introduce evidence which would tend to establish the fact that by the time (in the ordinary course of business) the check in question would be presented to the bank for payment thereof, sufficient funds would have been in the bank to the credit of defendant "for the payment of such check." Section 476a, Pen. Code.

Considering the general language of section 476a of the Penal Code, under the provisions of which defendant was charged, it may be noticed that it has application to any person who draws a check upon a bank wherein he has not sufficient funds "for the payment of such check," etc. Under the proposed rule for the application of which the prosecution here contends, if on a given Saturday, at a time after a bank in which he carried an account was closed for the receipt of deposits of money therein, a reputable merchant who had a very small balance to his credit in his account with said bank, should in person, accompanied by several of his friends, arrive at the bank with a substantial amount of money intended for deposit to his credit therein, but then and there was prevented by the receiving teller, the cashier, and the president of the bank, personally, from making such deposit; and thereafter, on the same Saturday, such merchant should issue and deliver to one of his creditors a check for a sum of money in excess of the balance then to his credit in the bank, but less than the amount which he had sought to deposit therein; neither the facts that related to his bona fide attempt to make such deposit, nor the additional fact, however thoroughly and satisfactorily it might be established, that before issuing the check he had made positive and reasonable arrangements to deposit in the bank on the following Monday the identical sum of money which theretofore he had sought to deposit, but had been prevented from depositing in said bank, and which was sufficient in amount "for the payment of such check," would be admissible in evidence. Although in such circumstances it might be difficult to accept the correctness of a ruling by the trial court such as just has been indicated, the principle of law relative to the admissibility of evidence therein is the precise principle, the application of which is here invoked by the prosecution and which by the trial court was applied as to defendant. That in a situation such as is here present the establishment of the fact of "reasonable expectation of payment" constitutes a defense to the charge, and that evidence relating to such "expectation" is admissible, is indicated by the rulings in each of several authorities that appear in a note in 35 A. L. R. at page 384 thereof.

With the exception of the single case of People v. King, 63 Cal. App. 674, 219 P. 753, the attention of this court is directed to no authority by which the contention of the prosecution herein is upheld. But an examination of the cited case will establish, if not demonstrate, the fact that the declaration by the court therein to the effect that evidence of the character of that here under consideration "was wholly irrelevant and immaterial to the issue" was entirely unnecessary to a proper decision of any legal point involved in the question before that court; nor was any authority cited in its support. As a foundation for its pronouncement, no reason was assigned; it was pure "obiter." The principle there announced is contrary and in direct opposition to the weight of authority, and this court is unwilling either to adopt it, or to concur in it, as a correct interpretation of the law applicable to the facts in the instant case.

The judgment and the order are reversed.

I concur: CONREY, P. J.

I dissent: YORK, J.

137 Cal.App. 339

PEOPLE v. WORTMAN.

Cr. 1334.

District Court of Appeal, Third District, California.

March 13, 1934.

1. Criminal law 🔑1023(8).

Order overruling demurrer to indictment is not appealable.

2. Criminal law 🔑1134(10).

Sufficiency of indictment may be raised on appeal from judgment.

3. Infants 🔑20.

Indictment for contributing to delinquency of minor must specifically refer to some act tending to cause minor to lead, or to be in danger of growing up to lead, idle and dissolute life (Gen. Laws 1931, Act 3966, §§ 1 (11), 21).

4. Infants 🔑20.

Indictment charging that accused "by certain acts, omissions, commands, and persuasions" caused minor female to occupy same bed with named man, *held* sufficiently to charge offense of contributing to delinquency of minor, though it did not specify acts, omissions, or commands, such acts or omissions being merely evidentiary (Gen. Laws 1931, Act 3966, §§ 1 (11), 21).

5. Criminal law 🔑1167(5).

Any error in overruling demurrer to indictment charging accused with contributing to delinquency of minor because of failure to specify acts, omissions, or commands inducing delinquency *held* harmless (Gen. Laws 1931, Act 3966, §§ 1 (11), 21; Const. art. 6, § 4½).

6. Infants 🔑20.

Evidence *held* sufficient to sustain conviction for contributing to delinquency of minor female (Gen. Laws 1931, Act 3966, §§ 1 (11), 21; Const. art. 6, § 4½).

7. Criminal law 🔑778(4).

In prosecution for contributing to delinquency of minor, instruction that presumption of innocence is sufficient to overcome all partial evidence which jury may believe to have been introduced by prosecution and that it is prosecution's duty to connect accused with every act and circumstance necessary to prove crime *held* properly refused as misleading (Gen. Laws 1931, Act 3966, §§ 1 (11), 21).

8. Infants 🔑20.

Instruction that before accused could be found guilty of contributing to delinquency of minor, jury must find beyond reasonable doubt that material allegations of charge were true and that minor was leading or in danger of leading an idle, dissolute, or immoral life, by reason of alleged acts set forth in indictment *held* properly given (Gen. Laws 1931, Act 3966, §§ 1 (11), 21).

9. Criminal law 🔑720(7).

In prosecution for contributing to delinquency of minor, district attorney's statement, in arguing to jury that probably it was scheme to give minor intoxicating liquor "and take her over there and break her in right and get her ready for the line" *held* warranted by evidence (Gen. Laws 1931, Act 3966, §§ 1 (11), 21).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Mabel Wortman was convicted of contributing to the delinquency of a minor, and she appeals.

Affirmed.

R. A. Zarick and Thomas O'Hara, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice PLUMMER delivered the opinion of the court.

The defendant appeals from a judgment of conviction following a trial wherein the indictment charged the defendant with contributing to the delinquency of a minor, in the following language:

"The Grand Jury of the County of Sacramento hereby accuses Mabel Wortman of an indictable misdemeanor, to-wit: Contributing to the delinquency of a minor on or about the 20th day of October, 1933, at the County of Sacramento, in the State of California, did then and there wilfully, unlawfully and knowingly, by certain acts, omissions, commands and persuasions cause, and tend to cause, encourage and contribute to the delinquency of one Marianna Fields, alias Jean Larson, of the age of 16 years, or thereabouts, in that the said Mabel Wortman did wilfully and unlawfully and knowingly, by certain acts, omissions, commands and persuasions, cause the said Marianna Fields, alias Jean Larson, the minor aforesaid, to occupy the same bed with Joe Franks, and by reason thereof, the said Marianna Fields, alias Jean Larson, was then and there in danger of growing up to lead an idle, dissolute and immoral life, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California."

[1, 2] The appeal is from the order of the court denying the defendant's motion for new trial, from the judgment of conviction following the verdict of the jury, and also from the order of the court overruling the appellant's demurrer to the indictment just set forth. As no appeal lies from this latter order, it is hereby dismissed. The sufficiency of the indictment, however, may be raised upon consideration of the appeal from the judgment, and for this case the irregularity of presenting the alleged error of the court in overruling the appellant's demurrer will be disregarded, and the sufficiency of the indictment considered.

The indictment is based upon the provisions of subdivision 11 of section 1, and section 21 of the Juvenile Court Law, volume 2, Deering's General Laws, 1931, page 2075 et seq., Act 3966. Section 21, supra, provides that "any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, or which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty-one years, to do or perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, shall be guilty of a misdemeanor," etc.

[3, 4] Subdivision 11 of section 1, supra, defining "delinquency," reads: "One who is leading or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life."

While the evidentiary matters necessary to support the indictment in this case are not set out therein, the indictment, of course, must specifically refer to some act which has for its tendency the causing of the minor either to lead, or in danger of growing up to lead an idle and dissolute life. The indictment in this case does particularly specify the act which was induced by the defendant to be performed by the minor, and there is no escape from the conclusion that the performance of the act so induced would not only tend to cause the minor to lead an idle and dissolute life, but to begin immediately an immoral and dissolute course of living. We do not think it necessary to set out in the opinion the exact words and persuasions used by the appellant in inducing the plaintiff to occupy a bed with Joe Franks, even though all such evidentiary matters must necessarily be presented as testimony before the jury, upon which the jury would be required to base its verdict.

[5] That the indictment in this case is sufficient is supported by the reasoning of this court in the case of People v. Perfetti, 88 Cal. App. 609, 264 P. 318, and the cases there cited.

The indictment further follows the language of the statute, together with a specification of the particular act upon which it is sought to hold the appellant liable, and directs her attention thereto in such a manner as to adequately inform her of the act upon which the prosecution would rely for a conviction. It is true that the indictment does not contain a detailed statement of the specific acts, or omissions, or commands on the part of the defendant which caused the minor to occupy a bed with Joe Franks, nor does it specify who Joe Franks may be. These matters, however, appear to us to be evidentiary in their nature, and would not have any more fully advised the appellant of the specific act induced by her to be performed by the minor, tending to cause the minor to lead an idle, dissolute, and immoral life. However, if any error was committed by the trial court in overruling the defendant's demurrer, it is rendered harmless by reason of section 4½ of article 6 of the Constitution, wherein it specifies that no error of the court in ruling as to any matter of pleading should be ground for reversal unless the error complained of has resulted in a miscarriage of justice. That there was no miscarriage of justice in this case appears in the record before us, from which we hereinafter set forth a portion of the testimony.

[6] The testimony in support of the indictment is well summarized by the prosecution and is borne out by an examination of the transcript. This summary shows the following: Marianna Fields, at the time involved in this action, was a minor of the age of 16 years; came to Sacramento September 11, 1933, from her home at Fair Oaks, to go to work at the home of Mr. and Mrs. MacLachlan, and attend school at junior college; she left the MacLachlan home and went to live with Betty Lynch on 12th and G streets; found work as a taxi-dancer at St. Nicholas

dance hall; there she met the appellant, who was also employed as a taxi-dancer. On October 19, 1933, the minor had a conversation at the dance hall with the appellant, at which time a man by the name of George Leal was present. In this converastion the appellant told the minor that she could introduce her to a man down at the dance hall who could help her quite a bit; who would buy her clothes and "wise her up" to a few things so that she could make better money than she had been making. The following night about 1 o'clock the minor had another conversation with the appellant, at which the appellant told her that by "going on the line," she could make more money, and that such work would be more entertaining than working in a dance hall, and that she, the appellant, would introduce her to a man that evening, stating that this man would buy the minor clothes and "wise her up" so that she could "go on the line." After this conversation, the appellant took the minor over to a man named Joe Franks and introduced her. The minor then had a glass of beer with Joe Franks, and went on dancing; about five minutes later the appellant returned and advised the minor to go with Joe Franks and to listen to what he had to say to her, and to do what he told her to do. After the dance closed, the appellant took the minor out to the front of the dance hall, where Joe Franks was waiting for her. The minor had made an engagement with George Leal to have him take her home, but when the appellant advised her to go with Joe Franks, she acted upon this advice and went with the latter. The appellant, the minor, and Joe Franks left the dance hall and went to a restauarnt on K street between 4th and 5th, where they had something to drink; a glass of beer was first drunk, and then some whisky, the whisky being produced by Joe Franks; the bartender, "Pinkie" Logan, joined the party, and also had a drink with them; the appellant was then escorted to a taxi, and the minor and Joe Franks started across the street; at that time the minor states that she felt dazed, and from that time remembered nothing that happened; when she awoke the next morning she was in a bed with Joe Franks in a room at the Coloma hotel; they went out for breakfast in the morning, after which they went to where the minor had lived with Betty Lynch; here, she got her clothes; Franks and the minor returned to the Coloma hotel, where Franks took the clothes up to his room; following this they went over to the appellant's place, where Franks bought two dresses from the appellant for the minor; the three then went shopping, on which tour many items of personal effects were purchased for the prosecutrix by Joe Franks; the appellant selected the articles; underclothes, stockings, and cosmetics were purchased; after the purchases Franks took the articles to the Coloma hotel. In the face of this testimony we think the jury was well warranted in finding the defendant guilty.

[7, 8] The appellant contends that the court erred in failing to give the following instruction, to wit: "I instruct you that the presumption of innocence with which the defendant is surrounded by law is sufficient to overcome all partial evidence which you may believe to have been introduced by the prosecution, and it is the duty of the prosecution to connect the defendant with every act and circumstance necessary to prove the crime." A reading of this requested instruction demonstrates that its effect would only be to mislead rather than to instruct the jury as to its proper course of action. Instead of giving such an instruction the court did advise the jury that before the defendant could be found guilty of the charge set forth in the indictment, that the jury must find, beyond a reasonable doubt, not only that all the material allegations of the charge are true, but that said Marianna Fields (alias Jean Larson) is leading, or in danger of leading an idle, dissolute, or immoral life by reason of the alleged acts as set forth in the indictment; otherwise, it would be the duty of the jury to render a verdict of not guilty. A consideration of all the instructions set out in the transcript leads to the conclusion that the jury was properly instructed, and no cause of complaint lies in reference thereto.

[9] It is further contended that the deputy district attorney was guilty of misconduct in his argument to the jury. In this particular we may state that the court specifically instructed the jury that they could only consider in their deliberations the testimony which had been introduced; that the case was to be tried only upon the evidence, etc. One portion of the alleged objection to the argument of the district attorney is as follows: "Probably it was a scheme of Franks at that time to give her some intoxicating liquor and take her over there and break her in right and get her ready for the 'line.'" The testimony which we have heretofore set out very properly called for such remarks, if not for an argument slightly more pungent. We have in this case a schoolgirl unacquainted with the ways of the world, by some means coming in contact with the taxi-

dancer, initiated into that "border-line" method of earning a living, introduced by one, as the record shows, familiar with "border-line" living, to a man of the same grade of society, told how she could earn more money, secure better clothing, and other inducements held out, as the records shows, well calculated to influence the thoughts and conduct of an unsophisticated schoolgirl from a life of rectitude to a life of easy virtue. Under such circumstances the language of the district attorney would have to go beyond anything shown in the record before us in order to justify an appellate court, in the face of the testimony set forth herein, to hold that there had been a miscarriage of justice.

The order and judgment are affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

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137 Cal.App. 200

MECHAM et al. v. CRUMP et al.

Civ. 4953.

District Court of Appeal, Third District, California.

March 3, 1934.

1. Automobiles ⇨244(35).

Evidence supported verdict that driver was negligent in driving at unreasonable rate of speed on highway under construction, where automobile struck foreman (St. 1931, p. 2120, § 113).

2. Appeal and error ⇨1001(1).

Verdict supported by substantial evidence is conclusive.

3. Automobiles ⇨219.

Foreman on highway under construction, who not only directed others but participated in whatever was necessary to be performed as occasion demanded, was not a pedestrian who must constantly look for on-coming automobiles.

4. Automobiles ⇨245(75).

Contributory negligence of foreman for failing to look for on-coming automobile which struck him, before attempting to pick up key on highway under construction, *held* for jury.

5. Automobiles ⇨168(3).

Driver, who was traveling at unreasonable rate of speed on highway under construction where automobile struck foreman, was not exonerated from negligence because traveling within speed allowed by law (St. 1931, p. 2120, § 113).

6. Trial ⇨255(13).

Trial court need not have defined phrase used by it in its instructions, absent request for instructions thereon.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by M. S. Mecham and another against E. M. Crump and another. From a judgment in favor of plaintiffs, defendants appeal.

Affirmed.

J. Francis O'Shea and Ray T. Coughlin, both of Sacramento, for appellants.

Ralph H. Lewis and Gerald M. Desmond, both of Sacramento, for respondents.

JAMISON, Justice pro tem., delivered the opinion of the court.

This is an action for damages for injuries received by plaintiff resulting from being struck by an automobile operated by defendant Lillian Crump.

Defendants E. M. Crump and Lillian Crump are husband and wife, and at the time of the accident Lillian Crump was operating the automobile by and with the consent of her said husband.

This action was tried by a jury, which returned a verdict in favor of plaintiff and against both defendants. Defendants moved for a new trial, and, same being denied, both defendants appealed from the judgment rendered upon said verdict.

[1] Defendants contend that the evidence did not show negligence upon the part of defendant Lillian Crump, and that it did show contributory negligence upon the part of the plaintiff.

The evidence produced by plaintiff was substantially as follows:

Respondent Mecham, at the time he suffered the injuries, was the foreman of the Force Construction Company and was engaged in filling in the low places and cutting down the shoulders along the paved portion of the Sacramento and Stockton highway. His duties as such foreman required of him that he sometimes operated the equipment, sometimes set stakes, and sometimes performed physical labor.

On August 20, 1932, respondent had been overseeing and inspecting the work on said highway. This work covered a distance of some eleven miles. Shortly before noon respondent arrived at the place where he was injured. He parked his automobile on the east side of the highway about 4 feet from the paved part thereof. Shortly thereafter H. L. Leventon, the contractor, also drove up and parked his car on the east side of the highway and about 10 feet from the paved portion and about 30 feet south of respondent's car. There was a caterpillar towing a grader on the west side of the highway and an automobile, belonging to one Carlson, who was operating a caterpillar on the east side of the highway, and this automobile was parked off of the paved portion of the highway some 20 feet in front of the caterpillar and grader on the west side. On the east side of the highway in addition to the two automobiles belonging to Leventon and respondent there was another caterpillar towing a grader about 30 feet south of respondent's car and off the paved portion of the highway. When Leventon stopped his car, respondent went to him, and they had some conversation. While engaged in this conversation, respondent observed that the Carlson automobile was in a position that impeded the caterpillar and grader that was operating on the west side, and he went across the highway to remove it. As he neared the Carlson automobile, he noticed that the ignition key was missing. He then returned across the highway and motioned to Carlson for the key. Carlson immediately threw the key to respondent, and in striking his hand fell upon the paved portion of the highway about 2 feet from its edge. Respondent, when the key was thrown, was about 4 feet from the edge of the paved portion of the highway and took two steps to recover the key, and, while he was at the edge of the paved portion of the highway and was stooping over to get the key, he was struck by the automobile driven by appellant Lilliam Crump, which was coming from the south. At the time respondent was struck, the automobile operated by appellant Lillian Crump was traveling at a speed of 40 or 45 miles per hour. After being struck, respondent was rolled 20 feet and the automobile continued 350 feet before stopping.

Large signs were placed at the north end and the south end of the highway upon which the work was being done. These were large signs and read, "Highway under construction for 11.95 miles, men at work, equipment at work." Then there were smaller signs placed at intervals along said work which contained the words, "Slow—Danger." One of these last-named signs was one mile south and another 11,000 feet south of the place where respondent was injured. These signs were placed 2 feet from the paved portion of the highway.

Appellant Lillian Crump testified that she saw none of these signs and had no knowledge that the road was being worked. She further produced evidence that respondent came from behind an automobile and ran in a stooping position against the right front door of her car while her car was about in the middle of the paved portion of the highway. The paved portion of the highway is 20 feet in width.

[2] Appellants contend that they were not guilty of negligence. The jury decided adversely to appellants' contention upon the question of negligence; as there is sufficient evidence upon the part of respondent to justify this decision, it needs no citation of authorities upon the well-recognized proposition that, where there is substantial evidence to support the verdict, this court is powerless to reverse the case.

There is evidence upon the part of respondent that signs were placed at each end of the work being carried on upon the highway notifying the traveling public that the highway was being worked, and additional signs at intervals along said highway warning the public to travel slow, and yet, in spite of these warning signals, there is evidence that appellant Lillian Crump was traveling at a high rate of speed at the time of the accident, namely, at a speed of 40 to 45 miles an hour. She testified that she did not see respondent until she was within 5 feet of him. According to respondent's evidence, no warning signal of her approach was given by said appellant.

Appellants next contend that respondent was guilty of contributory negligence in that he did not look toward the south before leaning over the highway to pick up the fallen key, and in support of this contention cases are cited which hold that a pedestrian crossing a highway is guilty of contributory negligence if he fails to look in the direction of oncoming vehicles before attempting to cross.

[3, 4] In the case now under consideration, respondent was not a pedestrian upon the highway, but was there in performance of his duties as foreman. Leventon, the contractor, testified that respondent's duties required of him to sometimes operate the equipment

and sometimes to perform physical labor; in other words, his duties as foreman did not consist merely in standing back and directing others in the work that was being done, but as occasion demanded that he participate in whatever was necessary to be performed. Under these circumstances he is not to be considered in the same light as a pedestrian. State, etc., Ins. Fund v. Scamell, 73 Cal. App. 285, 238 P. 780, 781; King v. Green, 7 Cal. App. 473, 94 P. 777; Zumwalt v. E. H. Tryon, Inc., 126 Cal. App. 583, 14 P.(2d) 912. The question of negligence under such circumstances is one for the jury.

In the case of Cecola v. 44 Cigar Co., 253 Pa. at page 639, 98 A. 775, plaintiff was struck by defendant's automobile while he was engaged in picking up a paving brick. There was also evidence to show that the driver of the automobile had given no warning of his approach, and it was there held that the question of plaintiff's negligence was one for the jury, and the judgment in plaintiff's favor was affirmed.

In Blackwell v. Renwick, 21 Cal. App. 131, 131 P. 94, 96, the court thus declared the law as applying to contributory negligence: "The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say as a matter of law that the jury could not fairly and honestly find for the plaintiff." Fox v. Oakland Consol. St. Ry., 118 Cal. 55, 50 P. 25, 62 Am. St. Rep. 216.

In the case of State, etc., Ins. Fund v. Scamell, supra, in which a rehearing was denied by the Supreme Court, Justice Tyler said: "One using a street traveled by automobile, in the absence of warning, is not required to constantly keep a sharp lookout from behind to see whether a machine is approaching; * * * and his failure so to do does not constitute negligence as a matter of law. * * * Much less so is a laborer whose duties require him to be in the street in the performance of his occupation. Pedestrians are not continuously in the street, and their attention is devoted to a safe passage, while the attention of a street laborer must be to a considerable extent devoted to his task. There can be and there is no duty imposed on a workman to be constantly on the lookout for motor vehicles; on the contrary, it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them. It is not negligence as a matter of law for a workman to keep his mind on his work or to fail to look and listen for approaching vehicles. He may properly assume that the automobilist will not be guilty of negligence in running him down without warning."

Respondent had the right to assume that appellant Lillian Crump would not run him down, without warning, while he was engaged in the performance of his duties as foreman, and particularly so as numerous warning signs were placed along the highway from the direction in which said appellant was traveling thereon.

It is true that while section 113 of the California Vehicle Act (St. 1923, p. 553, § 113, as amended by St. 1931, p. 2120), permits a speed of 45 miles per hour, it limits this by the following language: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person."

[5] The fact that appellant Lillian Crump was traveling within the speed allowed by the California Vehicle Act does not exonerate her from negligence. Reaugh v. Cudahy Packing Company, 189 Cal. 335, 208 P. 125; Spring v. McCabe, 53 Cal. App. 330, 200 P. 41; Davis v. Brown, 92 Cal. App. 20, 267 P. 754.

We are of the opinion that under the evidence in this case the question of the contributory negligence of respondent was a question for the jury.

[6] Appellants contend that the court should have defined, in its instructions, the meaning of the words "along the shoulders of the highway" used by it in two of its instructions.

They had ample opportunity to have secured this information from the witnesses. Nor did they ask any instructions on this point. This contention is without merit.

The judgment is affirmed.

We concur: **PULLEN, P. J.; PLUMMER, J.**

137 Cal.App. 477

NEWMAN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 9319.

District Court of Appeal, Second District, Division 1, California.
March 21, 1934.

Master and servant 🔑419.
Order of Industrial Accident Commission terminating liability for compensation payments must be affirmed, where there is any material evidence substantially supporting finding.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by Frank Newman, claimant. On certiorari to review an order of the Industrial Accident Commission, terminating liability of the insurance carrier under a previously entered compensation award.

Order affirmed.

See, also, 129 Cal. App. 534, 18 P.(2d) 977.

Goldman & Lieberman and A. E. Coppleman, all of Los Angeles, for petitioner.

Everett A. Corten, of San Francisco, for respondents.

CONREY, Presiding Justice.

This is a petition for writ of review of an order terminating as of February 18, 1933, liability of respondent insurance carrier under a previously entered compensation award. Petitioner claims that the evidence is not sufficient to sustain the order.

The original injury occurred November 21, 1931, by reason of an abrasion at one side of the left heel, followed by infection. An award was made for temporary total disability and continuing to a stated date, "July 6, 1932, and indefinitely." There have been two applications to the commission for an order terminating the liability. The first of these applications was denied by order of December 14, 1932; the second application was filed February 20, 1933. By order of June 17, 1933, the liability was terminated as of February 18, 1933. (It is conceded that although the date given in the order is February 18, 1932, this was a clerical error.)

As shown by the return to the writ, the evidence in the instant proceeding before the commission consisted of the testimony of the employee Newman and certain reports of physicians. If there is any evidence, material to the issue and substantially tending to support the finding of the commission, then the order terminating the liability for compensation payments should be affirmed. The finding is that any disability suffered by reason of the injury had terminated at the time stated, and that any further disability complained of herein was not caused by said injury.

From an examination of the record, as shown by the return to the writ, it appears that the finding is sustained by the evidence; and particularly by the reports and opinions of some of the physicians, given after thorough examination into the facts of the case. All agree that the disability is temporary, although there is a difference of opinion about the extent of recovery attained.

The order is affirmed.

We concur: HOUSER, J.; YORK, J.

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137 Cal.App. 308

Ex parte SEARS.

Cr. 1340.

District Court of Appeal, Third District, California.
March 10, 1934.

1. **Master and servant** 🔑84.
Complaint in prosecution for violating statute penalizing failure to pay discharged employee's wages *held* sufficient (Gen. Laws 1931, Act 4743, §§ 1, 2, 4, 6; Const. art. 1, § 15).

Complaint alleged that defendants, while acting as officers of the employer corporation, discharged the employee from the service of the corporation, and with intent to annoy, harass, oppress, hinder, delay, and defraud the employee willfully and unlawfully refused to pay the employee the wages due to the employee, employer having the ability to pay, all in violation of the provisions of sections 1 and 6 of Gen. Laws 1931, Act 4743.

2. **Habeas corpus** 🔑34.
Decision in certiorari proceeding *held* determinative of all issues involved in petition for writ of habeas corpus where scope of inquiry on petition for writ of habeas corpus was same as that in certiorari proceeding.

3. Constitutional law ⚷83(3).
Master and servant ⚷69.

Statute penalizing failure to pay discharged employee's wages *held* not to violate Constitution prohibiting imprisonment for debt (Gen. Laws 1931, Act 4743, §§ 1, 2, 4, 6; Const. art. 1, § 15).

4. Criminal law ⚷90(2).

Justice's court had jurisdiction of prosecution for discharging and fraudulently refusing to pay wages of employee (Gen. Laws 1931, Act 4743, §§ 1, 2, 4, 6; Const. art. 1, § 15).

Application for writ of habeas corpus by Harry Sears, to be directed to the sheriff of Calaveras County to secure release of petitioner.

Writ denied and prisoner remanded.

Philip C. Boardman, Wm. M. Abbott, K. W. Cannon, Cyril Appel, Ivores R. Dains, and Henry A. Plattner, all of San Francisco, for petitioner.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The petitioner seeks to obtain his discharge from custody by means of a writ of habeas corpus on the ground that the statute under which he was convicted of willfully and fraudulently failing to pay the wages of an employee upon his discharge, is unconstitutional, and because the complaint fails to state a public offense.

The same matter was previously determined adversely to the petitioner upon a petition for a writ of certiorari. Sears v. Superior Court (Cal. App.) 24 P.(2d) 842. The facts are more fully related in our opinion which was filed in that proceeding. The petitioner and William H. Warwick were jointly charged in a complaint which was filed in the justice's court of Angels township, Calaveras county, with violating the provisions of the act regulating the payment of wages by private employers. (Stats. 1919, p. 294, and amendments thereto; 2 Deering's Gen. Laws of 1931, p. 2241, Act 4743.) The complaint contained two counts. The first count charges that while the defendants were acting as officers of the Calaveras Gold Mining Company they did "employ two or more workers in and about the mining operations * * * without maintaining pay days, * * * and without paying said workers in full for their services semi-monthly as required by sections 2 and 4 of the said law." The second count charges that while the defendants were acting as such officers of the Calaveras Central Gold Mining Company, "and being then and there the employers of O. H. Lague, did then and there discharge said employee from the service of said corporation, and did then and there, with intent to annoy, harass, oppress, hinder, delay and defraud the said employee, wilfully and unlawfully refuse to pay the said employee the wages then and there due the said employee * * * having the ability to pay the same, all in violation of the provisions of sections 1 and 6 of the said law." The defendants were convicted and fined separately under each of the counts of the complaint with the alternative penalty of one day of imprisonment for each $2 of said fine, in the event of nonpayment thereof. On appeal to the superior court the judgment was affirmed. After an unsuccessful effort to annul the judgment upon a petition for a writ of certiorari, this petition for a writ of habeas corpus was filed.

[1-4] The petitioner contends that the justice's court was without jurisdiction to try the cause or pronounce judgment for the reason that neither count of the complaint states a public offense, and because the act is unconstitutional since it violates the provisions of article 1, § 15, of the Constitution of California, which provides: "No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud, nor in civil actions for torts, except in cases of wilful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."

Conceding that the first count of the complaint fails to state a public offense, the petitioner is still not entitled to be discharged from custody for the reason that we have previously held that the second count does sufficiently state a public offense of which the justice's court had jurisdiction and that the workmen's wages act in question is not unconstitutional. Sears v. Superior Court, supra. A petition for a hearing of the certiorari case in the Supreme Court, after a decision had been rendered in this District Court of Appeal, was denied. The scope of inquiry upon this petition for a writ of habeas corpus is exactly the same as it was in the certiorari proceeding. The previous decision in the certiorari proceeding is therefore determinative of all of the issues which are involved in this petition for a writ of habeas corpus. In re Drew, 188 Cal. 717, 207 P. 249, 250. It is there said: "The scope of inquiry upon a writ of review extends only to the question of the jurisdiction of the court which rendered the judgment sought to be reviewed. The scope of inquiry on habeas corpus is precisely the same. It cannot go beyond the question of jurisdiction. The decision of the district court in that case was therefore an adjudication by that court, and also by this court on petition for rehearing, of the precise matter upon which the petitioner here claims that the contempt judgment is void. Even if we were of the opinion that the decision in that case was erroneous, it would now be conclusive."

We are still of the opinion the second count of the complaint states sufficient facts to constitute a public offense against the petitioner contrary to the provisions of section 6 of the workmen's wages act, supra, for the reasons stated in the certiorari proceeding above cited, and that the portion of the statute under which the petitioner was convicted is constitutional.

The writ of habeas corpus is denied and the prisoner is remanded.

We concur: PULLEN, P. J.; PLUMMER, J.

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137 Cal.App. 768

Ex parte WARWICK.

Cr. 1339.

District Court of Appeal, Third District, California.

March 10, 1934.

Habeas corpus 🔑**21.**

Writ of habeas corpus would not issue to release accused who was convicted in justice's court for discharging and fraudulently refusing to pay wages of employee (Gen. Laws 1931, Act 4743).

Petition for writ of habeas corpus by William H. Warwick to be directed to the sheriff of Calaveras County to secure release of petitioner.

Writ denied and prisoner remanded.

Philip C. Boardman, Wm. M. Abbott, K. W. Cannon, Cyril Appel, Ivores R. Dains, and Henry A. Plattner, all of San Francisco, for petitioner.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This petition for a writ of habeas corpus is a companion proceeding with that of In re Sears (Cal. App.) 30 P.(2d) 571, in which an opinion was this day filed in this court.

Both petitioners were charged in the same complaint which was filed in the justice's court of Angels township, Calaveras county, and convicted of willfully and fraudulently discharging an employee without paying his wages, contrary to the provisions of Statutes of 1919, page 294, and amendments thereto (2 Deering's Gen. Laws of 1931, p. 2241, Act 4743).

Upon the authority of In re Sears, supra, the writ of habeas corpus is denied and the prisoner is remanded.

We concur: PULLEN, P. J.; PLUMMER, J.

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137 Cal.App. 378

PEOPLE v. DAVIS.

Cr. 1773.

District Court of Appeal, First District, Division 2, California.

March 16, 1934.

Rehearing Denied March 31, 1934.

Hearing Denied by Supreme Court April 13, 1934.

1. False pretenses 🔑**7(1).**

Where broker was dealing with one party to exchange of properties on his own account, or as agent of mortgage company which was other party to exchange, with authority to sell for price above company's net price, broker's alleged misrepresentation of price could not be made basis of prosecution for grand theft.

2. False pretenses 🔑**49(5).**

Evidence *held* insufficient to show misrepresentation by broker of property exchanged by mortgage company to other party to exchange where prior to consummation of exchange such party knew that company was not to receive the full price of the property, that broker was to profit by the transaction, and deal was carried out as represented by him.

Appeal from the Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Max Davis was convicted of grand theft, and he appeals.

Judgment and order denying new trial reversed, and the cause remanded.

Charles Reagh and Martin Pence, both of Honolulu, T. H., for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

SPENCE, Justice.

The defendant was charged with the crime of grand theft. He waived a jury, and upon a trial by the court he was convicted of the crime charged. He appeals from the final judgment of conviction and the order denying his motion for new trial.

The main contention of appellant is that the evidence was insufficient to sustain his conviction, and we shall therefore proceed to a consideration of the evidence produced. We may state in passing that the evidence offered by defendant conflicted in many details with that offered by the prosecution. We may also state that the evidence offered by the prosecution, consisting mainly of the testimony of the complaining witness, contained many discrepancies and inconsistencies. We shall endeavor, however, to deal only with the essential facts as shown by the evidence produced by the prosecution.

The charge against appellant arose out of a real estate transaction. Mrs. Hyland, the complaining witness, was the owner of a piece of real property located in San Diego county. It appears that this property was of the value of approximately $250 and had an assessed valuation of $30. Mrs. Hyland first entered into a written agreement of exchange with appellant whereby she agreed to exchange said San Diego property for a certain lot and improvements in San Francisco owned by the "S. F. Mortgage Company" and known as 1848 and 1850 Buchanan street. She further agreed thereby to pay $625 in cash for the account of Frank M. Davidson, a cousin of appellant, and to "assume the balance of $7,431.25 payable to the S. F. Mortgage Co., above mentioned, in monthly installments of not less than $65 per month including interest." The exchange was finally consummated in the following manner: Mrs. Hyland, at the request of appellant, delivered to appellant a deed to the San Diego property, naming Frank M. Davidson as the grantee therein; she paid to appellant the sum of $50 in cash and executed two promissory notes, one for $175 and the other for $400, making a total in cash and notes of $625; she also signed an agreement with the San Francisco Guarantee Company, referred to in the above-mentioned agreement as the "S. F. Mortgage Company," whereby she agreed to purchase the Buchanan street property from said company for the sum of $7,431.25, payable in installments of $65 per month.

The circumstances preceding the execution of said agreements, upon which circumstances the prosecution based its claim of fraudulent representation, were as follows: Mr. Herrick, representing the San Francisco Guarantee Company, entered into an oral agreement with appellant regarding the sale by appellant of the Buchanan street property. Said property had been acquired upon foreclosure and, as it was against the company's policy "to carry real estate," they desired to sell it for $7,431.25, which was the amount necessary to cover the "loan and expenses." Appellant was a real estate broker. While Mr. Herrick testified that he did not deal with appellant as the company's agent in the sale of the property and that he did not agree to transfer it to appellant so that appellant could sell it as his own and that appellant had no "oral option to buy the property," he did testify that he did have an "agreement with him (appellant) for the sale of the property by him (appellant)." While it is difficult to determine the exact nature of the agreement from the record, we believe this to be immaterial. It is sufficient that there was some form of agreement regarding the sale of the property by appellant, and we need not concern ourselves with the question of whether under said agreement appellant was dealing with the property on his own behalf or as agent for the company, selling for them upon a net price agreement. Nor is it of any moment that said oral agreement may have been unenforceable between the appellant and the company, for it appears that said agreement was thereafter acted upon by the parties and carried out. After making said agreement with Mr. Herrick appellant contacted Mrs. Hyland. The price which he set upon the Buchanan street property for the purpose of the exchange was $10,000. The price discussed by appellant and Mrs. Hyland for her San Diego property for the purpose of exchange was $2,000. It is difficult to reconcile the discrepancies in the figures found in the testimony, but it will be seen that by adding the company's figure of $7,431.25 and the sum of $625, being the amount represented in cash and notes, and the value of $2,000 placed upon Mrs. Hyland's San Diego property, the total approximates the $10,000 figure placed by appellant on the Buchanan street property. It is undisputed that Mrs. Hyland inspected the Buchanan street property, was entirely satisfied with the deal, and took no exception to the prices fixed as the basis of exchange. She went with appellant to talk with Mr. Herrick, and made no further inquiry regarding the price, confining her inquiries to other details connected with the transaction. Appellant had told Mr. Herrick that he was putting a price of $10,000 on the Buchanan street property for the purpose of exchange with Mrs. Hyland and explained to him that he was getting the San Diego property and cash, but that the San Diego property was of very little value. Mr. Herrick testified that "that part did not concern us," that he had given appellant a "net price," and that "it would not concern me what he did in the deal." Mr. Herrick would not say that appellant had an "oral option" on the property, but he said, "however, if we got in a deal with a man, and he was working on it, we would hold it up until he could consummate the deal, or he could not turn the trick." According to Mrs. Hyland, appellant told her that there would be no commission to be paid by her and that "he was getting paid by the company for it." In other words, it is undisputed that both Mrs. Hyland and the company knew that appellant would profit by the consummation of the deal and there was no objection raised to his so doing or to the basis upon which the exchange was being made. As heretofore stated, Mrs. Hyland first entered into a written agreement of exchange with appellant, which agreement was thereafter carried out substantially in accordance with its terms. Notes were given, however, for part of the cash payment. After Mrs. Hyland had paid $250 on account of the cash payment and notes and, as she then claimed, had learned for the first time that the company was to receive for the Buchanan street property only the $7,431.25 represented by the contract of sale, she became dissatisfied and caused appellant's arrest upon the charge of grand theft. Upon the trial the only claim of misrepresentation was the claim that the price of the Buchanan street property had been misrepresented. The district attorney took the position that this was the only misrepresentation, and he objected to any cross-examination of the complaining witness as to whether there were any other alleged misrepresentations. The trial court interrogated the district attorney as to the prosecution's theory and the district attorney said, "No, the misrepresentation was as to the price."

[1] Appellant takes the position that no offense was committed, as under the circumstances there could be no misrepresentation as to the price. We believe that there is merit in appellant's contention, for under his oral agreement with the company he was either dealing with Mrs. Hyland on his own account or as the agent of the company with authority to sell at any price above the said net price fixed by the company. Whether he was acting as principal or agent, the price of the Buchanan street property was any amount which appellant might set in excess of the net figure (Robinson v. Easton, Eldridge & Co., 93 Cal. 80, 28 P. 796, 27 Am. St. Rep. 167; Sill v. Ceschi, 167 Cal. 698, 140 P. 949), and he could no more misrepresent that price than could the owner of real property in representing a figure as the price at which he was willing to sell. Our attention has been called to numerous civil cases in other jurisdictions dealing with this general subject (Sanders v. Stevens, 23 Ariz. 370, 203 P. 1083; Wrench v. Von Schriltz, 108 Kan. 748, 197 P. 197; Ripy v. Cronan, 131 Ky. 631, 115 S. W. 791, 21 L. R. A. (N. S.) 305; Baker v. Wheeler, 149 Ill. App. 579; McLennan v. Investment Exchange Co., 170 Mo. App. 389, 156 S. W. 730; Lone Rock Bank v. Pipkin, 169 Ark. 491, 276 S. W. 588; Aronowitz v. Woollard, 166 App. Div. 365, 152 N. Y. S. 11), and while there may be some apparent conflict of authority, we believe that the rules set forth in the authorities cited represent the prevailing view.

[2] But even assuming that there could be a misrepresentation as to the price under the circumstances before us, we are of the opinion that the evidence was insufficient to show any such misrepresentation in the present case. After the complaining witness had testified in a most unsatisfactory manner regarding some of the details of the transaction, she thereupon stated that the first time that she learned that the company was to receive $7,431.25 was at the time when the agreement with the company was forwarded to her for signature when she was on a trip to Seattle. Her direct examination continued as follows:

"Not before that? A. I cannot remember.

"Q. Well, now, are you sure that neither Mr. Herrick nor Mr. Davis never told you prior to that time? That the price was $7,431.25 so far as the company was concerned? A. I am not positive.

"Q. Mr. Herrick may have said so? A. Mr. Davis might have told me.

"Q. Mr. Davis might have told you, that the company was getting $7,431.25? A. Yes.

"Q. But Mr. Herrick did not? A. No, sir.

"Q. You think Mr. Davis might have told you that? A. Yes, if I remember rightly, we did have a conversation about it.

"Q. Yes. A. And he said after I had paid the $725.00 and given him the $2,000 property—

"Q. After you had paid the $725.00 and given him the $2,000 property— A. That the difference would represent the amount of money that the company would charge for the property.

"Q. After you gave Mr. Davis the property down there, and the $725.00, then, the difference of $7,431.25 would be what the company was to get? A. Yes.

"The Court: Well, gentlemen, what is this all about?"

The amount of $725 referred to in the testimony was subsequently changed by the witness to the sum of $625. The remaining portions of the above-mentioned testimony were never changed or modified in any manner. Subsequently the trial court asked, "Why was it, when you knew the company was getting $7,431.25, that was what they were getting, why did you give the deed to your property down there for $2,000 to Mr. Davidson or to Mr. Davis, and also give these notes for either $625.00 or $725.00? A. Because he said the price was $10,000. * * *" At that time the trial court was evidently unable to understand the theory of the prosecution, and we must confess that we are now unable to find any theory upon which the conviction may be sustained. The testimony of the complaining witness showed that she knew that appellant was to receive the San Diego property together with the $625 represented in cash and notes and that "$7,431.25 would be what the company was to get." According to her own testimony, the deal as carried out was precisely the deal as represented. We need not concern ourselves as to why Mrs. Hyland entered into this transaction. We may point out, however, that she made a cash outlay of only $50 at the time and obtained a piece of city property producing an income of $80 per month upon an agreement which required that she make monthly payments thereon of only $65 per month. There was no showing that the property was not of the value of $10,000, and the complaining witness may have been glad to seize the opportunity to acquire the income-producing property on apparently favorable terms and to dispose of her unimproved property in San Diego county at an exchange price of $2,000. Even after one of the tenants had moved, and Mrs. Hyland became dissatisfied, she made no effort to rescind the entire transaction, but merely attempted to force appellant to return his profit or commission, whichever it may be termed. This she could not do under the facts before us. The parties dealt at arm's length in entering into this transaction and it is possible that one may have profited thereby more than the other. The testimony fails to prove even this; but assuming that it did, there would be no basis for a criminal prosecution.

In view of the conclusions which we have reached, we deem it unnecessary to discuss certain other points raised by appellant. The judgment and order denying the motion for new trial are reversed, and the cause is remanded for a new trial.

We concur: NOURSE, P. J.; STURTEVANT, J.

137 Cal.App. 366

PEOPLE v. BELKNAP.

Cr. 1330.

District Court of Appeal, Third District, California.

March 14, 1934.

1. Criminal law 🔑241.

Defendant's confinement in county jail by sheriff *held* not unlawful, even though defendant was arrested without warrant by sheriff of another county on charge of fraud, where confinement was on order of committing magistrate after preliminary hearing.

2. Criminal law 🔑625.

Failure to stay prosecution for jailbreak and determine defendant's sanity as required by statute in case of doubt *held* not error, where defendant never raised issue of insanity, and no doubt arose, notwithstanding prosecutor suggested defendant must be insane to conduct own case without counsel and to present argument which he presented (Pen. Code, § 1368).

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Reginald Belknap was convicted of escaping from county jail, and he appeals.

Affirmed.

Reginald Belknap, in pro. per.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

An information was filed against defendant in the county of Napa for issuing a check upon a bank with intent to defraud. During his confinement in the county jail, awaiting trial upon this charge, a second charge was filed against him wherein it was alleged he willfully, unlawfully, and feloniously broke and escaped from said Napa county jail while confined therein awaiting trial upon the charge above set forth. Upon this latter charge he was tried and convicted, and from that verdict and judgment prosecutes this appeal.

None of the points urged by appellant merit an extended examination.

[1] The first point presented by defendant is that he was not lawfully confined in the county jail of Napa county at the time of his escape therefrom, because as he claims, he was arrested upon the charge of fraud by the sheriff of Solano county who, at the time of arrest, did not personally have a warrant directing him so to do. One of the many answers that might be made to this objection is that at the time of defendant's attempted escape from the county jail he was then being held by the sheriff of Napa county, not by virtue of the process complained of, but by an order by a committing magistrate after a preliminary hearing.

The second point raised by appellant is directed against the original charge of issuing a check with intent to defraud. The merits of that charge were not an issue before the trial court and are not here under consideration.

[2] The third point is unintelligible, and the fourth point is, the district attorney suggested to the court at the time of judgment and sentence that defendant must be insane to attempt to conduct his own case without aid of counsel and to present to the jury the argument which he did at the conclusion of the testimony.

The trial judge determined and so declared that in his mind there was no question as to the sanity of the defendant and in his opinion he was sane, and thereupon proceeded to impose the sentence prescribed by law. Appellant never raised the issue of insanity, and, as stated by the trial judge, no doubt arose as to the sanity of the defendant at any time during the pendency of the action or at the time of judgment. It is only when a doubt arises that section 1368 of the Penal Code is applicable.

Appellant here has conducted his own appeal and the issues have been presented in a very informal and incomplete manner. We have, however, in behalf of appellant, examined the entire record and can find nothing that would warrant a new trial. The trial judge was very patient and liberal in his rulings in behalf of appellant and allowed him wide latitude in his examination of the witnesses and in the process of the court.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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137 Cal.App. 472

PEOPLE v. RAMERIZ.

Cr. 261.

District Court of Appeal, Fourth District, California.

March 20, 1934.

Rehearing Denied April 2, 1934.

Hearing Denied by Supreme Court April 19, 1934.

1. Criminal law 🔑1070½.

Announcement respecting notice of appeal in open court need not be in any particular form (Pen. Code, § 1239).

2. Criminal law 🔑1070½.

Where defendant was not represented by counsel and his request to be allowed to be present at hearing was denied and he filed, in advance, written notice of appeal with request that it be entered if his motion was denied, such written notice of appeal *held* sufficient compliance with statute (Pen. Code, § 1239).

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Tim Rameriz was convicted of burglary, and from an order refusing to vacate the judgment he appeals, and the State moves to dismiss the appeal.

Motion to dismiss appeal denied.

Tim Rameriz, in pro. per.

U. S. Webb, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The appellant pleaded guilty to the crime of burglary. Judgment was pronounced on July 21, 1930, the court finding the crime to be burglary in the first degree. It now appears that no evidence as to the degree of the crime was taken by the court and that, in fact, the crime committed was burglary in the second degree.

On October 28, 1933, the appellant, who was then confined in the state penitentiary and who was not represented by counsel, filed a written motion to vacate the judgment pronounced on July 21, 1930, and at the same time filed a supporting brief, a motion asking that he be brought into court at the time of the hearing on his motion to vacate the judgment, and a notice of appeal and a request for a transcript. The notice of appeal contained a statement that it was to be entered only in the event the court denied his motion. The court denied these motions and thereafter entered an order which, after reciting that the motion to vacate the judgment had been denied, that the motion to bring the defendant into court for the purpose of entering an amended judgment and sentence had been denied, and that the defendant had filed a written notice of appeal with a request for a transcript, directed that a transcript be prepared. This is the appeal thus taken from the order refusing to vacate the judgment.

The Attorney General has moved to dismiss the appeal on the ground that a notice of appeal was not announced in open court at the time the order was made, as required by section 1239 of the Penal Code.

[1, 2] While this section is usually taken as contemplating an oral notice of appeal at the time an order is made, the essential requirement seems to be that notice of appeal shall then be given "by announcing in open court," rather than that the announcement shall be in a particular form. The instant case presents an unusual situation in which it was impossible for the appellant to make that announcement in the ordinary and usual manner, although he informed the court and all concerned, in writing, that he appealed from the order. He was not represented by counsel and his request to be allowed to be present at the hearing was denied. Under such circumstances he filed in advance a written notice of appeal with the request that it be entered in the event his motion was denied. This was the only thing he could do and the only way in which it was possible for him to claim the right to which he was entitled under the statute. Under such circumstances, we think the written notice of appeal filed was such a substantial compliance with the statute as should be considered sufficient. The record indicates that there is considerable merit in the appeal and the interests of justice require a consideration thereof.

The motion to dismiss the appeal is denied.

We concur: MARKS, J.; JENNINGS, J.

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137 Cal.App. 421

SHEPHERD et al. v. BOARD OF SUP'RS OF SAN JOAQUIN COUNTY.

Civ. 4865.

District Court of Appeal, Third District, California.

March 19, 1934.

Hearing Denied by Supreme Court May 17, 1934.

1. Municipal corporations 🔑33(1).
County board of supervisors, in passing on sufficiency of petition for annexation of uninhabited territory by city, sits in quasi judicial capacity (Gen. Laws 1931, Act 5163).

2. Municipal corporations 🔑33(1).
In proceeding for annexation of uninhabited territory by city, where respective parties had notice of hearing before county board of supervisors and fair opportunity to attend and present evidence, hearing *held* sufficiently formal to render board's decision valid, even if witnesses were not sworn (Gen. Laws 1931, Act 5163).

3. Municipal corporations 🔑33(8).
In certiorari proceeding to cancel order of county board of supervisors authorizing annexation of uninhabited territory by city, where parties stipulated as to oral "testimony" submitted to board and were represented by attorneys at hearing before board, court must assume that witnesses were sworn and each party had opportunity of cross-examination (Gen. Laws 1931, Act 5163).

Under such stipulation, court must assume that witnesses were duly sworn and that each party had opportunity of cross-examination of witnesses, since it was stipulated that oral testimony was submitted, and "testimony" is defined as statement made by witness under oath.

[Ed. Note.—For other definitions of "Testimony," see Words & Phrases.]

4. Certiorari ⇨68.

Where court or quasi judicial tribunal has jurisdiction, mere insufficiency of evidence may not be considered in proceeding on certiorari.

5. Municipal corporations ⇨33(8).

In proceeding for annexation of uninhabited territory by city, where two witnesses testified before county board of supervisors that land "is uninhabited," there was evidence on which board was authorized to determine whether territory was uninhabited, rendering board's decision conclusive on certiorari, notwithstanding conflicting evidence (Gen. Laws 1931, Act 5163).

6. Municipal corporations ⇨33(6).

In proceeding for annexation of uninhabited territory by city, presence of dwelling houses or other buildings, or fact that territory had been occupied at some previous time, *held* not conclusive of question whether it was presently inhabited (Gen. Laws 1931, Act 5163).

7. Municipal corporations ⇨29(4).

In statute providing for annexation of uninhabited territory by city, term "uninhabited" means that property is not presently occupied by persons who actually live or abide thereon (Gen. Laws 1931, Act 5163).

[Ed. Note.—For other definitions of "Uninhabited," see Words & Phrases.]

8. Municipal corporations ⇨34.

In proceeding for annexation of uninhabited territory by city of Stockton, part of which was owned by city, city *held* entitled to consent, before county board, to the annexation of city's property without first procuring authorization from city's electors (Gen. Laws 1931, Act 5163, § 1; St. 1923, p. 1336, art. 4, § 1, and pp. 1345, 1348, art. 5, subds. 46, 64).

9. Municipal corporations ⇨29(3).

In proceeding for city's annexation of uninhabited territory partly owned by city, county board properly considered both privately controlled and city owned property in determining whether owners of more than one-half of entire tract had protested against annexation (Gen. Laws 1931, Act 5163, § 1).

10. Municipal corporations ⇨33(1).

In proceeding before county board of supervisors for annexation of uninhabited territory by city, boundaries of tract sought to be annexed, if adopted without fraud or in violation of statute, are controlling on board in determining merits of annexation petition (Gen. Laws 1931, Act 5163, § 1).

Appeal from Superior Court, San Joaquin County; M. D. Young, Judge.

Certiorari proceeding by D. H. Shepherd and others against the Board of Supervisors of San Joaquin County, to cancel an order of respondent Board authorizing the City of Stockton to annex certain uninhabited territory. From a decree canceling the Board's order, the Board appeals.

Reversed.

J. Leroy Johnson, of Stockton, for appellant.

Hubert H. Briggs and Stephen N. Blewett, both of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal in a proceeding in certiorari, from a decree of the superior court of San Joaquin county, canceling an order of the board of supervisors of that county which was previously made, authorizing the city of Stockton to annex certain uninhabited territory pursuant to the statutes of 1899 and amendments thereto. St. 1899, p. 37, and amendments thereto; 2 Deering's Gen. Laws of 1931, p. 2590, Act 5163. The order of the board was annulled on the theory that it was made without the formality of a legal hearing, without competent evidence that the territory sought to be annexed was uninhabited, and because the owners of more than one-half of the privately owned property, as distinguished from that portion which was owned by the city, had formally protested against the action of the board.

Stockton is an incorporated city which is governed by a charter. St. 1923, p. 1321. The city sought to annex a strip of uninhabited territory extending from the western border thereof along the northerly bank of the Stockton channel, westerly a distance of a mile and three-fourths, to its confluence with Smith canal. One-third of this tract of land, nearest to the border of the city, is owned by private individuals, and is included as a part of subdivisions 1 and 2 of Stockton Acres, outside of the city limits, according to a recorded map of that district. The remaining two-thirds of the uninhabited tract, sought to be annexed, is owned by the city of Stockton.

A petition in due form, praying for annexation by the city of Stockton of this uninhabited strip of land, including both the privately and publicly owned contiguous portions thereof, was filed with the city council August 31, 1931. The petition was signed by the necessary number of citizens and contained all of the allegations required by law. After investigation, the city council, by resolution duly adopted, certified to the board of supervisors of San Joaquin county the fact that the petition had been filed and that it was in proper legal form, and thereupon requested the board to fix the time and place of hearing thereof as required by the act of the Legislature. The board of supervisors promptly published notice of the hearing of the petition as required by law, setting the time for September 8, 1931. Pursuant to the statute, which provides that "any person owning any land so sought to be annexed, may object to said annexation by filing written remonstrance with said board of supervisors," nearly every owner of the privately possessed property sought to be annexed, filed written protests against the granting of the petition. No protest was filed in behalf of the city of Stockton, which owns two-thirds of the joint tracts sought to be annexed. Indeed, the city was anxious to annex the property for use for industrial purposes. It is conceded the proceedings are regular and valid to the time of the hearing of the petition for annexation.

The hearing before the board of supervisors, which acted in a quasi judicial capacity in passing upon the sufficiency of the petition, was somewhat informal. However, representatives of both parties to the controversy were present with their attorneys at the time set for the hearing. Oral and documentary evidence was adduced. The following stipulation regarding the taking of testimony at the hearing before the board was signed by respective counsel and filed in the certiorari proceeding, to wit: "It is stipulated by and between the parties hereto that the statements, attached hereto, are correct statements of the oral testimony submitted to the Board of Supervisors of the County of San Joaquin, State of California, on Tuesday, September 8, 1931, concerning the annexation of certain uninhabited territory, which is more particularly described in the petition in this action."

Regarding the issue as to the uninhabited character of the property in controversy, Walter B. Hogan testified: "It is uninhabited land and extends westerly from Buena Vista Avenue, along the north side of Stockton Channel, to Smith's Canal." J. Leroy Johnson testified regarding the same subject: "The land is largely owned by the city and it includes Louis Park. There is no one living on the land. It is uninhabited land with great industrial possibilities. The city is anxious to have it come in so that we may extend fire and police protection to it."

In behalf of the protestants, Dr. Margaret Smythe testified that she owned a house located upon the property in question "which was rented and occupied up to the time the City of Stockton was ready to pump in spoilage upon this area from its Deep Water Project." D. H. Shepherd testified "he considered his lot a part and parcel of inhabited territory." Stephen N. Blewett testified that the tract "although presently unoccupied was not in the general sense uninhabited territory." Clarence Keister testified that the Wagner Leather Company, of which he was a member, owned a warehouse which was located on the property, and that they were opposed to the annexation of the tract. He did not testify regarding the presence of inhabitants thereon. George F. Gilgert testified that "this subdivision was improved with dwellings, and families lived thereon." Other witnesses testified that the privately owned tract was subdivided into lots and blocks as shown by an official map thereof, that certain improvements existed thereon, and that individuals had lived on the property prior to the time when the city began pumping mud along the northern bank from the channel of Stockton canal. In respondents' brief, all that they contend for regarding the actual residence of people on the tract of land in question is expressed as follows: "Nobody has claimed that persons were actually dwelling upon this inundated private property. Consequently, there is no contradiction. But to say it was, at the time, uninhabited from a legal aspect, is quite a different proposition."

The evidence is quite convincing to the effect that no individual actually lived on any portion of the publicly or privately owned property sought to be annexed at the time the petition was filed, or subsequently. It does appear that one or two families had lived upon a portion of the privately owned property some time prior to the date when the petition for annexation was filed. They moved away, however, when the city began to pump mud from Stockton channel upon the adjacent property. The clearing of this channel by the city was for public improvement. It has no bearing upon the merits of the present controversy. If the property owners were thereby damaged, they had their remedy in another action.

Upon that showing the board of supervisors formally determined, by resolution duly adopted, that the petition for annexation of uninhabited territory was filed with the city council in the form required by law; that it was duly certified to the board of supervisors; that notice of the time and place of the hearing thereof was published according to law; that written protests against the proposed annexation were filed "by the owners of less than one-half of said new uninhabited territory"; that at the time and place fixed therefor the board "proceeded to hear all objections to said annexation and to consider the written protests concerning said annexation." The board, by resolution, thereupon adopted findings to the effect that "written protests to the annexation of said new uninhabited territory to the City of Stockton were filed by the owners of less than one-half of said uninhabited territory; that all said protests are hereby overruled and denied; that consent is hereby given to the City of Stockton, a municipal corporation, to the annexation of the said uninhabited territory, which is more particularly described as follows." (Here follows a particular description of the entire tract sought to be annexed.) Subsequently the annexation of this entire tract of uninhabited territory was approved by the city of Stockton at a special election which was called for that purpose.

Thereupon the respondents herein, each of whom is an owner of a portion of the privately possessed property included within the district sought to be annexed by the city of Stockton, filed this petition for a writ of certiorari in the superior court of San Joaquin county, asking for a decree canceling the order of the board of supervisors authorizing the annexation of the two adjacent tracts of land in controversy.

The petition for the writ of certiorari contains all of the proceedings which are necessary for a determination of the issues which are involved herein, and prays for a cancellation of the order of the board of supervisors which authorized the city of Stockton to annex the uninhabited contiguous tracts of land therein described. A demurrer to this petition was filed on the ground that it fails to state facts sufficient to constitute a cause of action authorizing the granting of the writ. Upon hearing of this petition for a writ of certiorari the superior court of the county of San Joaquin held that the board of supervisors was without jurisdiction to make the order overruling the protestations against the petition for annexation, or to authorize the annexation of the desired territory, for the reasons that the record shows the property to have been inhabited, and because it was assumed by the board that the owners of less than one-half of the territory sought to be annexed had filed protests against the petition, and that, upon the contrary, the board was not legally entitled to consider that major portion of the tract which belongs to the city, because its annexation was not first authorized by the voters of Stockton at an election called for that purpose. The trial court adopted findings in accordance therewith. A decree to that effect was thereupon rendered. From that decree the board has appealed.

[1-3] The respondents contend that the proceedings before the board of supervisors are invalid for the reason that the witnesses were not sworn. In passing upon the sufficiency of a petition for annexation, the board sits in a quasi judicial capacity. Its proceedings are necessarily somewhat informal. It is not expected the board will conduct its proceedings with all the precision of a court of law. It is necessary to a valid hearing that the respective parties shall have notice of the hearing and a fair opportunity to attend and present the board with evidence affecting the issues which are involved. In the present case it appears that both parties were afforded that opportunity, and that the hearing upon the petition for annexation was sufficiently formal to render the decision of the board valid and binding.

Assuming that it is necessary for witnesses to have been formally sworn and that both parties should be given an opportunity to cross-examine witnesses, there is nothing in the record of this case to indicate that these formalities were not afforded. Both parties were represented by their attorneys. Testimony was adduced. It was stipulated that "oral testimony (was) submitted." Testimony is defined as "the statement made by a witness under oath." 3 Bouv. Law Dict. 3264. Under the stipulation which was made in this case we must assume the witnesses were duly sworn and that each party had the opportunity of cross-examination of witnesses.

[4-7] The trial court was unauthorized in this certiorari proceeding to weigh the evidence adduced at the hearing of the board of supervisors, so as to upset its sole province and discretion of determining that the territory sought to be annexed is uninhabited. The evidence upon that subject is conflicting. The act specifically provides that "the decision of said board of supervisors upon said protestations shall be final and conclusive." Where a court or quasi judicial tribunal has jurisdiction of a cause, the mere insufficiency of the evidence may not be considered in a

proceeding on certiorari. White v. Superior Court, 110 Cal. 60, 42 P. 480, 481; Garvin v. Chambers, 195 Cal. 212, 221, 232 P. 696, 700; Brune v. Superior Court, 113 Cal. App. 21, 297 P. 566; Winning v. Board of Dental Examiners, 114 Cal. App. 658, 665, 300 P. 866; Sears v. Superior Court (Cal. App.) 24 P.(2d) 842; 4 Cal. Jur. 1036, § 14. In the White Case, supra, it is said: "Nothing is better understood than that on this proceeding the single question involved is whether the lower court has exceeded its jurisdiction. If it has not, no matter how grievously it may have erred to the prejudice of the petitioner, either in matters of fact or matters of law, this writ will not afford an avenue of relief."

In the Garvin Case, supra, it is said: "It is a fair summary of the decisions of this state, dealing with the scope of statutory certiorari, to say that the evidence adduced upon the hearing before an inferior board or tribunal having limited jurisdiction may be brought up to the reviewing court upon certiorari for the sole purpose of determining whether or not, from the evidence before it, the finding of a jurisdictional fact by such inferior board or tribunal is sustainable, and if there be no evidence to sustain such decision it must be annulled."

Granting that certiorari will lie when there is no evidence in the record upon which a board of supervisors could base its decision that the land sought to be annexed to a city under the provisions of the Statutes of 1899 (St. 1899, p. 37, and amendments thereto [2 Deering's Gen. Laws 1931, Act 5163]) is uninhabited, it may not be said there is no evidence upon that subject in the present case. Two witnesses testified before the board that the land in question "is uninhabited." This is sufficient to show there is evidence in the record upon which the board was authorized to determine whether it was inhabited or uninhabited. The fact that other witnesses testified to the contrary raises only a conflict. The introduction of the map which shows that the privately owned portion of the tract has been platted, is not necessarily in conflict with the oral testimony that it was uninhabited. Many an ambitious realtor has platted a vacant tract of land adjacent to a thriving city and lingered a long time in hope of persuading some one to inhabit the property. Nor is the presence of dwelling houses or other buildings on the premises or occupants thereof at some previous time conclusive of the question as to whether it is presently inhabited. If that were the test, the famous old mining town of Shasta City, with its historic deserted buildings, would be evidence that that romantic ghost city of the golden days of '49 is still inhabited. Clearly the term "uninhabited," as it is used in the annexation statute which is here involved, means that the property is not presently occupied by persons who actually live or abide thereon. Webster's New Int. Dict. of 1928, p. 1109; 8 Century Dict. and Cyc. p. 6618.

The respondent, however, insists that the board of supervisors was bound to deny the petition for annexation, since the evidence is uncontradicted that the owners of more than one-half of the privately possessed land filed written protests against the annexation, and that the portion of the tract which is owned by the city of Stockton could not be legally taken into consideration, since it constitutes 70 per cent. of the entire tract sought to be annexed, and, if considered, it would render the protests of the owners of privately possessed property useless, and because the city council had no legal authority to either consent to or protest against the annexation without a previous vote of the electors of Stockton with relation thereto.

The statute (section 1) provides that: "At the time specified in said notice, or at such other time as may be fixed by postponement, the said board of supervisors shall hear the said protestations, and unless the remonstrances are filed by the owners of more than one-half of the land sought to be annexed, the decision of said board of supervisors upon said protestations shall be final and conclusive. In the event that the owners of more than one-half of the land so sought to be annexed, file remonstrances against such annexation, said protestations shall be sustained by said board of supervisors, and shall be a bar to any further proceedings under the provisions of this act for the period of one year."

It thus appears that, when a board of supervisors determines that protests against annexation have been filed by the owners of more than "one-half of the land sought to be annexed," the only legal authority which it possesses is to "sustain the protests" and deny the petition for annexation. In other words, it is asserted that, when it appears to the board, without conflict, that protests against annexation have been filed by the owners of more than one-half of the land sought to be annexed, the board is without jurisdiction to do more than sustain the protests and deny the petition.

This appears to be the clear meaning of the statute. It therefore becomes necessary to determine whether the board had a right to take into consideration that portion of the entire tract sought to be annexed, which is owned by the city of Stockton.

[8] We are of the opinion the city of Stockton has a right under the statute to annex property owned by the city without the necessity of first procuring authorization therefor from the electors of the city. The statute does not require an election to be first held for that purpose. It does require the annexation to be approved at a subsequent election to be held for that purpose after the petition has been first approved by the board of supervisors. That election was held, and the annexation was approved.

The city council, under the authority of the charter, acting as the agents of the city, has the authority to conduct the preliminary proceedings incident to the annexation of uninhabited territory pursuant to the provisions of the statute above cited. The charter of Stockton constitutes the city council its agent or governing body, subject only to the limitations expressly stated therein. Article 4, section 1, of the charter (St. 1923, p. 1336), provides in that regard: "There is hereby created a City Council which shall be the governing body of the municipality. It shall exercise the corporate powers of the city and, subject to the expressed limitations of this charter, shall be vested with all powers of legislation in municipal affairs adequate to a complete system of local government consistent with the constitution of the state."

As such agents of the city, the council has the exclusive control of the use and management of city property, subject only to specified limitations. Article 5 of the charter provides in part:

"As the legislative body of the city, the council may, subject to the provisions and restrictions of this charter, have power: * * *

"46. * * * To improve * * * streets, avenues, sidewalks, lanes, alleys, courts, places, or public ways or property. * * *

"64. To enact appropriate legislation and to do and perform any and all other acts and things which may be necessary and proper to carry out the general powers of the city or any of the provisions of this charter; and to adopt and enforce all such measures and to establish all such regulations in case no expressed provision is in this charter made as the city council may deem expedient and necessary for the promotion and protection of the health, comfort, safety, life, welfare, and property of the inhabitants of the city."

[9] We are of the opinion the board of supervisors properly considered the entire tract of land sought to be annexed, including both the privately controlled and city owned property, in determining whether the owners of more than one-half of the entire tract of land sought to be annexed had protested against the proposed annexation. Under the circumstances of this case, it is undoubtedly true that, since the city owns two-thirds of the entire tract, a protest of the owners of the entire privately owned portion thereof would be insufficient to defeat the petition. This may be unfortunate for the private owners, but the statute makes no distinction between public or private owners of land. It is argued that this results in an injustice to the private owners. But, if their contention be correct, and only the privately owned property could be considered, under such circumstances it would work just as grave an injustice against the city, for that would bar the possibility of a city annexing its own property when protesting owners of private property intervene between the publicly owned territory and the city. Under such circumstances it would be impossible for a city to annex its own land, necessary and valuable as such annexation might become. With full appreciation of the hardship which annexation may impose upon the intervening private owners of the property which is here involved, we are convinced that a reasonable construction of the statute impels the conclusion that both the publicly and privately owned uninhabited territory sought to be annexed to the city in one contiguous tract must be considered by the board of supervisors in determining whether the petition should be approved.

[10] There is no evidence in the present case to indicate that the petitioners for annexation exercised fraud in describing the lines which bound the territory sought to be annexed. It is charged that the city deliberately gerrymandered the district so as to exclude therefrom properties which are inhabited by individuals. There is nothing in the statute prohibiting that action. But the lines describing the property sought to be annexed appear to follow natural limitations, such as streets, blocks, and a railroad right of way. So long as the boundaries of the tract sought to be annexed are adopted without fraud or in violation of the statute, we are of the opinion they are controlling upon the board in determining the merits of the petition.

The judgment canceling the order of the board of supervisors is therefore reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

137 Cal.App. 772

RICO et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 1088.

District Court of Appeal, Fourth District, California.

March 16, 1934.

Master and servant ⇨364.

Indigent person who was given made work by county pursuant to relief plan *held* not an "employee" within Workmen's Compensation Act, so as to entitle his widow and minor children to compensation for his death.

[Ed. Note.—For other definitions of "Employee," see Words & Phrases.]

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by Isabel T. Rico and others for the death of Manuel P. Rico, husband of Isabel T. Rico and father of the other claimants, opposed by the County of San Diego, employer. On certiorari to review an order of the Industrial Accident Commission denying compensation.

Order affirmed.

Davies & Wallace and A. Fairchild, all of San Diego, for petitioners.

Everett A. Corten and A. I. Townsend, both of San Francisco, for respondents.

MARKS, Justice.

Isabel T. Rico is the widow, and the other petitioners are the minor children of herself and Manuel P. Rico. This is a proceeding to review an order of the Industrial Accident Commission denying compensation to petitioners for the death of Manuel.

Manuel was an unemployed and indigent resident of the city of San Diego. To relieve his financial distress and that of his family he was given work two days a week at $4 a day. He received his pay in orders for food issued by the county welfare commission of the county of San Diego. Bills represented by purchases under these orders were paid out of the outside indigent fund of the county which was raised by general taxation.

On December 27, 1932, Manuel, while returning from work, which may be described as "made work" supplied to permit him to obtain the necessaries of life, fell from a truck belonging to the county of San Diego, and was instantly killed. A proceeding was instituted before the Industrial Accident Commission to obtain compensation for his dependents. The commission denied the petition upon the ground that Manuel was not an employee as that term is defined by the Workmen's Compensation Act.

The same question was before the Supreme Court in the case of McBurney v. Industrial Accident Commission, 30 P.(2d) 414, and the order of the commission denying compensation was affirmed. Upon the authority of that case a like conclusion must be reached here.

The order is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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137 Cal.App. 392

CRAMPTON et al. v. CLARK.

Civ. 9300.

District Court of Appeal, First District, Division 2, California.

March 16, 1934.

1. Appeal and error ⇨1010(1).

Where there is direct evidence in support of trial court's finding, finding is conclusive on appeal.

2. Bailment ⇨20.

In action against lessee's assignee of oil well drilling equipment for wrongful detention of equipment after well had been completed, lessor *held* entitled to reasonable rental value during period of wrongful detention, though he did not show that defendant used equipment during such period.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by A. H. Crampton and others against L. G. Clark, in which defendant interposed a counterclaim. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Bernard Potter, of Los Angeles, for appellant.

R. D. McLaughlin, of Los Angeles, for respondents.

STURTEVANT, Justice.

From a judgment in favor of the plaintiffs the defendant has appealed.

On the 2d day of May, 1927, R. R. Horwitz, being the owner of certain land in Los Angeles county, and A. H. Crampton, being the owner of a rotary equipment for drilling oil wells, entered into an indenture of lease, by the terms of which Mr. Crampton leased to Mr. Horwitz his drilling equipment for the purpose of drilling a well on the premises so owned by Mr. Horwitz. The lease was dated May 2, 1927. Thereafter, on August 31, 1927, Mr. Horwitz assigned the lease to Dr. L. G. Clark, the defendant. Thereafter, on September 1, 1927, the defendant took possession of the drilling equipment and operated it until about January 6, 1928. At that time the well had been sunk into oil-bearing strata. The drilling was stopped and pumping was commenced. Shortly thereafter, according to the testimony introduced by the plaintiffs, the latter made a demand that the drilling equipment be returned to them. That demand was repeated. The defendant having refused to release the equipment, on March 31, 1928, the plaintiffs forcibly took possession of the equipment. Thereafter two actions were commenced. The plaintiffs sued for the reasonable value of the use of the equipment from January 6, 1928, to March 31, 1928. The defendant interposed a counterclaim for damages based on the alleged refusal of the lessors to furnish all of the equipment called for in the lease. The other action was brought by the plaintiffs against the defendant for an alleged breach of an implied contract of rental. Both actions were tried at the same time. In the action last named judgment was rendered for the defendant. In the action first named judgment was rendered in favor of the plaintiffs on the cause of action pleaded by them and against the defendant on the counterclaim set up in the defendant's answer.

As to the allegations contained in the pleadings on which the first cause of action went to trial, the lower court made specific findings in which it found on each and all of the issues presented at the trial.

Finding No. II was: "That on or about September 1, 1927, the defendant L. G. Clark took possession of certain rotary equipment then owned by the plaintiffs, and with the consent of the plaintiffs used the same in the drilling of an oil well on the premises described in said contract and described in the complaint, the drilling of which oil well was fully completed on or about January 6, 1928, on which last named date oil began to be produced from said well." The defendant contends that said finding as to when the drilling was completed is not supported by the evidence. In making this contention he is not supported by the record. There was direct evidence in support of the finding.

[1] Finding No. III was: "That on or about the 8th day of January, 1928, and at other times subsequent thereto, the plaintiffs demanded of the defendant, and caused demand to be made upon him, for the return of, and for the possession of, said rotary drilling equipment, but the defendant failed and refused to return the same," etc. The defendant asserts that the evidence shows conclutively that plaintiffs did not demand the return of the equipment. That assertion is likewise without merit. There was direct evidence in support of the finding. Under these circumstances, neither finding may be disturbed by a court of review.

In the next point made by the defendant he states that: "In paragraph I of plaintiff's complaint there is set up an agreement of date August 31, 1927, upon which the plaintiffs pretend to rely, towit: An agreement to lease or rent to the defendant the equipment referred to in the complaint. The plaintiffs by their proof sought to recover on a common count; that is, the reasonable value of the use of the equipment." Neither statement is correct. The plaintiffs' cause of action was plainly an action for damages for the wrongful detention of personal property.

[2] It is next asserted that: "The court did not find what the reasonable value of the use of the equipment was but only found what the reasonable rental value thereof was, and it was never shown that the defendant used the equipment during the period for which plaintiffs seek compensation." The point is not a new one. It has been decided against the defendant's contention. Taylor v. Bernheim, 58 Cal. App. 404, 410, 209 P. 55; Nahhas v. Browning, 181 Cal. 55, 183 P. 442, 6 A. L. R. 476.

Finally the defendant calls to our attention several rulings on the admission and exclusion of evidence. No error is shown as to any one of them. The evidence excluded was not pertinent to any issue that was being tried and which is involved in this appeal.

We find no error in the record. The judgment is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

137 Cal.App. 211

FISHBACK et al. v. J. C. FORKNER FIG GARDENS, INC., et al.

Civ. 1297.

District Court of Appeal, Fourth District, California.

March 6, 1934.

Hearing Denied by Supreme Court May 3, 1934.

1. Mortgages 🔑461.

In action to foreclose mortgage on tract which was purchased and resold with adjoining tract not involved therein, documents solely concerning transaction affecting adjoining tract *held* properly excluded.

2. Evidence 🔑71.

Respecting question whether grantees received deed allegedly mailed by county employee, testimony to prove county records' accuracy by past experience *held* inadmissible.

3. Pleading 🔑253.

Allegations of amendment to complaint made at close of case to conform to proof *held* denied by operation of law.

4. Mortgages 🔑292(6).

Allegation that purchaser's grantees assumed purchase-money mortgage *held* sufficiently put in issue by allegations that grantees did not assume mortgage, and that assumption clause was inserted in deed without their knowledge.

5. Mortgages 🔑292(8).

Finding that purchaser's grantees did not assume purchase-money mortgage *held* not inconsistent with remainder of finding that, unknown to grantees, deed contained assumption clause.

6. Pleading 🔑8(1).

Conclusion of law in complaint states no issuable fact requiring finding.

7. Mortgages 🔑280(3).

Mortgage assumption clause *held* not ratified by grantees never physically possessing deed and not discovering clause for seven years, and clause did not estop grantees from denying assumption.

8. Mortgages 🔑280(3).

Suit to reform deed *held* unnecessary if foreclosure suit preceded grantees' discovery of mortgage assumption clause in deed.

9. Appeal and error 🔑907(4).

Record being incomplete, appellate court must assume that omitted portions would support judgment.

10. Mortgages 🔑280(3).

Rule that purchaser is charged with notice of everything on face of deed is inapplicable to mortgage assumption clause.

11. Mortgages 🔑280(4).

Mortgage assumption clause in deed is not properly part of grant, but is collateral undertaking, personal in nature and not relating to land.

12. Appeal and error 🔑996.

Since conflicting inferences arose from option, finding that option, stating entire price payable for land, did not alone show that optionees assumed mortgage, would not be disturbed.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Cornelia Fishback and others against the J. C. Forkner Fig Gardens, Inc., and others. From that portion of a judgment which, except as against defendant named, refused a judgment for any deficiency remaining after the sale of mortgaged property, plaintiffs appeal.

Affirmed.

C. V. Caldwell, of Los Angeles, and G. L. Aynesworth, of Fresno, for appellants.

Everts, Ewing, Wild & Everts, C. L. Clark, and L. N. Barber, all of Fresno, for respondents H. E. and Bernal L. Vogel and Helen Thompson.

Louis C. Levy, of Fresno, for respondent E. O. Thompson.

James T. Barstow, of Fresno, for respondent J. C. Forkner Fig Gardens, Inc.

MARKS, Justice.

This is an action to foreclose a mortgage. The decree of foreclosure gave judgment against the J. C. Forkner Fig Gardens, Inc., for any deficiency remaining after sale of the mortgaged property, but not against the other defendants. We will hereafter refer to the J. C. Forkner Fig Gardens, Inc., as the defendant, and to the other defendants as the respondents. The appeal is taken from that portion of the judgment which refused judgment for a deficiency against respondents. An appeal by certain defendants was decided in Fishback v. J. C. Forkner Fig Gardens, Inc. (Cal. Sup.) 23 P.(2d) 293.

Horace Fishback owned forty acres of land in Fresno county. On March 15, 1922, defendant had an oral option to purchase this property and an adjoining forty acres belonging to one Sexauer for $57,800. A writing was given to H. E. Vogel, E. O. Thompson, and C. M. Thompson, since deceased, whereby they were given an option to purchase the two tracts from defendant for $58,800. The option contained the following:

"The entire price to be paid for said above described real property is Fifty Eight Thousand Eight Hundred and No/100 dollars ($58800.00), payable as follows:

"$2000.00 cash as above mentioned,

"$14800.00 on the exercise of this option,

"Balance on or before five years at 7 per cent interest, payable annually.

"Releasure clause privilege of one acre or more upon payment of sum of One Thousand Dollars ($1000.00) per acre.

"This option is given by The J. C. Forkner Fig Gardens, Inc. and accepted by H. E. Vogel and C. M. & E. O. Thompson according to the terms and conditions of deeds, notes and mortgages and escrow instructions now in the hands of the San Joaquin Abstract Co. relative to the land described herein and said papers are hereby referred to and made a part of this option except as to the amount to be paid upon the exercise of this option.

"Title to be perfect. Grant, bargain and sale deed to be executed and delivered by the said ———— to H. E. Vogel and C. M. and E. O. Thompson, or their assigns, on or before the 15th day of June, 1922, together with an abstract showing a good merchantable title provided, however, that the sum of $14800.00 is paid at said date; but if said sum is not paid on or before the said 15th day of June, 1922, then this contract to be of no effect, and in that event the said sum of $2000.00 is to be returned by The J. C. Forkner Fig Gardens, Inc. to H. E. Vogel and C. M. and E. O. Thompson."

This option was exercised on June 20, 1922, and $14,800 paid by the purchasers. Defendant had previously paid Fishback $2,000, also the additional money he required, and gave him a note secured by a mortgage in the sum of $21,000. It also gave Sexauer a note and mortgage for $21,000. It received deeds to the two properties from the respective owners, and simultaneously conveyed the properties to H. E. Vogel, Bernal L. Vogel, E. O. Thompson, and C. M. Thompson. The deed to the Fishback property contained the following: "Subject to a mortgage of date March 15, 1922, upon the above described land given by The J. C. Forkner Fig Gardens, Incorporated to Horace Fishback to secure a note of even date therewith for twenty one thousand and no/100 Dollars ($21000.00) due on or before five (5) years from date, with interest at seven (7) per cent per annum, which said mortgage and note said second parties assume and agree to pay."

Appellants have many assignments of errors as to rulings of the trial court on objections to the introduction of evidence. These may be divided into three general classes: First, objections sustained excluding documents used in the Sexauer transactions; second, objections sustained excluding some of the documents pertaining to the Fishback transaction; third, objections sustained to questions which sought to elicit information that experience had proven the accuracy of records of the county recorder as to the mailing of recorded instruments.

[1, 2] The Sexauer transaction was not involved in the instant litigation, and documents concerning it alone were properly excluded from the evidence in this case. We have examined the proffers of proof made in connection with the papers concerning the Fishback transaction and can find nothing material that was not admitted in evidence or conceded by counsel. The questions seeking to prove the accuracy of the county records by past experience were clearly improper. An employee in that office testified that she mailed the deed from defendant to appellants, addressed "H. E. Vogel, Fresno, California." This was direct evidence on the question which appellants sought to prove by the experience of the office. We find no prejudicial error in the rulings of the trial court on objections to questions of counsel.

[3, 4] Appellants urge that the answers admit that respondents assumed the mortgage to Fishback and that such an admission is binding on the court. The second amended complaint, upon which the action went to trial, pleaded the assumption of the mortgage indebtedness by setting out in hæc verba the paragraph of the deed we have quoted. At the close of the case appellants were permitted to file an amendment to conform to the proof, in which it was alleged that respondents "assumed and agreed to pay the note in favor of Horace Fishback." The allegations of this amendment were denied by operation of law. 21 Cal. Juris. 189. The answers alleged that it was not a part of the agreement of sale that the purchasers were to assume and pay the mortgage indebtedness and that the quoted clause was inserted in the deed without their knowledge or consent; that the grantees never at any time agreed directly or indirectly to pay the mortgage. We think these allegations sufficiently put the questions in issue.

[5, 6] Appellants urge that the italicized portion of the following finding is inconsistent with the remaining portion and is a conclusion of law and not a finding of fact that will support the judgment: "That said deed contained a provision that said grantees assumed and agreed to pay the indebtedness secured by the mortgage from The J. C. Forkner Fig Gardens, Inc. to Horace Fishback; that said grantees, however, did not know that said assumption clause was in said deed; *neither did they assume or agree to pay said indebtedness.*" One portion of the finding is not inconsistent with the other. As to the objection that the italicized portion does not find a fact but merely states a conclusion of law, it should be sufficient to observe that this portion follows the exact language of the amendment to the second amended complaint and is responsive to its allegations. If it is a conclusion of law in the finding, it is a like conclusion of law in the pleading. A conclusion of law in a complaint states no issuable fact upon which a finding is necessary. While the findings are not a model of excellence, when read as a whole they sufficiently dispose of the issues presented and support the judgment.

Appellants urge that the findings and judgment are contrary to the evidence for two reasons: First, that respondents are bound by the covenant in the deed to assume and pay the mortgage note; and, second, that they agreed to pay the note in the option because the purchase price of the two tracts of land was stated at a unit sum of $58,800.

Appellants rely upon the cases of White v. Schader, 185 Cal. 606, 198 P. 19, 21 A. L. R. 499; Epperson v. Cappellino, 113 Cal. App. 473, 298 P. 533; and Walter H. Sullivan, Inc., v. Johnson, 116 Cal. App. 591, 3 P.(2d) 72, which, with many others, hold that, where a grantee of property incumbered by a prior mortgage assumes and agrees to pay the debt, he becomes personally liable for any deficiency remaining after the security is exhausted; that his promise to pay may be established by appropriate language in the deed to him, by an independent writing, or by a verbal contract.

Respondents seek to avoid the application of these rules by urging that the agreement to assume and pay the note and mortgage was inserted in the deed without their knowledge or consent; that they did not know of its existence or presence in the deed until 1929, seven years after its execution and delivery; that they made no promise to pay the mortgage note. They urge that under well-reasoned and ample authority there can be no liability for a deficiency under these facts, which the trial court found to be true. We have been cited to no California case deciding the precise question here presented.

In the case of Blass v. Terry, 156 N. Y. 122, 50 N. E. 953, the Court of Appeals of New York had this question under consideration. It was there said: "The record thus produced proves a grant of certain land therein described to the defendant, and it contains a clause assuming and agreeing to pay the mortgage thereon. But this clause does not prove a personal promise or obligation on the part of the defendant to pay the debt of a third party, in the absence of proof that she actually accepted the deed with knowledge of the assumption clause, or at least under such circumstances that she was bound to know its purport and legal effect. A clause of that character in such an instrument is, properly speaking no part of the grant. It is a collateral undertaking, personal in its nature, not relating to the land. Like all other personal contracts it must be shown by the paper itself, or otherwise, that there was a meeting of minds, and mutual assent of the parties. In a unilateral instrument, the acceptance of it by the party to be bound, or the retention of it without objection, would be evidence of assent to its terms; but when a deed of land contains a provision binding the grantee to become personally responsible for the payment of a pre-existing mortgage, the holder of the mortgage claiming the benefit of a promise made, not to him, but to a third party, must prove something more than the mere fact that the deed was deposited in the clerk's office at some time by some one. There may be constructive delivery of a deed, sufficient to vest title in the grantee, but it does not follow that such a delivery is sufficient to create a personal obligation on his part to pay a mortgage which is a lien on the land. In order to make the instrument effective for that purpose, enough must be shown to at least raise a presumption that it was accepted by the grantee with knowledge of the fact that it was not only a grant of the land, but contained a collateral promise on his part to pay a sum of money to some third party. * * * It is quite true that, if the defendant accepted the deed with knowledge of the assumption clause, she made the debt of a third party her own, and is bound to pay it. But it was an essential part of the plaintiffs' case to prove that the defendant had knowledge of this collateral covenant in the deed, or in some way assented to it. The recording of the deed, at best, was only presumptive evidence of a delivery; and the testimony of the defendant that she never knew of such a deed, or intended to enter into any obligation to assume the mortgage, removes the presumption; and the case is left without any evidence that she agreed to pay the mortgage, or ratified the clause in the deed. Savings Inst. v. Burdick, 87 N. Y. 40; Kilmer v. Smith, 77 N. Y. 226 [33 Am. Rep. 613]; Dey Ermand v. Chamberlin, 88 N. Y. 658; Townsend v. Rackham, 143 N. Y. 516, 38 N. E. 731; Gifford v. Corrigan, 117 N. Y. 257, 22 N. E. 756 [6 L. R. A. 610, 15 Am. St. Rep. 508]. * * * The plaintiffs are seeking to make the defendant liable to them by reason of a transaction with which, so far as appears, they had nothing whatever to do. They are not, therefore, in a position to claim anything from the deed, to which they were not parties, in consequence of any apparent authority in the husband to accept it for his wife. The plaintiffs can take nothing from appearances, since they were not affected by them, and could not have been. They must show that the defendant agreed to pay their debt through some act of her own, or that of her agent duly authorized. * * * The plaintiffs had no transaction whatever with the husband or agent. They are claiming the benefit of a clause in a deed between other parties. This they may do, but they must prove all the facts upon which the legal liability of the defendant to them rests. The rule that sometimes prevails in the law of principal and agent, and which attributes to the agent not only the authority that he may actually have, but that which he appears to have, has no application to this case, since the plaintiffs did not act upon or part with anything on the faith of any apparent authority. Their action or their rights were in no way affected by the conduct of the defendant's husband. Consequently, in the absence of proof that she made the agreement alleged in the complaint, or that her husband made it for her with her authority, or that she, with knowledge of all the facts, ratified it, the cause of action stated was not made out."

The rules thus announced find support in numerous cases, among which the following may be cited: Elliott v. Sackett, 108 U. S. 132, 2 S. Ct. 375, 27 L. Ed. 678; Raffel v. Clark, 87 Conn. 567, 89 A. 184; Haskins v. Young, 89 Conn. 66, 92 A. 877; Demaris v. Rodgers, 110 Minn. 49, 124 N. W. 457; Citizens' Bank of Springfield v. Thomas, 214 Mo. App. 581, 264 S. W. 86; Bradshaw v. Provident Trust Co., 81 Or. 55, 158 P. 274; Lloyd v. Lowe, 63 Colo. 288, 165 P. 609, L. R. A. 1918A, 999; Cushing v. Newbern, 75 Okl. 258, 183 P. 409; Proctor Trust Co. v. Neihart, 130 Kan. 698, 288 P. 574; Parker v. Jenks, 36 N. J. Eq. 398; Bogart v. Phillips and Noble, 112 Mich. 697, 71 N. W. 320; Broadbent v. Hutter, 163 Wis. 380, 157 N. W. 1095; Metzger v. Huntington, 139 Ind. 501, 37 N. E. 1084, 39 N. E. 235; Schmitt v. Merriman, 101 Ill. App. 443; Granger v. Roll, 6 S. D. 611, 62 N. W. 970.

[7-9] These cases are also authority for our concluding that there was no ratification of the mortgage indebtedness assumption clause of the deed by respondents and that they were not estopped by it from asserting that they did not promise to pay the note. There is no merit in the argument that respondents should have commenced an action for reformation of the deed by the elimination of this clause. The deed was filed for record by a title company, and was never in the physical possession of respondents. They did not discover the existence of this clause until 1929. There is nothing in the record here showing when the original complaint was filed. When the record on appeal is incomplete, we must assume that the omitted portions would support the judgment. We must then presume that the complaint was filed before respondents discovered the assumption clause in the deed. A suit to reform the instrument was not then necessary.

[10, 11] The above cited cases are also authority for the conclusion that the rule that "a purchaser must be held to have notice of everything which appears on the face of the deeds under which he buys" (Watson v. Sutro, 86 Cal. 500, at page 522, 24 P. 172, 178, 25 P. 64) does not apply to a mortgage assumption clause which "is, properly speaking, no part of the grant," and which "is a collateral undertaking, personal in its nature, not relating to the land." Blass v. Terry, supra. See, also, Raffel v. Clark, supra.

[12] Appellants urge that the option given by defendant amounted to a promise on the part of the three respondents to pay the entire purchase price of $58,800, which included the Fishback mortgage. The option was originally signed by the defendant alone. At the time of the consummation of the transaction the word "accepted" was written on the bottom of it under which H. E. Vogel, E. O. Thompson, and C. M. Thompson signed their names. Bernal L. Vogel did not sign, and there is no evidence showing that he knew of the existence of this document.

There are numerous cases holding that a statement in a contract of purchase of the full purchase price which included the amount of a mortgage indebtedness is not of itself a promise to assume and pay such indebtedness. Hibernia Savings Society v. Dickinson, 167 Cal. 616, 140 P. 265; Elliott v. Sackett, supra; Schmitt v. Merriman, supra; Green v. Hall, 45 Neb. 89, 63 N. W. 119; Granger v. Roll, supra. In Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659, where a deed recited a total consideration of $11,000 and contained the provision that the sale was "subject, however, to a mortgage held by the Lowell Five Cents Savings Bank, of $7000, which is part of the above-named consideration," the court said: "A promise to pay the mortgage debt cannot be inferred from the acceptance of the deed, on the ground that the clause contains this reference to the consideration. Taken by themselves, the words do not necessarily imply any obligation to be performed by the grantee. They are to be considered rather as additional words of recital or description, showing that the whole amount of the consideration was not paid or intended to be paid, but that the grantee had purchased only an equity of redemption."

The option was not carefully drawn. Any conclusion that the three respondents signing it promised to pay the entire purchase price of $58,800 by paying $16,800 cash, and paying the two mortgage notes each in the sum of $21,000, could only be supported by a bare inference. An equally strong, if not much stronger inference may be drawn from its language supporting the opposite conclusion, which is the one reached by the trial court. In Mah See v. North American Acc. Ins. Co., 190 Cal. 421, at page 426, 213 P. 42, 44, 26 A. L. R. 123, it is said: "This court has frequently held that, even though all the facts are admitted or uncontradicted, nevertheless, if it appears that either one of two inferences may fairly and reasonably be deduced from those facts there still remains in the case a question of fact to be determined by the jury (or by the trial judge where the case is tried without a jury), and that the verdict of the jury or the finding of the trial judge thereon cannot be set aside by this court on the ground that it is not sustained by the evidence. Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. In so far as the evidence is subject to opposing inferences, it must upon a review thereof be regarded in the light most favorable to the support of the judgment. Woodard v. Glenwood Lumber Co., 171 Cal. 513, 519, 520, 153 P. 951; Hassell v. Bunge, 167 Cal. 365, 367, 139 P. 800. 'In reviewing a question of this kind, all the inferences reasonably possible from the evidence favorable to the plaintiff (the prevailing party) must be indulged by this court.' Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 547, 174 P. 44, 45."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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137 Cal.App. 770

PEOPLE v. BORN et al.

Civ. 8615.

District Court of Appeal, First District, Division 1, California.

March 12, 1934.

Hearing Denied by Supreme Court May 10, 1934.

Master and servant 🔑347.

Statute requiring employers to pay $300 into compensation fund in cases where employees sustain compensable fatal injuries and leave no dependents *held* unconstitutional (St. 1929, p. 420, § 9 (b), subd. 2 (10), (a-c, e).

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by the People of the State of California against H. P. Born, an individual doing business under the fictitious name and style of the Rex Floor Company, and the Commercial Casualty Insurance Company, to recover money due on account of the death of an employee without dependents. From an adverse judgment, the People appeal.

Affirmed.

Everett A. Corten, A. I. Townsend, and Delger Trowbridge, all of San Francisco, for the People.

Bronson, Bronson & Slaven and Harold R. McKinnon, all of San Francisco, for respondents.

PER CURIAM.

The controlling question presented by this appeal, namely, the constitutionality of sec-

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tions 9(b), 2(10), (a), (b), (c), and (e) of chapter 222 of the Laws of 1929 (Workmen's Compensation Act, St. 1917, p. 836, § 9(b), subd. 2(10), (a–c, e), as amended by St. 1929, p. 420), was brought before the District Court of Appeal of the Fourth District, in the case of People v. Standard Oil Company, 132 Cal. App. 563, 23 P.(2d) 86, and there decided adversely to appellant's contentions. Afterwards the Supreme Court denied a petition to have the cause heard in that court.

Upon the authority of that case, therefore, and for the reason and upon the grounds stated in the decision therein, the judgment in the present case is affirmed.

* * *

137 Cal.App. 444

Ex parte WILLIAMS.

Cr. 93.

District Court of Appeal, Fourth District, California.

March 19, 1934.

Rehearing Denied April 2, 1934.

Hearing Denied by Supreme Court April 16, 1934.

1. Statutes 🔑**206.**

Each part of act should be so interpreted as to give effect to entire act.

2. Licenses 🔑**8(1).**

Statute giving public utility district express power to levy tax to carry on operations and pay indebtedness of district *held* not to authorize business license tax on sale of gasoline in district, where other provisions of statute showed intent that utilities operated by district should be self-sustaining, and that taxes should be levied only when revenues from operation of utilities were insufficient to pay expenses (Gen. Laws 1931, Act 6391, §§ 1, 30, subds. 5, 9; §§ 38, 39).

Application by J. J. Williams for a writ of habeas corpus against the Constable of Heber Township, Imperial County.

Writ granted, and prisoner discharged.

Wright, Monroe, Thomas & Glenn, of San Diego, for petitioner.

Frank Birkhauser, of El Centro, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of habeas corpus filed on behalf of J. J. Williams, alleging that he is unlawfully detained by the constable of the township of Heber, in the county of Imperial.

The petition alleges that Heber Public Utility District, in the county of Imperial, is a public utility district organized and existing under and by virtue of the state laws (St. 1921, p. 906, as amended, Deering's Gen. Laws, Act 6391); that the board of directors of this district adopted an ordinance purporting to impose a license tax for transacting and carrying on certain businesses, trades, professions, and occupations within the limits of the district, fixing the amount of such licenses with the method of collecting the same, and prescribing a penalty for nonpayment thereof; that the said Williams is a truck driver in the employ of the Standard Oil Company of California, a corporation; that he brought gasoline from without the territorial limits of said district and made a retail sale and delivery of a quantity of gasoline from said truck to an individual within said district; that neither he nor the Standard Oil Company of California has secured a license from said district in accordance with the purported requirements of said ordinance; and that he was arrested by said constable under a warrant of arrest issued out of the justice's court of the township of Heber, county of Imperial, based upon a complaint filed in that court charging him with a violation of the ordinance referred to. It is then alleged that this ordinance is invalid and void, for the reason that the imposing and collection of such license payments is beyond the jurisdiction and authority of such a district. This ordinance, a copy of which is set forth in the petition, recites that in order to carry out the objects and purposes of this district, for the purposes of revenue and in the exercise of the taxation power possessed by the district, a license tax is hereby imposed. It lists certain businesses and occupations, including the sale of gasoline, and fixes for each a designated license tax to be paid quarterly.

A demurrer to the petition was filed, and the sole question presented is whether such a public utility district has the power to license the carrying on of various forms of business within the district, to fix the amount of license tax to be paid for the privilege of transacting business therein, and to enforce a penalty for failing to pay the same.

[1, 2] It is the respondent's contention that such a license provision is a form of taxation, that such a form of taxation is within the powers given by other laws to a municipality, and that the public utilities act referred to gives to such a district, in so far as this matter is concerned, the same general powers that have been conferred upon a municipal corporation. It is unnecessary to consider the various cases and constitutional provisions relied upon by the respondent in support of his argument that the same powers should be given to such a district as have been given to municipalities. It seems apparent that the taxing powers possessed by such a district are those, and those only, which it derives under the act of 1921, as amended. The solution of the question here presented depends entirely on the proper construction of those portions of that act which purport to delegate powers of taxation to such a district.

Section 1 of the act in question provides that such a district "may exercise the powers herein expressly granted." Section 30 enumerates the powers which may be exercised by such a district. The ninth subdivision thereof reads as follows: "To levy and collect, or cause to be levied and collected, taxes for the purpose of carrying on the operations and paying the obligations of the district." It is respondent's contention that the provision just quoted is an express grant of the power to levy and collect taxes of every kind and nature, without limitation, except that the same shall be used for the purpose of carrying on the operations and paying the obligations of the district. However, the act in question was passed and is designed solely to permit the people of an unincorporated territory to organize such a district for the purpose of supplying certain designated utilities and services to the inhabitants thereof, and to enable a district thus organized to furnish such services to its people. This essential and basic power is set forth in subdivision 5 of section 30. We take it that section 30 of this act is but a general statement of the powers conferred on such a district, and that the provisions of the other subdivisions thereof are incidental to and designed to be of assistance in carrying out the power conferred by subdivision 5.

It plainly appears that no one of the subdivisions of section 30 is intended to be an absolute grant of power in itself, but that each is intended to be taken in connection with the others and with the other sections of the act. The basic power given, that is to acquire, construct, own, operate, control, or use the utilities named, is unquestionably to be taken in connection not only with the other provisions of that section giving to the district the right of eminent domain, of constructing works across or along streets and highways, of incurring indebtedness and issuing bonds, and of making contracts, but also with the succeeding sections of the act which set forth in more detail the manner in which a district may acquire or construct such a system and under what circumstances and in what manner it may issue bonds and provide for the payment of the same. Similarly subdivision 9 of this section, relied upon by the respondent, is not an absolute grant of all taxing power, but is limited by other sections of the act. Section 34 provides that the board of directors shall annually levy and collect a tax sufficient to pay the annual interest on such bonds as have been issued in accordance with other provisions. Section 38 provides that only revenue producing utilities shall be acquired or operated by such a district, declares in unmistakable language an intention that each public utility thus owned and operated shall be self-sustaining, and that all debts and all expenses shall be paid from revenues derived from the operation thereof, and provides that, so far as possible, the board of directors shall fix such charges for services furnished by each utility as will pay all expenses and all indebtedness. Section 39 then provides that in the event the revenues of the district are inadequate for this purpose the board of directors must or may, according to certain circumstances, levy a tax for such purposes "as herein provided." The section then contains elaborate provisions for the levy and collection of taxes on the taxable property situated within the district, including provisions for the sale of such property if the tax is not paid. Subdivision 4 of section 39 provides, in part, that: "All taxes levied under the provisions of this act shall be a lien on the property on which they are levied."

It would be just as reasonable to hold that subdivisions 5 and 8 of section 30 are independent of all other provisions of the act, and that such a district is thereby authorized to acquire or construct such utilities in any way or manner the board of directors may see fit, or to issue bonds without the formality of an election, in disregard of the limitations provided in succeeding sections for the doing of such acts, as to hold that the taxing power given to the district by subdivision 9 of section 30 is unlimited and not to be considered in connection with the provisions of sections 38 and 39. If respondent's contention be correct, section 38 of the act is entirely meaningless, and section 39 provides for a system of taxation which is only incidental and which may or may not be used, at the option of the board of directors, even though the ordinary revenues of the district are inadequate to meet its needs. If, as respondent contends, a general power to tax is conferred on the district by subdivision 9 of section 30, which power is independent of and unlimited by the provisions of other sections of the act, the board of directors would have the right to fix only a minimum charge for services rendered or furnished by the utility and to obtain the major portion of any needed revenues from a license tax on various forms of business carried on within the district, even though those transacting such business were outsiders and in no way benefited by the utilities being operated, and need apply the provisions of section 39 for taxing the property within the district only if the funds received from other forms of taxation were not sufficient to take care of the cost of operation and any indebtedness. The mere statement of the proposition should be a sufficient answer thereto, and furnishes an additional reason for applying the long-established rule that all parts of an act should be read and taken together, and that, when possible, each part of an act should be so interpreted as to give effect to the whole thereof.

The act in question was considered in the case of In re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004. In that case, the court held that a district organized under this act is quasi municipal in character, with power to carry on the particular functions committed to it, but that it is not necessary for such a district to exercise all the powers given to and usually exercised by municipal corporations. The court also pointed out that it is only when the revenues of a district are inadequate to meet its needs that the board of directors may levy a tax to provide such funds, and that the act specifically provides that in the event it becomes necessary to thus levy a tax the board of directors must or may, according to the purpose for which funds are needed, provide by ordinance for an assessment on the taxable property situated within the district. It is our opinion that, under its plain provisions, the power of taxation conferred on such a district is limited by the terms of the act and that, under those terms, the board of directors of this district had no power to levy and collect such a business license tax as was attempted to be provided for in this ordinance. It follows that the ordinance is void and that the said J. J. Williams should be discharged, and his bail exonerated.

It is so ordered.

We concur: MARKS, J.; JENNINGS, J.

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137 Cal.App. 278

KELLOGG et al. v. HUFFMAN et al.

Civ. 1298.

District Court of Appeal, Fourth District, California.

March 9, 1934.

Hearing Denied by Supreme Court May 7, 1934.

1. Adverse possession 🔑79(4).

Where tax sale purchasers claimed title to land and in good faith visited land yearly and leased it for grazing purposes, and later leased it for oil development purposes and guaranteed their title, tax deed was sufficient to constitute "color of title."

[Ed. Note.—For other definitions of "Color of Title," see Words & Phrases.]

2. Adverse possession 🔑25.

Possession by tenant inures to benefit of one claiming by adverse possession (Code Civ. Proc. § 323).

3. Adverse possession 🔑17.

To establish "adverse possession," it is only necessary to show land was put to such use as could reasonably be made thereof at all times when it could be used for such purpose.

[Ed. Note.—For other definitions of "Adverse Possession," see Words & Phrases.]

4. Adverse possession 🔑22.

Pasturing during grazing season of each year during which feed is available, if done to exclusion of other persons, is sufficient use of land reasonably fit only for pasturage purposes to constitute "occupation and possession" necessary to establish title by adverse possession.

[Ed. Note.—For other definitions of "Occupancy; Occupation; Occupy (Of Land)," and "Possession," see Words & Phrases.]

5. Adverse possession 🔑**25.**

Possession by tenants for grazing purposes was sufficient to constitute "adverse possession" by landlord, notwithstanding that before landlord acquired tax deed such tenants had used same land for grazing, where such grazing had been without knowledge or consent of former owners and where, after obtaining lease, tenants also established camp on the land (Code Civ. Proc. § 323).

6. Adverse possession 🔑**25.**

Where tax sale purchasers leased to tenants for grazing purposes land suitable only for grazing purposes, and tenants, from 1920 to 1929, pastured sheep on land in charge of herder and established camp and excluded others from use of land and such possession and use was well known, tax sale purchasers had title by adverse possession under claim of title (Code Civ. Proc. § 323).

7. Quieting title 🔑**52.**

Where grantee in warrant deed, against whom tax sale purchasers had quieted title, had executed trust agreement with grantor corporation which was not recorded, deed was not void on ground trust agreement was void for indefiniteness so as to make judgment quieting title of no effect on ground that no one having title was made party.

> Warrant deed to director of corporation was executed by corporation and recited that it was given in pursuance of resolution set out, and the trust agreement executed at same time but not recorded recited that grantee held property on trusts; that he would pay taxes and would, within ten years, upon request convey to any person named by other directors; that from proceeds of sale he would deduct amounts paid by him and fee for services and pay balance to stockholders of corporation; that if sale was not effected within ten years, he would continue to act as trustee or convey land to person agreed upon; and that in event of death, record of declaration of trust should operate as conveyance to other directors or their survivors.

8. Lis pendens 🔑**25(1).**

Trust agreement executed by grantee under grant deed *held* "conveyance" within statute making conveyance void as against judgment affecting title, unless conveyance was recorded before record of notice of action (Civ. Code, § 1215, and § 1214, as amended by St. 1895, p. 50).

> [Ed. Note.—For other definitions or "Conveyance," see Words & Phrases.]

9. Judgment 🔑**701.**

Where grantee under grant deed from corporation executed unrecorded trust agreement providing for reconveyance, judgment by tax sale purchasers against such grantee was binding on him as holder of record title, whether conclusive against directors of corporation or not (Civ. Code, § 1215, and § 1214, as amended by St. 1895, p. 50).

10. Adverse possession 🔑**79(1).**

Purchaser at tax sale, who in good faith takes possession and assumes burdens incident to ownership, may establish his title by adverse possession (Code Civ. Proc. § 323).

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by F. R. Kellogg and others, as trustees, against M. D. Huffman and others, in which William A. Shearer and others intervened, and in which defendants filed cross-complaint. From a judgment in favor of defendants, plaintiffs and interveners appeal.

Affirmed.

Pace, Smith & Purdue and Troy Pace, all of Los Angeles, and Russell & Heid, of Tulare, for appellants.

Chandler, Wright & Ward and Lawler & Degnan, all of Los Angeles, Everts, Ewing, Wild & Everts and Gallaher & Ozias, all of Fresno, and George H. Woodruff, P. E. Keeler, and C. H. Hartke, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to 160 acres of land in the Kettleman Hills in Fresno county. The land in question was owned in 1914 by the British Californian Oil Company, Limited, a California corporation. This corporation owned several properties located near Los Angeles, and also this piece of land in Fresno county which was then regarded as of little value. This property was rough and arid and was situated in what was, until about 1929, a sparsely settled country used only for grazing purposes.

In April or May, 1914, one of the plaintiffs, J. Foster Kell, a resident of London, representing about 450,000 shares of stock in this corporation, came to California for the purpose of attempting to wind up the affairs of the company and to get what he could for the English stockholders. He was elected to the board of directors and succeeded in selling all of the properties owned by the corporation with the exception of this piece of land. After all the other properties had been sold, and under date of June 3, 1914, the corporation executed and delivered a grant deed conveying this property to him. This deed recites that it was given in pursuance of a resolution passed by the board of directors, and sets forth a copy of the resolution which contains a recital to the effect that the bid of J. Foster Kell of $10 for the land had been accepted, and goes on to authorize the execution of a deed in his favor. This deed was acknowledged, and was recorded on June 13, 1914. Under the same date as the deed, June 3, 1914, J. Foster Kell executed an instrument which recited that this land had been conveyed to him and that he held the same upon the following trusts: (1) That he would pay the taxes on the land until the same was sold. (2) That at any time within ten years, upon request, he would convey the land to any person named by the other directors at a price fixed by them. (3) That from the proceeds of the sale he would deduct the amounts paid by him for taxes, a reasonable fee for his services, and pay the balance to the stockholders of the corporation in proportion to their holdings or as mutually agreed by the directors. (4) That if a sale was not effected within ten years, he would continue to act as trustee on the same terms or convey the land to such person as should be agreed upon by the directors. (5) That in the event of his death, the record of this declaration of trust should operate as a conveyance of the land to the other directors or their survivors, who should then hold the land in trust in like manner. This instrument was not recorded until February 5, 1931, after this action was commenced. Until about the time this action was filed none of the defendants had any information or notice, express or implied, that any such instrument had been executed or that any of the plaintiffs or interveners claimed any interest in the property.

This land was assessed for taxes in 1914 at $240, and was sold to the state on June 23, 1915, for $6.55. On June 28, 1920, it was sold at a tax sale for $650 to the defendant M. D. Huffman, who thereafter conveyed a one-quarter interest therein to the defendant Hardie. A correction deed was executed by the tax collector to the defendant Huffman on September 22, 1930, and another correction deed on October 2, 1930. All of these deeds were recorded. When the tax deed was issued in 1920, the defendant Huffman redeemed the land from all unpaid taxes, and thereafter the defendants paid all taxes assessed from year to year, to and including the year 1931. Shortly after receiving the tax deed, the defendant Huffman went to the land for the purpose of taking possession. He found that two brothers, Ed. Bourdieu and Jean Bourdieu, who lived near the land, had been pasturing their sheep upon the same. He informed them that he had bought the land, wanted to locate and take possession of it and, at his request, one of the brothers went to the land with him and pointed out to him the boundaries thereof. After walking over the land and locating its boundaries, the defendant Huffman agreed to lease the land to the two Bourdieus for sheep grazing for $20 a year. On a similar arrangement, year by year, these parties leased the land from the defendants and grazed sheep upon it during all of the time that feed was available, and during all of the time the same could be used for pasturage purposes, each year thereafter up to and including the year 1929.

On December 2, 1925, the plaintiff Shearer wrote to the tax collector of Fresno county inquiring whether the taxes on the land had been paid. In reply he received a letter dated December 5, 1925, inclosing a tax statement and informing him that a portion of the taxes for the current year had been paid. On December 7, 1925, he wrote to the county recorder asking for a record of the property involved, stating that he was one of the holders of a deed of trust, and asking what transfers had been made since the recording of a deed of trust dated June 3, 1914. He received from the county recorder a reply dated December 9, 1925, listing the deed from the British Californian Oil Company, Limited, to J. Foster Kell, tax sales for the years 1914 to 1919, inclusive, the tax deed to Huffman, the deed from Huffman to Hardie for a one-quarter interest, with the information that the title to the property stood in Huffman as to three-fourths interest and in Hardie as to one-fourth interest, and that the recorder was unable to find any record of the trust deed he mentioned. Shearer testified that he made no further inquiries, that he never paid any taxes on this property, and that he then considered the matter closed.

On June 18, 1927, the defendants executed and delivered to the Superior Oil Company an oil lease covering the property in question. On August 17, 1927, the defendants commenced a suit in the superior court of Fresno county against J. Foster Kell and his wife, asking that their title to the property in question be quieted. A notice of lis pendens was filed and on December 3, 1927, a judgment was entered quieting their title in the property as against said Kell and his wife. On September 20, 1929, the Superior Oil Company commenced operations in connection with drilling a well under the lease above mentioned, and the first well was brought in on September 4, 1930. Up to the time this action was commenced, the Superior Oil Company had spent practically a million dollars on this property, under the terms of the lease referred to. On March 4, 1916, the charter of the British Californian Oil Company, Limited, was forfeited to the state for nonpayment of its license tax. The term of the original charter expired by limitation on May 28, 1926, and the same was never renewed.

This action was begun on October 3, 1930, by the plaintiffs as the former directors and the statutory trustees of the British Californian Oil Company, Limited. A complaint in intervention was filed by certain of the stockholders in this company for and on behalf of all of the stockholders. Appropriate pleadings were filed by the defendants and after a trial on the merits the court found in all respects in their favor and entered a judgment to the effect that neither the plaintiffs nor the interveners had any right, title, or interest in or to the property in question or any part thereof, and quieting title thereto in the defendants. From this judgment the plaintiffs and interveners have appealed.

The appellants contend that the tax deed acquired by the respondents in 1920 is void for a number of reasons, and that certain defects in the deed itself and in the tax sale proceedings leading up thereto have not been cured by the two corrective deeds later executed or by the curative act passed by the Legislature in 1929 (see Stats. 1929, at page 745). We regard the questions thus presented as exceedingly close, but, under the view we take of the point next considered, it is unnecessary to discuss or decide the same.

[1] Whether or not it is insufficient to establish title in the respondents, the record contains uncontradicted evidence to the effect that the respondents believed that they had acquired good title to the land under this deed and acted in accordance with this belief; that they represented themselves to be the owners of the land and at all times claimed title thereto; that acting in this belief and in good faith they visited the land each year thereafter and each year leased the land to a tenant for grazing purposes; and that, in 1927, they leased the land for oil development purposes and guaranteed their title. Under these circumstances, irrespective of its validity, this tax deed was entirely sufficient to constitute color of title. Wilson v. Atkinson, 77 Cal. 485, 20 P. 66, 11 Am. St. Rep. 299; Simmons v. McCarthy, 128 Cal. 455, 60 P. 1037; Goodrich v. Mortimer, 44 Cal. App. 576, 186 P. 844. The main and, we think, the determinative question here presented is as to whether the possession taken by the respondents under this claim of title was sufficient in kind and sufficiently open, notorious, hostile, and exclusive over a period of at least five years, to ripen into a title by adverse possession. We think this question must be resolved in favor of the respondents.

The appropriate portion of section 323 of the Code of Civil Procedure reads as follows:

"What constitutes adverse possession under written instrument or judgment. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases: * * *

"3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing-timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant."

[2-4] Possession by a tenant inures to the benefit of one claiming by adverse possession, and his own personal occupation is not required. Weyse v. Biedebach, 86 Cal. App. 712, 261 P. 1086; Dodge v. Yates, 76 Cal. 251, 18 P. 323. To establish adverse possession it is only necessary that land be put to such use as can reasonably be made thereof, and such a use is sufficiently continuous if, during the required time, it be so used at all times when it can be used for the purpose to which it is adapted. Myers v. Berven, 166 Cal. 484, 137 P. 260; Posey v. Bay Point Realty Co., 214 Cal. 708, 7 P.(2d) 1020. It is well settled in this state that pasturing during the entire grazing season of each year during which feed is available, if done to the exclusion of others, is a sufficient use and occupation of land, which is reasonably fit only for pasturage purposes, to constitute the occupation and possession necessary to establish a title by adverse possession. Webber v. Clarke, 74 Cal. 11, 15 P. 431, 435; Marshall v. Beysser, 75 Cal. 544, 17 P. 644; Andrus v. Smith, 133 Cal. 78, 65 P. 320; Montgomery, etc., v. Quimby, 164 Cal. 250, 128 P. 402; Gibbons v. Yosemite Lumber Co., 190 Cal. 168, 211 P. 4; Posey v. Bay Point Realty Co., supra; Berry v. Cohn, 47 Cal. App. 19, 189 P. 1044. In Webber v. Clarke, supra, the leading case in this state, the court said: "Now, we think that pasturing during the pasturing season is 'appropriate use according to the particular locality and quality of the property.' To pasture the land when it was not 'pasturable' would not only be not an appropriate use, but an impracticable one. In

the case of cultivation, there is an interval of several months between the harvesting of one crop and the preparation of the soil for another. And there would be just as much sense in holding that the interval destroyed the continuity of the possession in the one case as in the other. To so hold would be, in effect, to hold for all practical purposes that adverse possession could not be acquired by pasturage; for obedience will be paid to nature's laws rather than to man's, and the thing supposed to be necessary would never be done. It is sufficient that the use is in accordance with the usual course of husbandry in the locality."

Turning to the record, with these rules in mind, we find the following evidence: The respondent M. D. Huffman testified that immediately after receiving the tax deed he went upon the land and located its boundaries; that he leased it to the Bourdieu brothers for the purpose of pasturing it to sheep; that the land was rough, unfit for cultivation, had been used only for grazing purposes, and was fit only for that use; and that the land was rented to these tenants each year from 1920 to 1929. The Bourdieu brothers testified that they had long been familiar with the land; that they had been grazing sheep over a considerable area, including this land, for some years; that prior to 1920 they had allowed their sheep to graze on this land without the permission of any one, not knowing who was the owner thereof; that when Mr. Huffman came and told them he had bought the land they agreed to rent the same from him; that thereafter they rented the same from him each year until 1929, and during each year pastured large numbers of sheep on this land during the entire grazing season; that as soon as they rented it from Mr. Huffman they established a sheep camp upon this land, which was used as headquarters each year for a large band of sheep while the same were grazing on this land and also on surrounding land; that during the period when feed was available in that vicinity the sheep were brought back to this camp each night; that the camp consisted of a tent for the herder, of a portable salt trough, of equipment for watering sheep, and other supplies; that a herder remained there in charge of the sheep while they were in that vicinity; that they used the pasturage on this land exclusively and kept trespassers away; that they had a sheep camp on this land every spring and every fall of each year from 1920 to 1929; that they and their herders all referred to this as the "Huffman Camp"; that the grazing seasons consisted of two or three months each spring and about the same time each fall; that it usually lasted from February until March or April in the spring, and during November and December in the fall; that the land could not be used for anything else between these seasons; that no one else occupied or used the land during all of this time; that they recognized Mr. Huffman as their landlord and no one else interfered with their possession; that they lived about a mile and a half from this land; that no one else lived that near, and they were in a position to observe whether any one else used the land during that time.

Several witnesses testified that they had been herders for the Bourdieu brothers during these years and had occupied the camp on this land; that they stayed on this land continuously at all times when feed was available in that vicinity, bringing the sheep back to this camp every night; that during the times of the year when the land was not so used, neither feed nor water was available there and the land could not be used for any purpose; and that no one else used the land during the grazing season of those years. A number of witnesses testified that they had been in the grazing business in that vicinity during those years; that the various stock owners in that neighborhood knew where each other's ranges were; that there was an established custom whereby owners of sheep or cattle recognized each other's rights to pasture in certain areas; that they refrained from trespassing each on the other; and that they all knew that this particular land was within the range used by the Bourdieu brothers, and they did not allow their stock to trespass upon it. There was other evidence that in the event any other stock strayed upon this land the owners were notified and at once came and removed their animals. The evidence is full and complete and, we think, uncontradicted to the effect that the land here in question was used for grazing purposes by the Bourdieu brothers at all times when feed thereon was available, and used as a camp at all times when feed in the neighborhood was available during the entire grazing season of each year from 1920 to 1929, and that no one else was permitted to or did use said land for grazing or any other purpose during all of this time, until drilling operations were begun by the other tenant.

[5] The appellants virtually concede that the use thus made of this land during these years would have been sufficient to establish a title by adverse possession had this use been by the respondents personally or by any ten-

ant other than the Bourdieu brothers. But they argue that the Bourdieu brothers, prior to their recognizing and renting from the respondents, had for some years pastured this land in connection with other lands used by them without the permission of any one and under no claim of right; that after the issuance of the tax deed they continued to use the land in the same manner as before; and that their use of the land as tenants of the respondents could not inure to the benefit of the respondents until notice of a change in the manner of occupation and use was brought home to the appellants. They rely on a line of cases in which it has been held that a possession and use which has been entered into with the consent of the owner cannot become adverse to such owner without some notice of a changed intention. While the rule just referred to has its proper application in some cases, it neither applies nor controls under the circumstances here appearing. It may first be observed that such use of this land as was made by these tenants prior to the time they leased the same from the respondents, was neither with the knowledge or consent of the appellants. During those years they simply allowed their sheep to roam over the land without claim of right. A somewhat similar contention was considered in the case of Holtzman v. Douglas, 168 U. S. 278, 18 S. Ct. 65, 66, 42 L. Ed. 466. In that case the court said: "The doctrine which the plaintiff seeks to set up, we think is not applicable to the facts of this case. After the purchase at the tax sale, the delivery of the deed, and the recording thereof, Mrs. Douglas, in 1867, claimed title to the land, and demanded possession thereof from Rothwell, and by reason of the understanding then arrived at between herself and Rothwell he became the tenant of Mrs. Douglas as the representative of the heirs at law of William Douglas, and such tenancy continued up to the commencement of this action. She went to him under a claim of ownership and of the right to immediate possession of the lot as owner. He then acknowledged her right, became her tenant, and paid rent to her. That certainly placed Mrs. Douglas, as the representative of the heirs, in possession of the lot. From that time the facts are sufficient upon which to base a claim of adverse possession. We think it was inaugurated when Rothwell, under his agreement with Mrs. Douglas, acknowledged her right, and paid her rent; and it was immaterial, so far as the heirs are concerned, that Rothwell had before that time entered upon the lot, although under no claim of title, and presumably in subordination to the title of plaintiff's predecessors. Harvey v. Tyler, 2 Wall. [69 U. S.] 328 [17 L. Ed. 871]. If Rothwell were himself asserting a title by adverse possession, while coming into possession in acknowledgment of and under the title of the owners, there might be an opportunity for the application of the doctrine contended for by plaintiff, and in such case Rothwell could not set up title by adverse possession while entering in subordination to the title of the owner, unless he first vacated, and then retook possession as a hostile entry, or did some act necessarily evincing an intention to put an end to his tenancy. We are not dealing with Rothwell's rights or title. The defendants did all they were called upon to do in order to take possession and inaugurate an adverse holding, when they came with their tax deed, claimed to own the property described in it, and exercised an act of ownership by letting the lot to Rothwell as a tenant at a certain rent. When Rothwell recognized the claim of ownership, and remained in possession from that time in subordination to the rights of Mrs. Douglas and the heirs at law, their adverse possession, so far as this point is concerned, was sufficiently inaugurated. Mrs. Douglas was no party or privy to the prior entry of Rothwell, and therefore, whatever the circumstances as proven in this case regarding such prior entry, her rights and those of the heirs cannot be in any way affected thereby. There is no pretense of any fraud or concealment in the case by any one; certainly not by Mrs. Douglas. Neither she nor the heirs were bound, in order to maintain their rights, to give any written or verbal notice to the former owners that they were in possession through Rothwell; nor did the possession of Rothwell, as tenant of the Douglas heirs, fail to commence at the time of this agreement because he did not give notice to the former owners of his recognition of the title and right to the possession as claimed by Mrs. Douglas."

The position of the respondents here is much stronger than was that of the defendants in the case to which we have just referred. Not only did they take possession and lease the land to tenants whose prior use had been without the consent of and unknown to the former owners, but, in addition to the tenancy then for the first time created, a change in the manner of the use of the land then occurred. The evidence shows, without conflict, that prior to the time these tenants leased this land from the respondents they had never had a camp on it, but that immediately thereafter they established a sheep camp thereon and maintained it there during the grazing seasons of each year thereafter. The tenants testified that they did this because they then knew who the owner was and because the land was so situated as to make it desirable and convenient for use as a camp site and as headquarters for the herder. Thereafter, during each grazing season, they not only pastured bands of sheep running into the thousands on this land, but brought the sheep back to this camp each night as long as there was feed available in that vicinity. There is much evidence that the existence of the camp on this site was known to most, if not all, of the sheep and cattlemen throughout that country, and a number of witnesses testified that it was called the "Huffman Camp," although some witnesses testified that they had never heard it so called. There is also evidence that where large numbers of sheep are kept in a camp of this nature, the droppings from the sheep make such a rich manure that vegetation will not grow there, and that such visible evidence of this particular use of this land always existed and was plainly to be seen up to the time of the trial. The evidence discloses such a change in the use of this land after the delivery of the tax deed as must be held sufficient to take this case out of the rule contended for by the appellants, even if the same would otherwise apply.

[6] In addition to the facts that sheep were pastured on this land during the entire grazing season of each year, that they were at all times in charge of a herder, that the land was exclusively, and continuously, when possible, used by the respondents' tenants, and that no one else was allowed to trespass thereon, a significant additional use of this land appears in its use as a camp and as headquarters during all of the time feed was available in that vicinity, which must reasonably constitute a better and more complete use than appears in the ordinary case of grazing, which is confined to the land itself and the period of use limited by the amount of feed thereon alone. The possession and use being made of this land was well known throughout all that territory, and physical evidences existed which would have given notice to any one who visited the land, even at times outside of the grazing season, that the land was being occupied and used. Under the principles of law established in this state and the facts here shown, the respondents have established their title to this land by adverse possession under claim of title, as found by the trial court.

[7] The appellants attack the court's findings and conclusions to the effect that the judgment entered in 1927 in the former quiet title action is binding upon them and conclusive against their interest in this land. It is argued that the deed from the corporation to J. Foster Kell and the agreement which he signed must be taken together as one transaction; that the trust attempted to be created by the agreement is void for indefiniteness; that the deed being a part of the same transaction is also void; that the title to the property then remained in the corporation and now is in the appellant directors as statutory trustees, and that no one having any title was made a party to that action. While the two instruments referred to should be considered together as between the parties thereto, we are neither prepared to hold that this should be done where the rights of a third person are involved, when the deed was recorded and the existence of the agreement was unknown to the third person, nor that the trust thus attempted to be created was, in fact, void. It would seem that even as between the parties there was at least a resulting trust and that the recorded deed, even if voidable, was not void in the sense here contended for. The appellants also rely on certain cases holding that a judgment is not binding on the beneficiaries of a trust when service is had only on the trustee. The cases cited are such as involve the ordinary trust deed given to secure a debt, or trusts of a similar nature, where the instrument itself discloses that there is both a trustee and a beneficiary. In the case now before us, the deed of record is absolute in form and it is conceded that the respondents had no knowledge, actual or constructive, that the same was in any way qualified. The appellants' only claim as against the judgment referred to is based upon rights assertedly given to them by and through the execution, on the same day as the deed, of what is and always has been, so far as the respondents are concerned, a secret agreement to reconvey the property to some one.

[8, 9] Section 1214 of the Civil Code, as amended in 1895 (page 50), provides, in part, that every conveyance of real property is void "as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action." Section 1215 of that Code defines a conveyance as that word is used in section 1214, and it seems apparent that the unrecorded agreement here referred to comes within that definition of a conveyance. Sec-

tion 1214 was discussed in Moore v. Schneider, 196 Cal. 380, 238 P. 81, and the language there used is significant, although the court withheld an opinion as to whether the rule of this portion of section 1214 should be applied in a case in which a prior grantee was not made a party to the action. More persuasive reasons might well be advanced for applying the rule referred to in a case where an interest affecting the title to property is created by one instrument which is not recorded, while at the same time a grant deed is placed on record ostensibly conveying the absolute title, than for applying the same in a case where the property has actually been conveyed to a prior grantee, but where nothing has been done to affirmatively mislead a third party. There might well be equities in favor of a grantee who merely fails to record his deed which would not exist in favor of persons claiming under a secret agreement who have, as a part of the same transaction, executed and recorded a conveyance appearing on its face to be absolute. However, no further discussion is here needed, since it is unnecessary to decide the question referred to in view of the other facts here appearing. Whether or not this prior judgment was conclusive as against all of the appellants, it was binding on the one who held the record title, who was made a party to that action, and the respondents have established a title by adverse possession as against the others who claim under this secret agreement with the record owner.

[10] For the same reason it is unnecessary to consider at length or to decide the questions raised by the appellants' attacks on certain other findings and conclusions to the effect that the claims of the appellants are barred by the various statutes of limitation, that the appellants have been guilty of laches, and that they are now estopped from claiming title as against the respondents. It may be observed that the highly technical points raised are not such as to greatly appeal to a court of equity under the facts shown by the record. What purported to be an absolute grant deed based upon and containing an adequate resolution passed by the board of directors of the corporation then owning the land, was executed and recorded. The purported trust agreement was withheld from record for nearly seventeen years and until long after other rights had accrued. Nearly all of the directors, now the trustees, of this corporation testified that they regarded this property as practically worthless. No taxes were paid for all those years, and nothing else was done in connection with the land, even though one of the directors ascertained as early as 1925 that the respondents held a tax deed and were paying the taxes on the property. No other inquiries were ever made and the recorded tax deed, notice of lis pendens, quiet title judgment, and even actual knowledge that the respondents had acquired such a tax deed were all insufficient to arouse any action on the part of the appellants, not one of whom during all of those years paid or offered to pay any taxes, visited the property, or did anything else to indicate any interest therein or any claim thereto. The discovery of oil, however, nearly seventeen years after the deed to Kell was recorded, nearly nine years after the final tax sale, nearly five years after one of the directors and trustees obtained actual knowledge of the existence of the tax deed, and nearly three years after the judgment was entered in the former quiet title action, was more effective and brought this action within a month. It is sufficient to say here that the evidence relied upon as supporting the findings relating to limitations, laches, and estoppel as against the appellants, if not sufficient for that purpose, is entirely sufficient to indicate and illustrate the wisdom of the rules permitting a purchaser at a tax sale, who in good faith takes possession of land and assumes the burdens incident to ownership thereof, to establish his title by adverse possession.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

137 Cal.App. 355

PEOPLE v. WOLCOTT.

Cr. 2474.

District Court of Appeal, Second District, Division 2, California.

March 14, 1934.

1. Homicide ⇨228(1).

In murder prosecution, evidence sustained corpus delicti.

2. Homicide ⇨250.

In murder prosecution, evidence as matter of law and fact sustained manslaughter conviction on jury's implied finding that accused intentionally shot deceased.

3. Homicide ⇨228(4).

In murder prosecution, before introducing accused's extrajudicial statements, corpus delicti need not be established by degree of evidence required for conviction.

4. Criminal law ⇨1159(2).

Appellate court cannot pass on any implied fact finding if supported by any substantial evidence.

5. Criminal law ⇨1160.

Appellate court, in considering sufficiency of evidence, gives weight to fact that trial judge has denied new trial.

6. Criminal law ⇨1166½(12).

In murder prosecution, court's asking witness whether, in putting handkerchief over lock before opening door, witness had fingerprints in mind, not tending to prove or disprove any material issue, *held* harmless.

7. Homicide ⇨309(4).

In murder prosecution, manslaughter instruction *held* properly given.

8. Criminal law ⇨1144(14).

In determining whether instructions are misleading, appellate court will assume that jury consisted of ordinarily intelligent persons.

9. Criminal law ⇨761(11).

In murder prosecution, instruction in statutory language that, commission of homicide being proved, burden of proving mitigating circumstances or justification or excuse devolves on defendant, *held* not objectionable as assuming that defendant had committed homicide (Pen. Code, § 1105).

10. Homicide ⇨340(2).

In murder prosecution, where evidence would have supported conviction for murder, accused, having been convicted of manslaughter, or lowest degree of crime charged, could not complain of instructions as to manslaughter.

11. Indictment and information ⇨189(8).

Murder includes crime of manslaughter.

12. Criminal law ⇨1172(6).

Giving inapplicable instruction, although error, is not reversible error, unless prejudicial.

13. Criminal law ⇨720(9).

In murder prosecution, error, if any, in prosecutor's arguing that accused had debauched deceased and taken her from her usual decent associations *held* harmless; remarks not being far from accurate under evidence.

14. Criminal law ⇨1171(6).

In murder prosecution, where prosecutor stated intention to prove that accused had once struck deceased without provocation and claimed surprise when witness answered in negative regarding such assault, and accused's counsel stipulated that prosecutor's statement was made bona fide, statement *held* harmless.

15. Criminal law ⇨703.

In murder prosecution, prosecutor's stating intention to prove attempt to place gun in deceased's hand so that fingerprints would be found *held* not prejudicial as being unsupported by evidence.

Evidence showed, in part, that towel was found in accused's room with smudge marks similar to marks that would be made by wiping off gun like that found by deceased's body, and that such gun had fingerprint on lower inside of grip probably made by deceased. There was also evidence that it would have been difficult for deceased to have placed fingerprints by holding gun so as to shoot herself in such way as to make wound as it existed.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Harold E. Wolcott was convicted of manslaughter, and he appeals.

Affirmed.

Larsen & Shaw, William W. Larsen, and Leiland R. Shaw, all of Pasadena, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

STEPHENS, Presiding Justice.

The charging part of the information to which the defendant pleaded not guilty and upon which he was tried before a jury for murder and convicted of manslaughter is as follows: "The said Harold Ernest Wolcott is accused * * * of the crime of murder, a felony, committed as follows: That the said Harold Ernest Wolcott on or about the 13th day of August, 1933, * * * did wilfully, unlawfully and feloniously and with malice aforethought, murder one Helen Bendowski, a human being." After the return of the verdict, a motion for new trial was made and denied, and sentence was pronounced. Defendant appeals from the order denying the motion for a new trial and from the judgment following the verdict reached by the jury.

Appellant, aged about 33 years, and the deceased, Helen Bendowski, aged about 30 years, were very close associates and had been for several years. They had been "keeping company" since 1921. The two had had several serious and violent quarrels, and appellant had intimated that he intended to do the right thing by deceased, when asked why the two did not marry. However, in 1925 he married another, a widow, concealing and denying the marriage to deceased and to others. Later a divorce was secured against appellant. For some time prior to her death deceased kept appellant's rooms in order and generally attended to the domestic duties of the establishment. The conclusion is inescapable that the two were practically living together. Appellant conducted a flower store and lived in rooms constructed mezzaninelike at the back of the store, entering them by a stairway directly from the store. A short stairway also led from the rooms to the flat roof of the building. This roof joined other roofs separated by brick firewalls about two or three feet high. On the evening of the tragedy the two together attended a dance. A witness testified he saw them at about 9:30, that a little later in the evening the three went to appellant's apartments for drinks, and that deceased was in excellent spirits at the time. They returned to the dance at 10:30. There appellant and deceased became separated, but some time thereafter Miss Bendowski, returning to the apartments, according to her statement, was attacked in the alley near the store. One witness testified he heard an outcry, and that later, about 2 o'clock a. m., deceased came into his café, which adjoined the flower store, and told him about the attack and showed neck scratches and bruises. About 2:45 a. m. appellant was in the witness's café, and deceased came in and told appellant about the attack, but appellant expressed doubts about the truth of the story. Later, or at about 4 a. m., the café proprietor saw deceased climb a ladder in the rear of his store toward the roof which would lead to the roof entrance to appellant's apartments. She carried several small packages and her hat. These articles were later found on a settee just outside the roof entrance to the apartments. About 5 a. m. appellant awakened deceased's brother-in-law. Appellant was excited and said he had had a fight with deceased and that she had taken his car and gone away.

We now go back and pick up the story as related by a Mr. Miedema, a Pasadena police officer. Miedema was a friend of appellant's, and some time after 1 o'clock a. m. went to the latter's apartments and found appellant and deceased there. Deceased was crying and had scratches on her neck. She related the story of the attack but appellant accused her of having improper relations with other men, called her a "damned liar," and raised his arm as though to strike her, but Miedema intervened. Appellant told her that he did not care for her and that she could pack up and leave, to which she replied: "Well, I am glad I found that out. I have lived with you, I have loved you; I have given you everything I have." Miedema left shortly thereafter, but returned with a Mrs. Smith at about 5 a. m. Appellant was not there, but came shortly afterward, explaining that he had been looking for deceased, who had gone away with his car. He was nervous, angry, and appeared worried over deceased's whereabouts. The three drank some gin mixture, and Miedema and Mrs. Smith went down stairs to appellant's living room. Appellant said he would retire, but in a few minutes Miedema heard appellant's voice upstairs. He talked loudly and angrily. Miedema heard a shot "possibly a minute and a half or two minutes" thereafter, called to appellant, and then went upstairs, where appellant told him deceased had shot herself. Miedema went out on the roof, but appellant told him to get back, that Miss Bendowski had a gun. The two then went inside and sat down, and appellant cried and mumbled. While the two were seated, Miedema heard "a couple more reports," but said they were backfires and did not come from the roof. Appellant insisted that Miedema should remain—that he "must stick by him". Miedema took Mrs. Smith downstairs and let her out of the store, first putting his handkerchief over the lock as he turned it. This incident will be referred to again.

At about 6 o'clock a. m. Dr. Harter and Police Officer Kelly came to the building. Miedema was still with appellant. They found deceased lying on her back, arms outstretched, clothes smoothed out, her coat on but not buttoned. She was dead, having been shot through the chest. A stained bullet was found on the roof. The coat lay back from the right side. The doctor saw throat scratches but no powder marks. Appellant told the officers that he was in the apartment mixing a drink when he heard one shot, and that he ran out and found the girl lying there. Kelly found three .32 caliber revolver shells on the roof, all some distance from the body and across from the firewall. The gun found beside deceased was of the kind that the shells would fit it, and was appellant's gun. At this time appellant told the officer that he did not know deceased was on the roof until after the shot. Subsequently he made a statement to officers that as he walked to the sink to mix the drink he saw Miss Bendowski outside, stooping down between the window and door. He assumed to talk to Miedema that deceased would not know he saw her, and presently she made "a large noise on a board outside the window, so I knew that she knew that I knew she was there." She straightened up, passed the window, and appellant stepped to the door and called to her, but she kept going, climbed over the firewall, and he heard two shots in rapid succession. She was mumbling something; she "pulled the gun into full play"; he sat down and asked her to quit pointing the gun. She pointed the gun at herself, and he started to run to get Miedema; then the gun went off. According to this statement, this was the third shot. There was testimony from other sources that three shots were heard close together.

An examination of the gun revealed a fingerprint on the lower inside of the grip—probably, according to fingerprint experts, Miss Bendowski's. No other fingerprints were found. There is evidence of the finding of a towel in appellant's bathtub with smudge marks similar to marks that would be made by wiping off a gun like the one found by deceased's body. There is also evidence that it would have been difficult for deceased to have placed the fingerprints by holding the gun so as to shoot herself in the chest. There was no powder burn or mark on the coat or dress. In his statement to the officers, appellant admitted that he had made previous false statements about the affair. There was other evidence, but it seems useless to go any further into detail.

[1, 2] With this recital it seems clear without discussion that as a matter of law and of fact the evidence is sufficient to sustain, first, the corpus delicti, and, second, the verdict of the jury upon their implied finding that the deceased came to her death by the intentional infliction of a gunshot wound upon her body by appellant. The latter contends against both of these conclusions.

[3, 4] It seems hardly necessary to mention that the corpus delicti need not be established by the degree of evidence necessary to convict before extrajudicial statements of the defendant may be introduced, or that this court cannot pass upon any implied finding of fact where there is any substantial evidence to support it.

[5] In the consideration of the various points made by appellant, it is well to have in mind the rule that courts give weight to the fact that a motion for new trial has been argued and denied in the trial court before the judge who tried the case. People v. Ellis, 188 Cal. 682, 206 P. 753. "He (the trial judge), too, had to be satisfied that the evidence, as a whole, was sufficient to sustain the verdict. If he was not, it was not only the proper exercise of a legal discretion, but his duty, to grant a new trial." People v. Lum Yit, 83 Cal. 130, 23 P. 228, 229.

[6] This disposes of points I and II, and brings us to point III of appellant's opening brief. As related in the statement of facts, Miedema stopped to wipe the door lock with a handkerchief before he took hold of it to let Mrs. Smith out of the store after the shooting. The court asked the question: "Did you want to stop the finger-prints on the lock; is that what you had in mind?" The witness answered in the affirmative. The question was objected to on practically all of the usual grounds of objection and a motion to strike the answer was made and denied. The question was assigned as prejudicial misconduct by appellant, and the court was requested to admonish the jury to disregard it. This was not done. We agree with appellant that this (quoting from his brief) "tended in no way to prove or disprove any material issue in the case." We are unable to perceive how it could have been prejudicial to him in the slightest degree.

Point IV.

[7-9] In instructing the jury as to the law, the court gave an instruction defining murder of the first and second degree and manslaughter, with a description of how to distinguish them each from the other. We do not understand that there is any adverse criticism of the instruction itself. Appellant, however, complains that no instruction as to manslaughter should have been given. The jury was entitled to such instruction. The court

also gave an instruction in the words of section 1105 of the Penal Code, as follows: "Upon a trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation or that justify or excuse it devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable." This is particularly objected to because, according to appellant, it assumes that the commission of the homicide by the defendant has been proven in the case and because it does not specify the degree of proof required of the defendant to sustain the burden of mitigation or justification. We have examined the complete instructions as they were given, and, if we assume that the jury was made up of ordinarily intelligent people, which we do assume, the jury could not possibly have been misled into the mistaken idea that the court was assuming anything as to the issue of fact. We shall again refer to this point when we comment upon the cases cited by appellant as authority for this and at the same time as to other points.

[10-12] Assuming, for the sake of argument only, that no mention of manslaughter should have been made in the instructions, and assuming, also for the same purpose, that the criticisms mentioned are well taken, how can appellant be heard to complain? It is true he has at all times denied that he had any hand in the death of Helen Bendowski. At no time has he suggested any mitigation, justification, or excuse for anything. Appellant cannot, then, complain, as the crime of which he was convicted is the least in degree of the crime with which he was charged. People v. Miller, 177 Cal. 404, 409, 170 P. 817; People v. Wilt, 173 Cal. 478, 160 P. 561; People v. Tugwell, 32 Cal. App. 520, at 530, 163 P. 508. The jury in possession of all of the testimony found that the death was caused by appellant. If the testimony in the circumstances of this case supports that implied finding, it would support the finding of murder. An able discussion on the shifting of the burden in murder cases upon mitigating circumstances is contained in People v. Jones, 160 Cal. 358, 117 P. 176. If the suggestion of manslaughter gave the jury the idea that possibly there were some mitigating circumstances in the killing, and in their private deliberations they concluded that appellant did the killing but that they would acquit him of murder and convict him of manslaughter, a crime included within the crime of murder (People v. Muhlner, 115 Cal. 304, 47 P. 128), appellant has been the beneficiary of such suggestion. Without it, it may be assumed that the jury would have convicted him of murder. People v. Tugwell, supra. This being true, he cannot be heard to object. People v. Muhlner, supra; People v. Cramley, 23 Cal. App. 340, 138 P. 123 —a case not unlike the instant one, in principle. This case also distinguished People v. Huntington, 138 Cal. 261, 70 P. 284; People v. Hamilton, 49 Cal. App. 30, 192 P. 467; People v. Borrego, 7 Cal. App. 613, 95 P. 381. The law is settled that the giving of an instruction inapplicable to the cause on trial, while error, is not reversible error, unless it has prejudiced the defendant. People v. Wilt, supra; People v. Grill, 151 Cal. 592, 91 P. 515; People v. Tapia, 131 Cal. 647, 63 P. 1001, 1005; People v. Miller, supra. It is our conclusion that appellant has suffered no prejudice by the court's instructions on manslaughter.

At the outset of appellant's treatment of his point IV in his opening brief he asserts as a fact that "there is little or no evidence tending to connect the defendant with the death of Helen Bendowski," and deducts from such assumed statement of fact that any slight error would have been sufficient to have caused a miscarriage of justice. We cannot accept the assumption in our consideration of appellant's points.

Two cases are stressed by appellant, People v. Huntington and People v. Tapia, supra. These two cases have been cited and analyzed many times by the appellate courts of this state. Suffice it here to say that the former was a murder case in which the defendant was charged with having caused the death of a young woman while he was unlawfully attempting an abortion. The court gave an instruction that would have been proper had defendant offered the suggestion that the death was caused while treating the patient (defendant was a physician) for a disease. The jury brought in a verdict of manslaughter. The Supreme Court said in its opinion reversing the judgment that this instruction injected an entirely new element into the case, one entirely foreign to the proof. In the Tapia Case, also involving a murder, the evidence was so weak that the court felt that the slightest error might have been the deciding factor. The instructions as they reached the jury, either by inclusion or exclusion, left it at liberty to consider an extrajudicial statement, itself of doubtful authenticity, in determining the corpus delicti. The court also instructed the jury, as did the court in the instant case, by quoting section 1105 of the Penal Code, but went further and defined burden of proof. The judgment was reversed; the Supreme Court saying: "In conclusion we desire to say that this decision is based upon the very peculiar features of this case as above shown, and that in many cases the errors above noticed would not call for a reversal."

The case of People v. Grill, supra, had exactly the same instruction that was given in the instant case, and it was there held that the instruction implied no assumption of guilt. It cites and distinguishes the Tapia Case. The same point is treated in the same way in People v. Wilt, supra, at page 484 of 173 Cal., 160 P. 561.

Appellant also relies upon People v. Kelley, 24 Cal. App. 54, 140 P. 302, 305. This is another murder case, wherein the definitions of manslaughter were given. The jury returned a verdict of guilty of involuntary manslaughter. The case in principle has many elements not dissimilar to the instant case. The Court of Appeal reversed the judgment because there were no elements of involuntary manslaughter in it, but made the following significant statement: "Strictly speaking, there was but one or the other of two results which, under the evidence, could logically have been reached by the jury, and that was to convict the defendant of one or the other of the two degrees of murder or acquit him. This is not to say, however, that a verdict of voluntary manslaughter could not be sustained upon the record before us, for it is true, as a general proposition, which might perhaps be held applicable in this case, had the defendant been convicted of voluntary manslaughter, that a party will not be heard in an objection to a verdict of manslaughter against him under an indictment for murder, where it appears that, under the evidence, he in justness ought to have been convicted of the crime of murder of one or the other of the degrees thereof; the theory of that proposition being that there can in reason be no just cause of complaint by the defendant where the verdict is more favorable to him than is perhaps justified by the evidence."

[13] We shall consider appellant's points VI and VII together, as they both concern specifications of alleged misconduct of the deputy district attorney at the trial. In the closing address to the jury, the deputy district attorney made the following remarks: "We treasure the associations of our youth as the most precious possessions of a normal life, but this girl, debauched early by this man in her youth, domineered by him, taken to nightclubs by him, taken from her usual decent associations by him, she lost those connections and it is not to Wolcott's credit." These remarks were duly excepted to, and the court was requested to instruct the jury to disregard them. This the court did not do. While the remarks might well have been omitted, a reading of the evidence reveals the fact that they were not far from accurate. It is unreasonable to believe that the remarks added anything to the sordid and tragic story that had been related to the jury through competent evidence.

[14] In the deputy district attorney's opening address to the jury, he stated that he would prove that appellant once knocked deceased down in a public drinking place entirely without provocation, and that, in answer to a question as to why he had done such a thing, he replied, "I just got tired of looking at the woman." It appears that in an attempt to prove this episode a witness testified that he saw appellant and deceased at a beer place, but answered in the negative as to the fact of the assault. The deputy district attorney stated that he was taken by surprise, but counsel for appellant stipulated that the statement had been made by the prosecutor in good faith and the episode ended. The statement made at the opening must have seemed mild to the jury when compared to what they listened to later in the course of the trial. No exception to this statement was made at the trial. People v. Cramley, supra. We think neither of these statements could have acted to the prejudice of appellant. "Verdicts will not be disturbed merely on account of the inadvertent mistakes of counsel as to matters of evidence in addressing juries. It is only when from the course of conduct of a prosecuting officer, it is apparent that the right of the defendant to a fair trial has been prejudicially invaded, that he can successfully complain of it." People v. Willard, 150 Cal. 543, 551, 89 P. 124, 128; People v. Sing Yow, 145 Cal. 1, 9, 78 P. 235.

Point VIII.

[15] This assignment is that the following statement by the district attorney in his opening address was prejudicial to appellant and was not substantiated by the evidence: "We will satisfy you also that the finger-prints were removed from this gun, and even an attempt was made to place that gun in the hand of the dying girl, where the fingers were pressed against it in an attempt to have finger-prints found." We think a clear understanding of the facts as abbreviated in this opinion absolves the prosecutor of any attempt to de-

ceive or to prejudice the defendant on trial. It is true that no evidence was introduced upon the point that an attempt had been made to place the hand of deceased so that fingerprints could be found. A fingerprint probably of the deceased was found upon the handle of the weapon, however, and it is clear that the deputy district attorney was deducing from that fact his idea of how it got there. But the instructions plainly informed the jury that they were to decide the case upon the evidence adduced before them, and the prosecutor himself stated to them as follows: "I want the jury to understand that no matter what form I couch the language, all I am doing here is outlining the evidence in this case. Do not consider what I say as evidence." Appellant suffered no prejudice in the circumstance.

Upon all of the points herein treated, appellant based his motion for a new trial, and he bases his prayer for reversal in this court upon the proposition that a new trial should have been granted upon each and every assignment. He also bases his prayer for reversal here upon the proposition that each and every of his assignments shows that the judgment is against the law and the evidence in the case.

The judgment and order appealed from are affirmed.

We concur: CRAIG, J.; HAHN, Justice pro tem.

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137 Cal.App. 410

JENKINS v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 9356.

District Court of Appeal, First District, Division 2, California.

March 19, 1934.

Hearing Denied by Supreme Court May 17, 1934.

1. Municipal corporations 🔑218(2).

Civil service employee may not complain of removal upon ground of lack of funds or lack of work unless removal was not made in good faith.

2. Mandamus 🔑168(4).

In proceeding for writ of mandate, evidence sustained finding that civil service employee, classified as carpenter foreman, was laid off in good faith because of lack of funds and resulting lack of work.

3. Municipal corporations 🔑218(2).

Civil service employee could not compel civil service commission and other city officials to continue his employment when there was neither work nor funds provided therefor.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Petition by Lee R. Jenkins against the Board of Civil Service Commissioners of the City of Los Angeles and others for a writ of mandate. From a judgment denying the petition, plaintiff appeals.

Affirmed.

Eugene L. Wolver, of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., and Francis H. Lindley, Deputy City Atty., all of Los Angeles, for respondents.

SPENCE, Justice.

This is an appeal by plaintiff from the judgment of the trial court denying his petition for a writ of mandate.

Plaintiff was a civil service employee, classified as a "carpenter foreman," and was employed as such in the bureau of power and light in the department of water and power. In July, 1928, his employment was terminated because of "lack of funds." More than two years thereafter plaintiff commenced this proceeding seeking to compel the defendants to give him employment as a civil service employee and to pay him his salary from the time his employment was terminated.

Plaintiff alleged, among other things, that he was not removed because of lack of funds. This was denied by defendants, and they affirmatively alleged that at all times since the date of plaintiff's removal there had been a lack of funds and a lack of work in plaintiff's classification. Upon the issues thus made the trial court found in part as follows: "That in accordance with said charter requirement, the Board of Water and Power Commissioners duly adopted a budget covering the anticipated revenues and expenditures of the Bureau of Power and Light of the Department of Water and Power for the fiscal year July 1, 1928, to June 30, 1929. That the allocation of funds for purposes requiring the services and employment of Carpenters and Carpenter

Foremen of the Bureau of Power and Light under the budget adopted by the said Board for said fiscal year was decreased to such an extent that it became and was necessary, on account of lack of funds and a resulting lack of work, to effect a reduction in the number of employees employed in said Bureau. That the funds covered by the budget for the fiscal years July 1, 1929, to June 30, 1930, and July 1, 1930, to June 30, 1931, respectively, were allocated as to require a continued reduction of the number of employees of said Bureau as aforesaid. * * * That with the reduction of the number of employees in said Bureau for said fiscal year, as aforesaid, it became and was necessary on July 22, 1928, to remove or lay off, due to lack of funds and a resulting lack of work, the said petitioner from his position as Carpenter Foreman. That the Board of Civil Service Commissioners of the City of Los Angeles and petitioner were duly notified that the said petitioner was laid off for lack of funds. That at all times since said date there has continued to be a lack of funds of said Bureau and a corresponding lack of work in the classification to which petitioner was and is certified."

[1] Appellant contends "that the court's judgment cannot be sustained on the grounds appearing in its findings," but we find no merit in this contention. The charter of the city of Los Angeles contained many of the usual civil service provisions. In section 112, subdivision (a), are found the provisions relating to removal, discharge, and suspension of employees, and that section reads in part: "Provided, that the order of any appointing board or officer suspending any person because of lack of funds in such department shall be final, and shall not be subject to review by said Board of Civil Service Commissioners." But, even in the absence of such express provision relating to the removal of employees because of lack of funds, we are of the opinion that a civil service employee such as appellant may not complain of his removal upon the ground of lack of funds or lack of work, unless it appears that such removal was not made in good faith. Gilbert v. Civil Service Commission, 61 Cal. App. 459, 215 P. 97; Fitzsimmons v. O'Neill, 214 Ill. 494, 73 N. E. 797; Griffin v. Williams, 168 App. Div. 63, 153 N. Y. S. 926; Gardner v. City of Lowell, 221 Mass. 150, 108 N. E. 937; People v. Mayor of City of Brooklyn, 149 N. Y. 215, 43 N. E. 554; People v. Waring, 7 App. Div. 204, 40 N. Y. S. 275; Kenny v. Kane, 27 Misc. 680, 59 N. Y. S. 555; Vansuch v. State, 112 Ohio St. 688, 148 N. E. 232; Colligan v. Williams, 91 Misc. 128, 154 N. Y. S. 329; State v. City of Seattle, 74 Wash. 199, 133 P. 11, 4 A. L. R. 198.

We do not believe that appellant seriously questions the rule established by the authorities cited, although the first main heading of the argument in his brief would seem to so indicate. The remaining headings and subheadings of the brief which require consideration merely attack in one manner or another the sufficiency of the evidence to sustain the findings above set forth. They indicate appellant's view that he was not removed in good faith because of lack of funds. We find no merit in any of the points raised.

[2, 3] The evidence showed that for about two years prior to his removal appellant had been employed as carpenter foreman at the shop on Slauson avenue and Long Beach avenue; that the main work done in said shop was the fabrication of various wooden structures to be used in substations; that the building of said substations was part of an extension program commenced in 1923 and continued until 1928, at which time all of said work had been practically completed; that, because of this fact, the funds allocated for the work in which appellant was engaged were greatly reduced for the fiscal year commencing July 1, 1928, and it became necessary to terminate the employment of numerous employees, including appellant; that the carpenter shop over which appellant served as carpenter foreman was closed down at the time that appellant's employment was terminated and was never reopened thereafter. Such evidence clearly indicates that appellant's employment was terminated in good faith and because of lack of work and lack of funds, but appellant lays stress upon the fact that certain carpenter work was subsequently done and that certain carpenters were designated from time to time as "straw bosses" and were paid additional compensation, making their total compensation while serving as such straw bosses equal to that previously paid to the carpenter foremen. It appears, however, that the carpenter work done by the reduced force was mainly repair work, and there was evidence to show that the services performed by the straw bosses were not of the same character as the services previously performed by the carpenter foremen. The testimony on this subject showed, among other things, that the duties of the carpenter foremen were solely of a supervisory nature requiring a higher degree of skill than the duties of the straw bosses, and that, while the carpenter foremen did not work with

tools along with the other carpenters, the straw bosses did.

The facts in the present case are not analogous to the facts in Winslow v. Bull, 97 Cal. App. 516, 275 P. 974, which is cited and relied upon by appellant. There the position from which the petitioner was removed and the position to which his successor was immediately appointed were identical in fact as well as in name, and the court points out on page 521 of the opinion in 97 Cal. App., 275 P. 974, 975, "that appellant's position was not 'abolished or made unnecessary,' nor was the number of positions of that character reduced through lack of work or lack of funds, there being but the one such position, and the work thereof being performed by appellant's successor after the attempted discharge." We therefore conclude that there was ample evidence in the present case to sustain the findings above set forth and that appellant could not compel respondents to continue his employment when there was neither work to justify such continuance nor funds provided therefor.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

* * *

137 Cal.App. 414

DAWSON v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 9313.

District Court of Appeal, First District, Division 2, California.

March 19, 1934.

Municipal corporations 🔑218(8).

Evidence that construction work on substation upon which civil service employee, carpenter foreman, was engaged, had been completed at time of his removal, and that there was but one other substation under construction, supported finding regarding lack of work, warranting removal.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding by William James Dawson against the Board of Civil Service Commissioners of the City of Los Angeles and others. From the judgment, plaintiff appeals. Affirmed.

Eugene L. Wolver, of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., and Francis H. Lindley, Deputy City Atty., all of Los Angeles, for respondents.

SPENCE, Justice.

This is a companion case to Jenkins v. Board of Civil Service Commissioners, 30 P. (2d) 606, the opinion in which last-named case has been this day filed.

The pleadings, evidence, findings, judgments, and briefs in the two cases are practically the same. Plaintiff herein was employed as a carpenter foreman in charge of the construction work on substation No. 4. Plaintiff's employment was terminated at the time of the termination of the employment of the plaintiff in the Jenkins Case. The construction work on said substation upon which plaintiff was engaged had been completed at that time, and there was but one other substation still under construction. The evidence herein regarding lack of work and lack of funds amply supports the findings on these issues, and the trial court properly denied the writ.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

* * *

137 Cal.App. 261

KNUDSON v. ADAMS et al.

Civ. 1493.

District Court of Appeal, Fourth District, California.

March 8, 1934.

1. Deeds 🔑208(1).

Evidence in judgment creditor's action to set aside debtor's conveyances of realty to his codefendant as fraudulent *held* not to support court's finding that codefendant's previous deeds to debtor and another were placed by debtor in safety deposit box belonging to codefendant or used jointly by her and debtor.

2. Fraudulent conveyances 🔑310.

Court's finding in judgment creditor's action to set aside debtor's conveyances of realty to codefendant that latter's previous deed to debtor was never delivered *held* inconsistent with finding that debtor had only naked legal title to property.

3. Deeds 🔑208(1).
Evidence in judgment creditor's action to set aside debtor's conveyances of realty as fraudulent *held* not to support court's finding that grantee's prior deeds to debtor and another were not delivered.

4. Deeds 🔑56(2).
Essential and controlling element in determining whether deed was delivered is grantor's intention.

5. Deeds 🔑66.
Grantor's intention to deliver deed is fact question to be determined from consideration of all evidence bearing thereon.

6. Appeal and error 🔑1012(1).
Trial court's determination that grantor did not intend to divest herself of title to realty by delivering deed is not conclusive on reviewing court, where evidence, without conflict, unmistakably indicates such intent.

7. Deeds 🔑56(1).
Grantor's oral request of one grantee, to whom she handed deeds, that they be not recorded until she died, did not prevent intended delivery thereof from being effective, in absence of any intimation that she was attempting to effectuate testamentary scheme to avoid probate of her estate or payment of inheritance taxes.

8. Deeds 🔑208(3).
Grantee's undisturbed possession of deed for seven years was prima facie evidence of absolute delivery thereof and grantor's intent to vest title to property conveyed in grantee.

9. Deeds 🔑208(4).
Recordation of deeds, with grantor's knowledge and consent, after she handed them to one grantee with request not to record them until she died, was prima facie evidence of delivery thereof.

10. Deeds 🔑208(2).
Fact that grantor continued to live on property conveyed, paid taxes, and received proceeds thereof after executing deeds, did not indicate her intention not to divest herself of title thereto and prevent delivery of deeds from being effective.

11. Deeds 🔑15.
Facts that deeds were voluntary and grantor received no valuable consideration therefor did not affect their validity as conveyances (Civ. Code, § 1040).

12. Deeds 🔑61.
Trusts 🔑25(3).
Delivery of deeds, conveying certain interests in realty to grantees, with request that one grantee, to whom grantor handed them, should not record them until grantor died, vested fee title in grantees, subject to grantor's life estate, as to which grantee receiving deeds was trustee for grantor.

13. Trusts 🔑37½.
One with whom grantor deposited deed to another became trustee for grantee.

14. Wills 🔑722.
Will devising testatrix' share of her deceased father's property to her brother vested in him fee title to interest conveyed to testatrix by her sister after latter's purchase of father's realty from administrator of his estate.

15. Trusts 🔑25(3).
Devisee's fee title to interest in land, devised to him by his sister, to whom it had been conveyed by another sister's deed, handed to devisee by grantor with request not to record it until she died, was subject to grantor's life estate, as to which devisee was trustee for grantor.

16. Deeds 🔑59(1).
Recordation of deeds long after their execution and delivery to one grantee with request not to record them until grantor died did not affect title vesting in grantees subject to grantor's life estate.

17. Life estates 🔑22.
Life tenant's equitable interest in land cannot be subjected to payment of debts of one vested with fee title thereto.

18. Fraudulent conveyances 🔑24(1).
Quitclaim deed and grant deed of grantor's fee title to interest in land, previously conveyed to him by grantee, subject to life estate in latter, *held* not invalid as made to defraud grantor's judgment creditor.

Appeal from Superior Court, Orange County; H. G. Ames, Judge.

Action by Anne L. Knudson against H. Z. Adams, Carrie A. Love, and another. From a judgment for named defendants, plaintiff appeals.

Affirmed.

Patterson & Montgomery and William S. Scully, all of Los Angeles, for appellant.

Charles D. Swanner, of Santa Ana, for respondents.

JENNINGS, Justice.

This action was instituted by plaintiff, a judgment creditor of the defendant H. Z. Adams, for the purpose of securing a decree setting aside certain conveyances of real property made by the aforesaid defendant to the defendant Carrie A. Love, which were alleged to be fraudulent as to plaintiff. Upon the conclusion of the trial of the action, judgment was rendered in favor of the defendants. From the judgment thus rendered, plaintiff has appealed.

The record shows that the following facts were developed by the evidence which was produced during the trial: The defendants, H. Z. Adams and Carrie A. Love, are brother and sister, and the former has for many years made his home with the latter. The father of these two defendants died intestate in 1891. His estate was probated in the superior court of Orange county. During the course of administration certain real property of the estate was sold to the defendant Carrie A. Love for the sum of $9,000, and said defendant received a deed therefor from the administrator of the estate. On July 25, 1923, Carrie A. Love executed three separate grant deeds whereby she conveyed five-sixths of the property which she had purchased from her father's estate to the grantees named in said deeds. These grantees were her brothers H. Z. Adams and Leon H. Adams and her sister Lilla A. Camfield. The deed to H. Z. Adams conveyed to him an undivided one-half interest in said property and the deeds to Leon H. Adams and Lilla A. Camfield conveyed to each an undivided one-sixth interest in said property. No consideration was received by Carrie A. Love for these deeds. After the deeds were executed, they were handed by the grantor to the defendant H. Z. Adams with the request that he should not cause them to be recorded until after the grantor's death. H. Z. Adams placed the three deeds in a safe deposit box which was under his control. Lilla A. Camfield died on March 19, 1929, leaving a will wherein she devised her interest in the above-mentioned real property to her brother, the defendant H. Z. Adams. During the time the estate of Lilla A. Camfield was being administered, it became necessary to refinance an incumbrance on the property the record title to which stood in the name of Carrie A. Love, and, because of the reference in the Camfield will to an interest of the testator in said property, the title company which was handling the escrow in connection with the renewal of the incumbrance objected to making a certificate of title upon said real property. With the knowledge and consent of the record owner, Carrie A. Love, the deeds theretofore executed by her on July 25, 1923, were recorded on July 24, 1930. Shortly thereafter H. Z. Adams individually and as executor of the will of Lilla A. Camfield, Leon H. Adams, and Carrie A. Love joined in the execution of a new incumbrance which was placed upon the above-mentioned real property. On February 14, 1931, H. Z. Adams executed and delivered to Carrie A. Love a quitclaim deed whereby he conveyed to her all interest which he had in said property. This deed was recorded on the date of its execution. On May 25, 1931, H. Z. Adams executed and delivered to Carrie A. Love a grant deed whereby he conveyed to her an undivided one-sixth interest in said property. This deed was likewise recorded on the date of its execution. H. Z. Adams received no consideration for the execution of either of these deeds, which are the conveyances attacked by plaintiff as fraudulent. In the meantime, on April 2, 1926, a judgment against H. Z. Adams was rendered in an action instituted by James A. Knudson against said H. Z. Adams for the purpose of foreclosing a mechanic's lien on other property owned by H. Z. Adams. On April 2, 1931, the sheriff of Orange county sold the property incumbered by the mechanic's lien to the plaintiff, Anne L. Knudson, administratrix of the estate of James A. Knudson, for the sum of $22.50, and a deficiency judgment for $20,500 against H. Z. Adams was docketed. Thereafter, on April 2, 1931, Anne L. Knudson, as administratrix of her husband's estate, brought an action against H. Z. Adams on the aforesaid deficiency judgment and recovered judgment against H. Z. Adams for the sum of $20,500 and costs. A writ of execution was issued on the last-mentioned judgment and was returned wholly unsatisfied.

[1] In her appeal from the judgment rendered against her, appellant attacks a number of findings made by the trial court on the familiar ground that the findings are lacking in evidentiary support. It is particularly urged that the court's finding that there was no delivery of the grant deeds executed by respondent Carrie A. Love on July 25, 1923, to the grantees named in said deeds is vulnerable to attack on the above-mentioned ground. In this connection, it is contended that a specific finding that the deed to Lilla A. Camfield was "placed in the safety deposit box of the defendant Carrie A. Love" is entirely lacking in evidentiary support. The contention is correct. The evidence which was presented to the court established that the three deeds which were executed by Carrie A. Love on July 25, 1923, were given to H. Z. Adams by the grantor and that he deposited all of them in the same place, which was a safe deposit box under his control. In another finding the court found that the three deeds which

were executed by Carrie A. Love on July 25, 1923, "were placed in a safety deposit box used jointly by her and the defendant H. Z. Adams." The only evidence which was presented to the court which tended to show that the place of deposit was used jointly by H. Z. Adams and Carrie A. Love consisted of the testimony of H. Z. Adams to the effect that he was quite sure that there were other papers of Carrie A. Love in the Box. All other evidence respecting the safe deposit box indicated that it was the box of H. Z. Adams and under his exclusive control. It is hardly necessary to observe that the situation might have been quite different if there had been presented to the trial court evidence which had indicated that the place of deposit was in fact used jointly by H. Z. Adams and his sister, Carrie A. Love. Suffice it to say, the present record entirely fails to show joint user, and the court's finding to that effect is not sustained by the record.

[2] In connection with her attack upon the finding of nondelivery of the above-mentioned deeds, appellant points out that, although the trial court expressly found that there was no delivery, it also found that "the only title which the defendant H. Z. Adams had in said real property during the time a record interest stood in his name, and being from the date of the recording of the grant deed from Carrie A. Love to H. Z. Adams in 1930, to the date the property was reconveyed by him to Carrie A. Love, was a naked legal title." It is objected that the finding that respondent H. Z. Adams held bare legal title to the land by reason of the recordation of the deed is utterly inconsistent with the express finding that the deed was never delivered to him. The criticism is proper. If there was no delivery of the deed, no title of any sort became vested in H. Z. Adams. It will be consistent with orderly procedure to give consideration first to appellant's contention that the court's finding of nondelivery of the deeds executed in favor of H. Z. Adams and Lilla A. Camfield is not supported by the evidence.

[3] The circumstances which surrounded the execution of the three deeds by Carrie A. Love on July 25, 1923, and the subsequent disposal of them are established by evidence as to which there is no conflict. It appears therefrom that, after the deeds were executed, they were given by the grantor to H. Z. Adams with the request that he place them in his safe deposit box and that the deeds should not be recorded unless "something happened" to the grantor. The grantor testified that by the expression "something happened" she meant if she should die. It is undisputed that the grantor received no valuable consideration for the execution of the deeds. The record indicates that, after the deeds were placed in the safe deposit box of H. Z. Adams, they remained in the place of deposit until July 25, 1930, when they were taken from the box and with the full knowledge and consent of the grantor were recorded. The record shows that the reason for recordation on the aforesaid date was that the title company which was handling the escrow in connection with the renewal of an existing incumbrance upon the property declined to issue a certificate of title on the property by reason of the fact that the will of Lilla A. Camfield which was then being probated contained a reference to her interest in the property and devised this interest to H. Z. Adams.

From the above-undisputed facts it appears that there was, first, manual tradition of the three deeds to the grantee named in one of the deeds; second, that there is no evidence which tended to show that the grantor intended to exercise any dominion over the deeds after they were given to H. Z. Adams; third, the grantor did not thereafter attempt to exercise any dominion over the deeds; fourth, the only condition which the grantor imposed when she surrendered possession of the deeds to H. Z. Adams was that he should not cause the deeds to be recorded unless she should die, in which event they should be recorded and "given to the heirs"; fifth, the deeds were, however, recorded prior to the grantor's death with her knowledge and consent.

The establishment of the above-mentioned facts by evidence, which is in no wise conflicting, impels us to the conclusion that the trial court's finding that there was no delivery of the deeds in which H. Z. Adams and Lilla A. Camfield were named as grantees is not supported by the evidence. No consideration is given to the question of delivery of the deed in which Leon H. Adams was named as grantee, since the court's findings recite that the action was dismissed as to him prior to the trial of the cause.

[4-6] In the final analysis, the essential and controlling element which must be discovered in determining whether there has been delivery of a deed is the intention of the grantor, and this essential matter of the grantor's intention is a question of fact which is to be determined by the trial court from a consideration of all the evidence in a given case bearing upon the question. Williams v. Kidd, 170 Cal. 631, 638, 151 P. 1, Ann. Cas. 1916E, 703; Hefner v. Sealey, 175 Cal. 18, 164 P. 898; Hotaling v. Hotaling, 193 Cal. 368, 381,

224 P. 455, 56 A. L. R. 734; Lavely v. Nonemaker, 212 Cal. 380, 387, 298 P. 976; Hodoian v. Garabedian, 79 Cal. App. 762, 251 P. 227; Beyerle v. Calif. Surety Co., 120 Cal. App. 236, 238, 7 P.(2d) 1034. However, the rule that the matter of the grantor's intention is a question of fact which rests in the determination of the trial court is necessarily qualified by the limitation that it must be reached upon a consideration of all evidence bearing upon the question. In other words, the trial court's determination that the grantor did not intend to divest herself of title is not conclusive upon a reviewing court if there is no conflict in the evidence and if it unmistakably indicates the existence of an intention to part with title.

[7-11] It is our conclusion that the evidence which was presented to the trial court did unmistakably point to the existence of an intention on the part of the grantor to divest herself of title when she gave the deeds to her brother, H. Z. Adams. There is no evidence indicating an intention on her part to exercise any dominion over the deeds after she parted with possession of them. It appears that the only statement she made was an oral request that they be not recorded unless she should die. Such a reservation is by no means unusual and would not prevent the delivery from being effective if in fact she intended to deliver the deeds. Treat v. Treat, 170 Cal. 329, 335, 150 P. 53, 57; Stewart v. Silva, 192 Cal. 405, 221 P. 191. There is no intimation that the grantor was attempting to effectuate a testamentary scheme to avoid probate of her estate or the payment of collateral inheritance taxes. Such an inference would be repelled by the fact that she retained one-sixth of the property in her own name when she executed the three deeds on July 25, 1923, and there is no evidence that she was in poor health on the aforesaid date. Estate of Clampitt, 112 Cal. App. 502, 297 P. 54. The undisturbed possession of the deed in which H. Z. Adams was named as grantee by him for a period of seven years was prima facie evidence of both an absolute delivery and of an intent on the part of the grantor to vest in him the title to the property described in the deed. Merritt v. Rey, 104 Cal. App. 700, 705, 286 P. 510. The record fails to show the production of any evidence sufficient to rebut this prima facie showing. The subsequent recordation of both deeds with the grantor's knowledge and consent is likewise prima facie evidence of delivery. Dockstader v. First National Bank of Lemoore, 104 Cal. App. 169, 172, 285 P. 715. No evidence tending to rebut this prima facie showing was presented. The facts that Carrie A. Love continued to live on the property after she had executed the deeds and paid the taxes assessed against it and received the proceeds which were derived from it did not indicate an intention on her part not to divest herself of title and would not prevent the delivery of the deeds from being effective. Stewart v. Silva, supra. The fact that the deeds to H. Z. Adams and Lilla A. Camfield were voluntary and that the grantor received no valuable consideration for their execution did not affect the validity of these deeds as conveyances. Section 1040, Civ. Code; Lieman v. Golly, 178 Cal. 544, 174 P. 33; Pomper v. Behnke, 97 Cal. App. 628, 276 P. 122; Haller v. Haller, 102 Cal. App. 370, 375, 283 P. 94.

[12-16] It is also our conclusion that the circumstances which surrounded the execution of the deeds by Carrie A. Love on July 25, 1923, and the manual tradition of these instruments to H. Z. Adams indicate that the grantor intended to reserve a life estate in the property in herself. This intention is particularly manifested by her direction that the deeds should not be recorded until after her death. The effect, therefore, which was produced by the delivery of the deeds was, first, to vest in H. Z. Adams the title in fee to an undivided one-half interest in the property subject to a life estate in the grantor as to which life estate he was the trustee for the grantor (Des Granges v. Des Granges, 175 Cal. 67, 165 P. 13); and, second, to vest in Lilla A. Camfield a title in fee to an undivided one-sixth interest in the property subject to a life estate in the grantor. H. Z. Adams, who was made the depositary of the deed in which Lilla A. Camfield was named as grantee, became the trustee for said grantee. Bury v. Young, 98 Cal. 446, 33 P. 338, 35 Am. St. Rep. 186; Des Granges v. Des Granges, supra. Upon the death of Lilla A. Camfield on March 19, 1929, H. Z. Adams became vested eo instante with the title in fee to an additional one-sixth interest in the land by virtue of the provisions of the Camfield will whereby she expressly devised to him her "share in home place which our father left." Estate of Yorba, 176 Cal. 166, 169, 167 P. 854; Schade v. Stewart, 205 Cal. 658, 660, 272 P. 567. The fee title to this additional one-sixth interest which H. Z. Adams thus acquired was, however, subject to a life estate in Carrie A. Love as to which life estate H. Z. Adams was trustee for the life tenant. The subsequent recordation of the deeds to H. Z. Adams and Lilla A. Camfield on July 24, 1930, had no effect upon the title to the land which had become vested as above stated on July 25, 1923, when Carrie A. Love

executed the deeds and delivered them to H. Z. Adams. The grantor at that time had clearly indicated her intention to part with possession of the instruments of conveyance and to exercise no further dominion over them and to divest herself of all title to the land other than a life estate.

[17, 18] There remains for consideration appellant's objection that the trial court's finding that the deeds executed by respondent H. Z. Adams to his sister Carrie A. Love during the year 1931 were not made for the purpose of hindering or delaying or defrauding appellant is lacking in evidentiary support. The language of the court's finding with respect to the execution of these instruments is as follows: "The court further finds that the quitclaim deed executed and recorded by H. Z. Adams on or about the 14th day of February, 1931, in favor of the defendant Carrie A. Love to all of his interest in said real property, together with the grant deed executed by H. Z. Adams in favor of Carrie A. Love, dated the 25th day of May, 1931, to an undivided one-sixth interest in said real property, were not made for the purpose of hindering or delaying or defrauding plaintiff, or other creditors of H. Z. Adams, or for any other purpose other than to reconvey to Carrie A. Love, the real owner of said property, the naked legal title to an interest in said real property placed in the name of the defendant H. Z. Adams for the purpose of refinancing the encumbrance upon said property, and to clear the title of the apparent cloud upon the same caused by a provision in the will of Lilla A. Camfield attempting to devise an interest in said real property."

While it is obvious that the trial court's finding that the deeds from H. Z. Adams to Carrie A. Love were not made for the purpose of hindering or delaying or defrauding appellant or other creditors of H. Z. Adams would have been more definite and certain if the qualification that the deeds were made only for the purpose of reconveying to Carrie A. Love the bare legal title which had been placed in H. Z. Adams for the purpose of refinancing an existing incumbrance upon the land had been omitted, nevertheless there is an express finding of the trial court that the deeds were not executed for the purpose of hindering or delaying or defrauding appellant or other creditors of H. Z. Adams.

The finding is not vulnerable to appellant's attack. When the deeds mentioned in the above-quoted finding were executed, respondent H. Z. Adams was vested with fee title to an undivided two-thirds interest in the land subject to a life estate in Carrie A. Love, of which life estate he was the trustee for Carrie A. Love. Carrie A. Love's equitable interest in the land could not be subjected to the payment of the debts of H. Z. Adams. Breeze v. Brooks, 71 Cal. 169, 9 P. 670, 11 P. 885; Bank of Cottonwood v. Henriques, 91 Cal. App. 88, 266 P. 836; Zeller v. Knapp (Cal. App.) 26 P.(2d) 704. As to the life estate in the land to which Carrie A. Love was entitled and of which she was the equitable owner, H. Z. Adams held merely the bare legal title, and at any time during the lifetime of the life tenant could have been compelled to reconvey the same to her. The effect of the execution by H. Z. Adams of the two deeds to Carrie A. Love attacked by appellant as fraudulent was to accomplish a reconveyance to the life tenant of the legal title to that interest in the land of which she was the equitable owner. The creditors of H. Z. Adams could not successfully attack this reconveyance of an interest which they could not legally subject to the payment of their claims. In so far, therefore, as the deeds operated to reinvest Carrie A. Love with legal title to such interest as she had equitably owned since July 25, 1923, the deeds were proper conveyances and in no wise subject to attack as having been executed in fraud of the creditors of H. Z. Adams. It is true that the deeds purported to convey a greater interest in the land to Carrie A. Love than she was equitably entitled to receive. The deed of February 14, 1931, was a quitclaim deed and purported to convey to the grantee whatever interest the grantor had in the property. The deed of May 25, 1931, was a grant deed and purported to convey to the grantee the fee title to an undivided one-sixth interest in the land. However, the fact that these instruments conveyed to the grantee a greater interest than she was equitably entitled to receive did not render them invalid or subject to attack as having been made in fraud of the grantor's creditors. Even if it be assumed that appellant may, by appropriate action, subject to the lien of her judgment whatever interest in the land, legal or equitable, her debtor owns, a matter upon which we express no opinion, she is not entitled to the remedy which she here seeks.

For the reasons stated, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

MUNICIPAL BOND CO. v. CITY OF RIVERSIDE et al.*

Civ. 1427.

District Court of Appeal, Fourth District California.

March 19, 1934.

Rehearing Granted March 23, 1934.

Courts ⚿212.

Court of Appeal had no jurisdiction of city's appeal from adverse judgment on its cross-complaint in equity against city treasurer and his surety for misappropriation of amounts paid by property owners on account of street improvement bonds; Supreme Court having exclusive jurisdiction (Const. art. 6, § 4; St. 1911, p. 730).

Appeal from Superior Court, Riverside County; Benjamin F. Warmer, Judge.

Action by the Municipal Bond Company, a corporation, against the City of Riverside and others, in which the City filed a cross-complaint against its codefendants. From a portion of the judgment denying recovery from the City and one codefendant, plaintiff appeals, and, from a portion denying recovery on the cross-complaint, the City appeals. On the City's motion to dismiss plaintiff's appeal or affirm the judgment for the City and plaintiff's motion to set aside an order dismissing the City's appeal.

Plaintiff's motion granted, order of dismissal set aside, and cause transferred to the Supreme Court.

George W. Crouch and Roscoe R. Hess, both of Los Angeles, for appellant.

Eugene Best, of Riverside, for appellant-respondent City.

W. C. Smith and Everett H. Smith, both of Los Angeles, for respondent Maryland Casualty Co.

A. Heber Winder, of Riverside, and W. C. Smith, of Los Angeles, for respondent Dunbar.

Lawler & Degnan, Freston & Files, James A. McLaughlin, Clarence J. Walker, and John L. Rush, all of Los Angeles, amici curiæ.

JENNINGS, Justice.

This action was instituted by the holder of certain street improvement bonds issued pursuant to the provisions of the Improvement Act of 1911 (chapter 397, Stats. 1911, p. 730) to recover from the city treasurer of the city of Riverside and from the surety on his official bond and from the city of Riverside the sum of $2,758.93, which it was alleged had been paid to said city treasurer by the owners of property upon which assessments had been levied to pay the cost of the street improvements and for which assessments bonds had been issued and which said sum was alleged to have been appropriated by the city treasurer to his own use. The city of Riverside filed its answer denying liability to the plaintiff and a cross-complaint against its codefendants, the city treasurer and the surety on his official bond, seeking on behalf of the owners of bonds to recover from said cross-defendants the sum of $5,607.08, which was alleged to have been paid to said city treasurer by property owners in payment of coupons upon bonds issued as aforesaid and in partial redemption of said bonds and appropriated by said city treasurer to his own use. The city treasurer and the surety on his official bond filed separate answers, both to plaintiff's complaint and to the cross-complaint of the city of Riverside, denying liability respectively to plaintiff and to the city. Upon the conclusion of the trial of the issues framed by the pleadings, the trial court rendered judgment in favor of plaintiff for the amount sought with interest thereon against the city treasurer and denied recovery against the city and the surety on the official bond of the city treasurer and denied recovery to the city of Riverside against the city treasurer and his surety on the city's cross-complaint. From that portion of the judgment which denied recovery from the city of Riverside and from the surety on the official bond of the city treasurer, the plaintiff appealed. The city of Riverside also appealed from that portion of the judgment which denied to said city recovery on its cross-complaint. These appeals are presented on the judgment roll alone.

After the city of Riverside had perfected its appeal as aforesaid, a stipulation dismissing said appeal was entered into between the counsel for the respective parties and was filed with this court, whereupon the court made its order dismissing said appeal.

Thereafter the city of Riverside presented a motion to dismiss the appeal taken by plaintiff from that portion of the judgment denying recovery against the city or to affirm the judgment rendered by the trial court in favor of the city. At the time this motion for dismissal or affirmance came on for hearing

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 32 P.2d 661.

the plaintiff moved the court to set aside the order dismissing the appeal of the city of Riverside from that portion of the judgment denying recovery to the city on its cross-complaint from the city treasurer and the surety on his official bond. The appeal of the plaintiff on the merits and the aforesaid motions were submitted to the court for decision.

It is our opinion that the plaintiff's motion to vacate the order of this court dismissing the appeal of the city of Riverside from that portion of the judgment of the trial court which denied recovery to the city of Riverside on its cross-complaint must be granted for the reason that this court had no jurisdiction of the appeal taken by the city of Riverside. The cross-complaint of the city of Riverside alleged that the city treasurer had collected a total amount of $6,813.16, paid to him on account of the principal and interest and penalties on street improvement bonds issued by him in pursuance of the provisions of the Street Improvement Act of 1911, and that of this amount he had misappropriated the sum of $5,607.08, for which he had not accounted to the 1911 improvement bond redemption fund in the city treasury or to the city of Riverside or to the bond owners. Judgment was prayed that the city treasurer and the surety on his official bond be required to pay into the 1911 improvement bond redemption fund of the treasury of the city of Riverside the sum of $5,607.08 "for the benefit of the owners of said bonds."

It is obvious that the city's cross-complaint directed to the city treasurer and the surety on his official bond sought recovery of the amount alleged to have been misappropriated by the treasurer on the theory that the city was the trustee for the bond owners of moneys paid to the city treasurer on account of street improvement bonds. The cause of action alleged in the city's cross-complaint was therefore purely equitable in character, and the appeal of the city of Riverside from that part of the judgment which denied recovery on its cross-complaint was an appeal in an action in equity of which the Supreme Court has exclusive jurisdiction. Section 4, art. 6, Constitution of California. Since this court had no jurisdiction of the appeal taken by the city of Riverside, it possessed no jurisdiction to order the dismissal of the appeal and its order in this regard must, therefore, be vacated. Furthermore, since the cross-complaint filed in the action by the City of Riverside raised an issue that is purely equitable in character, we entertain the opinion that jurisdiction of the entire cause on appeal is in the Supreme Court.

It is therefore ordered that plaintiff's motion for vacation of the order of this court made on June 10, 1933, dismissing the appeal of the city of Riverside, be granted, and that said order of dismissal be vacated and set aside and that the cause be transferred to the Supreme Court.

We concur: BARNARD, P. J.; MARKS, J.

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137 Cal.App. 406

POLK (LONDON GUARANTEE & ACCIDENT CO., Inc., Intervener) v. GARCIA & MAGGINI CO.

Civ. 7316.

District Court of Appeal, First District, Division 1, California.

March 19, 1934.

1. Negligence 🔑134(1).

In absence of admission in pleading, plaintiff must offer some evidence to establish prima facie case of defendant's negligence to recover damages from accident.

2. Insurance 🔑606(5).

As regards claim, in personal injury action, of intervening insurance company which had paid plaintiff workmen's compensation, defendant's settlement of plaintiff's claim did not, in itself, establish liability for accident, and insurer must show defendant's negligence.

3. Compromise and settlement 🔑23(2).

In absence of any evidence to establish prima facie case of liability for accident, question of fraudulent settlement becomes unimportant.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Emory S. Polk against Garcia & Maggini Company and another to recover damages for personal injuries in which London Guarantee & Accident Company intervened. From a judgment of nonsuit, intervener appeals.

Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant.

KNIGHT, Justice.

The intervening plaintiff, London Guarantee & Accident Co., Inc., appeals from a judgment of nonsuit. After the appeal was taken, respondents were adjudged bankrupt, and the trustee in bankruptcy has declined to file a brief; therefore the appeal was submitted for decision on appellant's brief. Upon examining the same, however, it becomes apparent that the points urged therein are insufficient to justify a reversal of the judgment.

The action was brought by the plaintiff Polk, an employee of L. C. Dibert Company, a corporation, against the respondents to recover damages for personal injuries sustained by Polk while working on premises operated by respondents. Appellant was the insurance carrier for the Dibert Company, and on account of Polk's injuries appellant expended under its policy of workmen's compensation insurance sums aggregating more than $4,000. Seeking reimbursement therefor, it commenced a separate action against respondents for such purpose (superior court No. 150113), and subsequently appellant's attorneys were substituted as attorneys for plaintiff in the action brought by Polk (superior court No. 150029). Thereafter the separate action brought by appellant (No. 150113) was dismissed; and the action brought by Polk (No. 150029) was set for trial on January 17, 1928. Shortly before the date of trial, however, the officers of respondents called upon and effected a settlement with Polk for $425. At that time Polk stated to said officers, so they testified, that he was "pretty sore" at the insurance carrier, that his finances were low and he wanted to go east that night and was going. In consummation of such settlement Polk executed a written release, reading as follows: "San Francisco, California. January 12, 1928. In consideration of the sum of four hundred twenty-five dollars ($425.00) and for further good and valuable consideration, the undersigned hereby forever releases Garcia Maggini & Company from all claims or demands which he may now or in the future have against them and particularly such demands or claims as may arise out of injuries alleged to have been suffered by the undersigned on the 14th day of September, 1923, while working upon said company's premises at 128 King Street, San Francisco, California. This is intended as a full release by the undersigned to said Garcia Maggini & Company with respect to all claims arising out of said alleged accident and all litigation pertaining thereto. [Signed] Emory S. Polk. Witness—T. S. Downey. M. A. Walsh."

Upon learning of the settlement and of Polk's departure from the state, appellant filed a complaint in intervention in the present action, setting up, among other things, the payment made to Polk and the execution of the release by him. When the action came on for trial, appellant's attorneys, who, as stated, appeared also for Polk, announced that no evidence would be offered on behalf of Polk; and they proceeded then to prove in support of their complaint in intervention only the payment to Polk by respondents, the execution of the release by Polk, the circumstances under which it was executed, and the amount expended by appellant pursuant to its policy of industrial insurance. Thereupon they rested their case. Respondents then moved for and were granted a nonsuit.

[1, 2] Manifestly, in no case, in the absence of an admission in the pleadings, can a defendant be held liable to respond in damages for an accident where the plaintiff seeking such damages, regardless of the nature of his interest, fails to offer any evidence whatever to establish against the defendant a prima facie case of negligence. And appellant concedes that, inasmuch as it declined to introduce any evidence whatever on the part of the plaintiff Polk, "it was the duty of the trial court to grant a nonsuit as to Polk at the very outset of the case." But it is contended that as to appellant's claim, "by paying Polk, respondent admitted negligence, and therefore, under the law, became liable to pay appellant the amount of compensation expended." The authorities cited and relied upon by appellant fall far short of supporting the contention it makes in this behalf. On the contrary, as held in Rich v. Edison Electric Co., 18 Cal. App. 354, 123 P. 230, 232, the mere settlement of a claim for damages on account of personal injuries does not in itself establish liability for the accident out of which the injuries arose. In so holding the court in that case goes on to say: "It may be, and often is, the case that actions of this character are settled and dismissed, where no liability exists; other considerations entering into the transaction;" and consequently, as there held, if it be claimed that the negligence of the defendant occasioned the injury, it must be so established before damages may be awarded therefor. Nor is there any language used in the written release signed by Polk which can be construed as an admission of negligence or an assumption of liability for the accident.

[3] Appellant urges also that respondents' action in settling with Polk "amounted to a fraud upon the court, of which the law will not permit respondent to take advantage." Obviously, however, in the absence of any evidence at all to establish a prima facie case of liability, the question of a fraudulent settlement becomes entirely unimportant.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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137 Cal.App. 311

RILEY, State Controller, v. GORDON et al.

Civ. 8983.

District Court of Appeal, First District, Division 1, California.

March 12, 1934.

1. Husband and wife 🔑267(7).

Wife's joinder in deed covering community property acquired previous to 1927 is in legal effect but expression of her assent to transfer by husband.

2. Trusts 🔑140(3).

Where trust transferred community property to trustee, surviving spouse to have life estate in corpus with remainder to designated persons and organizations, including relatives of both spouses, remainders thereby created were vested though defeasible.

3. Taxation 🔑887.

Under trust transferring community property to trustee, surviving spouse to have life estate in corpus, remainder to designated persons and organizations, including relatives of both spouses, taxable transfer occurred on creation of trust and not on death of spouse, although market value would be determined as of date of death, as regards inheritance tax (St. 1921, p. 1517, § 17).

4. Taxation 🔑879(1).

Where transfer of community property to trustee with provision that surviving spouse should have life estate in corpus, remainder to designated persons and organizations, including relatives of both parties, was found to have been made in contemplation of death and without valuable or adequate consideration, it would be within inheritance tax statute (St. 1921, pp. 1500, 1501, § 2 and § 1, subd. 2, as amended by St. 1923, p. 693).

5. Taxation 🔑878(1).

Trust transaction *held* in effect transfer by deceased husband of life estate in community property to wife, contingent on her survivorship, and, with her consent, of vested though defeasible interest in remainder, and no title passed from her to any one, so that transfer was taxable in entirety to husband's estate on his death for inheritance tax (St. 1921, p. 1501, § 2, subd. 3).

> In creating trust, community property was transferred to trustee with provision that surviving spouse should have life estate in corpus and on death of survivor trust should terminate and corpus be distributed one-half to designated organizations and persons among whom were relatives of husband and one-half to designated organizations and persons among whom were relatives of wife. No community exemption attached to transfer to beneficiaries other than wife, and these should be taxed according to their relationships to deceased husband.

6. Taxation 🔑873.

Under statute, one-half of community property actually transferred to spouse is exempt from taxation for inheritance tax, but not one-half of all community property without regard to person to whom transfer is made (St. 1921, p. 1500, § 1, subd. 2).

7. Taxation 🔑860.

Inheritance tax statute should receive construction which will make application reasonable (St. 1921, p. 1500).

Appeal from Superior Court, Los Angeles County; C. S. Crail, Judge.

Action by Ray L. Riley, as Controller of the State of California, against Lillian J. Gordon and others. From an order fixing inheritance tax, petitioner appeals.

Reversed.

David Tannenbaum, of Los Angeles (Donald R. Peck, of Los Angeles, and W. H. H. Gentry, of Sacramento, of counsel), for appellant.

George I. Devor, of Los Angeles, for respondent Farmers' & Merchants' Nat. Bank of Los Angeles.

PER CURIAM.

On February 14, 1930, James L. Gordon and Lillian J. Gordon, his wife, with the Farmers' & Merchants' National Bank of Los Angeles, a corporation, executed a declaration of trust by which certain community personal property, acquired by the Gordons

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

previous to the enactment in 1927 of section 161a of the Civil Code (St. 1927, p. 484), was transferred to the bank as trustee; the spouses reserving to themselves the income therefrom during their joint lives. The trust was revocable during the lives of both spouses, but became irrevocable upon the death of either. Upon the death of either spouse the survivor was given a life estate in the corpus of the trust, and upon the death of the survivor the trust was to terminate, and the corpus distributed one-half to designated organizations and persons, among whom are the relatives of James L. Gordon, and one-half to designated organizations and persons, among whom are relatives of Lillian J. Gordon but strangers in blood to James L. Gordon.

The latter died on October 11, 1930. The state controller then filed a petition for the determination, under the provisions of section 17 of the Inheritance Tax Act (St. 1921, p. 1500), of the amount of inheritance tax due by reason of the transfer. The referee filed a report, in which he found that the transfer was a taxable transfer by the husband; that Mrs. Gordon had a life estate in the corpus of the trust, which interest was exempt from tax; and that the remainder was divisible into two equal parts, one portion being taxable to organizations and persons, among whom are the relatives of decedent, and the other taxable to organizations and persons, among whom are relatives of Mrs. Gordon but strangers in blood to decedent. Subsequently objections to the report were filed, by which it was urged that the portion of the trust property passing to the group last mentioned was not taxable upon the death of James L. Gordon and becomes taxable only upon the death of Mrs. Gordon; or, if now taxable, the persons taking this portion of the trust property should be taxed according to their relationship to Mrs. Gordon and not as strangers in blood.

The objections were sustained. The court found that the property transferred was community property acquired by the spouses prior to 1927; that the transfer was made without valuable or adequate consideration, and as to decedent was made by him in contemplation of death. It determined that the one-half of the trust estate passing to the group among whom are the relatives of decedent is now taxable, and judgment was entered fixing the tax upon this portion of the estate alone.

The controller, who has appealed therefrom, contends that in view of the facts the transfer was taxable in its entirety upon the death of Gordon.

[1-3] The interest of the wife in community property has been declared to be a more definite and present interest than that of an ordinary heir (Stewart v. Stewart, 199 Cal. 318, 249 P. 197, 206); but it has been held that the title to such property vests in the husband (McKay v. Lauriston, 204 Cal. 557, 269 P. 519, and cases cited). The courts have so far failed to define the nature of the wife's interest, or to adopt a term descriptive of the powers which she may exercise in regard to such property; but it was held in the following cases that the amendments of 1923 to sections 1401 and 1402 of the Civil Code (St. 1923, pp. 29, 30) do not purport to fix or define the interests of the spouses in community property during their lives. Estate of Phillips, 203 Cal. 106, 263 P. 1017; Trimble v. Trimble (Cal. Sup.) 26 P.(2d) 477. It is clear, however, from the decisions last cited that previous to 1927 at least there was no change in the rule that the title to community property was vested in the husband subject to the statutory restraints upon his power to alienate or incumber the same without his wife's consent, and the power given her to devise a portion thereof. Previous to 1923 she was not empowered to dispose of any of such property; but by the amendments last mentioned she was given testamentary power over a portion, and it was not until the adoption in 1927 of section 161a of the Civil Code that her interest therein was declared to be a present existing and equal interest, subject to the management and control of her husband as provided in sections 172 and 172a of the Civil Code. These enactments have been held to apply only to property subsequently acquired. McKay v. Lauriston, supra. It was also held in Stewart v. Stewart, supra, that said sections 172 and 172a of the Civil Code adopted in 1917 (St. 1917, p. 829) did not have the effect of creating in the wife a vested interest in community property, for, as the court said: "All that the Legislature by these amendments did do, or attempt to do, was to cast about the interest of the wife in both the real and personal property of the community during the continued existence of the marriage relation added safeguards and protection against the fraudulent or inconsiderate acts of the husband. * * *" See, also, McKay v. Lauriston, supra. What was there said applies with equal force to the proviso added to the latter section in 1925 (Stats. 1925, p. 84); and when a conveyance

by the husband in violation of these sections is set aside at the instance of the wife the title revests in the husband. McDougald v. First Federal Trust Co., 186 Cal. 243, 199 P. 11; Lahaney v. Lahaney, 208 Cal. 323, 281 P. 67. The testamentary power given the wife by the amendment to section 1401 of the Civil Code is analogous to the ordinary power of appointment, with respect to which it has been held that it may be created by statute (Chapin on Express Trusts and Powers, § 552), and that it is not necessary that an estate vest in the donee of the power (49 Cor. Jur., Powers, § 1, p. 1248; 21 R. C. L., Powers, § 1, p. 773; Thompson v. Pew, 214 Mass. 520, 102 N. E. 122, 125), and that the appointee will then take title not from the donee of the power but from the one in whom the title is vested (People v. Kaiser, 306 Ill. 313, 137 N. E. 826); also that the power if not otherwise restricted may be as effectually executed by will as by deed (49 Cor. Jur., Powers, § 114, p. 1285). But to whatever the wife's testamentary power may be likened it is plain from the decisions that as to community property acquired previous to 1927 her joinder in a deed thereof is in legal effect but an expression of her assent to the transfer by the husband. Roberts v. Wehmeyer, 191 Cal. 605, 218 P. 22. Nor, as urged by respondents, does Lynch v. Lynch, 207 Cal. 582, 279 P. 653, hold to the contrary. There the property conveyed by the wife was not community property, but, as the court held, had it been, her earlier deed would have carried the interest therein which she subsequently acquired from her husband, who died intestate. This, we think, was the effect of the transfer to the trustee in the present case. Furthermore, the remainders thereby created were vested though defeasible, and this vesting in interest constituted the succession. Consequently the taxable transfer occurred upon the creation of the trust and not upon decedent's death, although the market value thereof would be determined as of the date of death. Estate of Murphy, 182 Cal. 740, 190 P. 46; Riley v. Howard, 193 Cal. 522, 226 P. 393.

[4, 5] The court having found that the transfer was made by Gordon in contemplation of death and without a valuable or adequate consideration, the same would appear to be within the provisions of section 2 of the Inheritance Tax Act (St. 1921, p. 1500), which reads in part as follows: "A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, said taxes to be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted, in the following cases: * * * (3) When the transfer is of property made by a resident, or by a nonresident when such nonresident's property is within this state, by deed, grant, bargain, sale, assignment or gift, made without valuable and adequate consideration (i. e., a consideration equal in money or in money's worth to the full value of the property transferred): (a) In contemplation of the death of the grantor, vendor, assignor or donor, or, (b) Intended to take effect in possession or enjoyment at or after such death." In 1923, subdivision 2 of section 1 of the act was amended by the insertion of the following: "Provided, that for the purpose of this act upon the death of the husband one-half of the community property is taxable under the provisions of this act." Stats. 1923, p. 693. Respondents claim that the proper interpretation of this provision requires the exemption of one-half of the trust estate notwithstanding that the property passed from the husband to others than his wife.

Before 1917 a widow received no community exemption. In that year subdivision 2 of section 1 of the Inheritance Tax Act was amended as follows (St. 1917, p. 880): "Provided, that for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section one thousand four hundred two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act; provided, further, that in case of a transfer of community property from the husband to the wife, within the meaning of subdivisions (3) or (5) of section two of this act, one-half of the community property so transferred shall not be subject to the provisions of this act." This provision covered only community property passing under the intestacy section of the Code; and the second proviso exempts but one-half of the community property transferred.

These provisions were re-enacted in 1921

(St. 1921, p. 1500) and remain unchanged. The intestacy section referred to in these enactments is section 1402 of the Civil Code.

[6] As stated, the provision in question was adopted in 1923. It is clear that this was made necessary by reason of the amendment in that year of sections 1401 and 1402 of the Civil Code (St. 1923, pp. 29, 30). Previously the one-half of the community property passing to the widow in case of intestacy was exempt, and no tax was payable by the husband upon the death of his wife. Before 1923, section 1401 of the Civil Code provided that in case of the death of the wife the community property should belong to the husband; and section 1402 that upon his death one-half thereof should go to the surviving wife. By amendments in 1923 of these sections it was provided by section 1401 that upon the death of either spouse "one-half of the community property belongs to the surviving spouse"; and by section 1402 that property passing from the husband by reason of his death or testamentary disposition to the wife "is subject to administration, his debts, family allowance and the charges and expenses of administration." After these amendments the latter section no longer provided for the inheritance of the community property by the wife, this being covered by section 1401. At the same time the Legislature adopted the provision here involved, and further enacted that: "The one-half of the community property which belongs to the surviving spouse, under the provisions of section one thousand four hundred one of the Civil Code, and, in the case of the death of the wife, the community interest which goes to her husband under the provisions of section one thousand four hundred two of the Civil Code in the absence of her testamentary disposition thereof to another or others, shall not be deemed to pass to such surviving spouse as heir, but shall for the purpose of this act, be deemed to go, pass or be transferred for a valuable consideration, and the said one-half of the community property and the interest last mentioned going as aforesaid to the surviving husband shall not be subject to the provisions of this act." Stats. 1923, p. 694. It was also provided that these amendments should "become effective and in force contemporaneously with the taking effect of amendments to sections one thousand four hundred one and one thousand four hundred two of the Civil Code, which amendments were enacted at the forty-fifth session of the legislature of the State of California and known as chapter eighteen of the statutes of 1923, and not otherwise." Stats. 1923, p. 695. Under the second proviso inserted in subdivision 2 of section 1 of the act in 1917 and 1921 quoted above—and which, as stated, remains unchanged—one-half of the property actually transferred to a spouse is exempt from taxation, but not one-half of all the community property without regard to the person to whom the transfer is made.

[7] As held in Estate of Parrott, 199 Cal. 107, 248 P. 248, the act should receive a construction which will make its application reasonable. We agree with appellant that it cannot fairly be said to have been the legislative intention to extend the community exemption to others than the spouses; otherwise the statute would plainly have so declared.

We are satisfied that the purpose of the several enactments when read together was rather to harmonize the Inheritance Tax Act with the provisions of sections 1401 and 1402, Civil Code, as the same were amended in 1923, and they reasonably bear this construction. The effect of this would be to provide that at least one-half of the community property should be taxable on the death of the husband.

It is clear, we think, that the transaction in question was in effect the transfer by decedent of a life estate in the community property to his wife contingent upon her survivorship, and, with her consent, of vested though defeasible interests in remainder, and that no title or estate passed from her to any one. This being true, it was a transfer within subdivision 3 of section 2 of the act (St. 1921, p. 1500), and was taxable in its entirety to the husband's estate upon his death. Consequently no community exemption attached to the transfer to the beneficiaries other than the wife, and these beneficiaries should be taxed according to their relationships to decedent Gordon.

The order appealed from is reversed.

137 Cal.App. 173

DALLAS v. KNOX-POWELL STOCKTON CO., Inc., LIMITED.

Civ. 5042.

District Court of Appeal, Third District, California.

March 1, 1934.

Hearing Denied by Supreme Court April 30, 1964.

1. Appeal and error 🔑757(1).

On appeal from judgment by alternative method, where appellant has not in his brief, nor in any supplement thereto, printed or set forth any of pleadings, findings, judgment, or evidence in support of claim that judgment was erroneously rendered, no record is presented from which appellate court can determine that error was committed.

2. Appeal and error 🔑931(1).

On appeal from judgment by alternative method, only scant evidence is required to support finding, and such evidence has support of every legitimate inference that may be drawn therefrom.

3. Assignments 🔑9.

Contract to pay, deliver, or assign percentage of value of oil, gas, or royalties, or money from sales contracts, received from leases or drilling sites in designated oil fields, secured through named person, *held* not invalid as attempted transfer of mere possibility not coupled with interest (Civ. Code, § 1045).

4. Licenses 🔑39.

Contract to pay or assign percentage of value of oil, gas, or royalties, or money from sales contracts, received from leases or drilling sites in designated oil fields, secured through named person, *held* not invalid on ground assignee was operating employment agency without license, in absence of evidence sustaining such contention (Gen. Laws 1931, Act 2349).

5. Mines and minerals 🔑83.

Judgment in action on contract to pay, deliver, or assign percentage of value of oil, gas, or royalties, or money from sales contracts, received from leases or drilling sites in designated oil fields, secured through named person, determining assignee's right to commission, *held* not ambiguous and meaningless.

Portion of judgment complained of stated that it was intended to mean and was to be interpreted as statement of exception to proceeds of enterprise of which assignee was to receive 10 per cent.; that it was not intended as a condition precedent; and that it was understood that the 10 per cent. was only to be paid to the assignee after the assignor had received a commission of 20 per cent. for the sale of units, royalties, or per cents.

Appeal from Superior Court, Los Angeles County; Edward Henderson, Judge.

Action by M. Dallas against the Knox-Powell Stockton Company, Inc., Limited. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

M. Tellefson and Libby & Sherwin, all of Los Angeles, for appellant.

Moote & Longcroft, of Los Angeles, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an action wherein and whereby plaintiff seeks to have his rights declared under the terms of a written contract. The plaintiff is the assignee of the original party to the contract and rather than constantly refer to the nominal plaintiff, we will use the term "plaintiff" throughout as meaning the assignor, inasmuch as no point is presented regarding the assignment.

We find it unnecessary to detail the pleadings further than to state that the complaint measures up to the requirements of the statute authorizing an action seeking declaratory relief. The contract presented for construction is in the following words:

"This agreement, made between Al Eyraud and Knox Powell Stockton Company, Ltd., this 8th day of July, 1930, witnesseth:

"Whereas, Knox Powell Stockton Company, Ltd., is contemplating taking over and/or drilling certain leases or drilling sites in the Venice Del Rey oil field, Los Angeles county, California, in connection with or through W. G. Davis, and selling per cents or units therein,

"Now, therefore, for a valuable consideration, receipt of which is hereby acknowledged, it is agreed between the above parties as follows:

"Knox Powell Stockton Company, Ltd., agrees to pay and/or deliver or assign to Al Eyraud ten (10%) per cent. of the value of all oil or gas or royalties, or money received from sales contracts, received by said company from any leases or drilling sites in said Venice Del Rey oil field, secured through or in connection with W. G. Davis. It is understood that said ten (10%) per cent. is only to be paid to said Al Eyraud after said Knox

Powell Stockton Company, Ltd., has received a commission of twenty (20%) per cent. of the sale of units, royalties or per cents.

"In witness whereof," etc.

The present plaintiff is the assignee of Al Eyraud, so that the term "plaintiff," as hereinbefore suggested, as used hereinafter will designate Eyraud.

Upon issue joined and in response thereto the trial court found that the contract was duly entered into for a valuable consideration and that there was no fraud, misrepresentation, or mistake in the negotiations or in the contract. The court further found that the defendant had certain transactions with W. G. Davis, the party named in the contract, and, as a result thereof, took over drilling sites and leases which were within the terms of the contract between plaintiff and defendant. It is further found that a dispute had arisen between the parties to the contract as to the construction thereof and the rights of the respective parties thereunder, as well as to the validity of the contract.

The trial court thereupon determined as a matter of law that the contract was binding and enforceable; that the plaintiff was entitled to receive 10 per cent. of the value of all oil or gas produced or to be produced in the wells described and all royalties received in connection therewith as well as 10 per cent. of the moneys received by defendant from sales contracts or sales of the wells described, or of the leases on or the property used upon the lands on which the wells are located.

Likewise it was determined that the wells described were and each of them was upon lands and leases secured by defendant through and in connection with W. G. Davis within the meaning of the contract. By its judgment the court further decreed as follows:

"That the following portion of said contract was intended to mean and is to be interpreted as a statement of an exception to the proceeds of the enterprise of which Al Eyraud was to receive ten per cent (10%); that it was not intended as a condition precedent, and that plaintiff was not entitled to any portion of said twenty per cent (20%), nor is defendant entitled to credit for any portion thereof which it may not have received.

"'It is understood that said ten (10%) per cent is only to be paid to said Al Eyraud after said Knox Powell Stockton Company, Ltd., has received a commission of twenty (20%) per cent for the sale of units, royalties or per cents.'"

This portion of the judgment is quoted verbatim and may be termed the commission construction and will be hereinafter discussed.

[1] The appeal is presented under what has been termed the alternative method. The brief of appellant neither presents nor refers to the transcript of the evidence excepting in meager and unsatisfactory insertions of random bits of evidence grouped under the heading of "Supplement." The appeal would well come within the rule as announced in Dahlberg v. Dahlberg, 202 Cal. 295, 260 P. 290, that upon an appeal from a judgment by the alternative method, where appellant has not in his brief, nor in any supplement thereto, printed or set forth any of the pleadings, findings, judgment, or evidence offered in support of his claim that the judgment was erroneously rendered, there is no record from which the court on appeal can determine that there was error committed. Notwithstanding, we will take up the points of the appeal as presented by appellant.

The first point urged is that the conclusions of law and the judgment are not supported by the findings. This branch of the appeal is again subdivided into two subheadings listed as "(a)" and "(b)," detailed as follows:

"(a). There was no allegation in the complaint and no proof to show that defendant had secured lease, etc., through or in connection with W. G. Davis, or had received a commission of twenty per cent for the 'sale of units, royalties or per cents' as provided in the contract and there is, therefore, nothing whatsoever due under the contract until such commission is received.

"(b). Plaintiff simply offered the contract in evidence and rested and offered no evidence to interpret the contract or to support any portion of the prayer of the complaint and there is in the record no evidence interpreting the contract or justifying the findings and judgment."

[2] In amplifying the first subdivision appellant sets out alleged paragraphs of the complaint, from a fair reading of which it can be readily seen that the complaint did contain allegations alleged by appellant to be missing. Then on the question of the evidence the language of appellant is to the effect that it challenges respondent to present the evidence. This is rightfully a bur-

den that belongs upon appellant, and, if there were no evidence sufficient to support the finding, then the evidence adduced should be presented to the end that its insufficiency could be made to appear. However, respondent accepted the challenge. In addition to respondent's effort, we have read through the transcript of testimony and find that there was ample evidence to support the finding on the point presented by appellant. On a review, such as this, but scant evidence is required and such evidence has the support of every legitimate inference that may be drawn therefrom.

On the second subdivision we consider the point immaterial as to the source of the proof. True, the plaintiff in the court below did but present the contract and rest. Thereafter the defendant presented fully all of the facts surrounding the execution of the contract, etc., and the plaintiff in rebuttal presented his side of the controversy and the trial went through rebuttal and surrebuttal to the end that the controversy was most fully opened up.

Point two of appellant contains numerous alphabetical subheadings and these will be taken up in order.

(a) Plaintiff was acting as agent for both contracting parties without the knowledge of either and therefore was entitled to no compensation from either.

This contention rests upon the rule as announced in Glenn v. Rice, 174 Cal. 269, 162 P. 1020, and the later cases following the same rule. Appellent presents us with brief excerpts from the testimony to lay a sufficient factual structure upon which to apply the rule. However, the trial court found to the contrary and the finding has abundant support in the evidence, which we deem useless to quote.

(b) No consideration for the contract in that plaintiff was already acting as agent for Davis and in placing him with the defendant company plaintiff was doing no more than he already was obliged to do. Here again the testimony refutes the contention.

[3] (c) The contract is invalid under section 1045 of the Civil Code, in seeking to transfer a mere possibility not coupled with an interest. In support of this contention, appellant cites us to authority holding that the salary of a public officer, which salary is yet unearned, cannot be assigned. The case has no application here. A complete answer to appellant's argument may be found in the case of Cox v. Hughes, 10 Cal. App. 553, 102 P. 956.

[4] (d) The contract is invalid for the reason that plaintiff was operating an employment agency within the meaning of Act 2349, General Laws, 1931, without a license. Nothing in the record or in the transcript lends aid to this contention and appellant itself does not seem to consider it serious enough to do other than make the bare statement that such is the case.

The last contention is that the trial court erred in denying defendant's motion for a new trial.

It appears from the record before us that the present plaintiff had brought separate suit to recover against Davis on a contract with the latter involving practically the same subject-matter. While the cases were not consolidated, the Davis case was tried and when the present case came for trial it was stipulated that this case be determined upon the evidence adduced in the Davis case. The contention is now made that the findings and judgment in the Davis case were different from and in direct conflict with the findings and judgment in the instant case. This seems to be appellant's main argument on the motion for a new trial.

We find no merit in the claim. There may be a thousand different reasons operating in the mind of the trial judge, any one of which might suffice. No motion for a new trial was made in the Davis case and that judgment became final, but was only binding on the parties thereto. However, without going into the more occult sciences, we note that here again the record fails us. We have no way of ascertaining either from the briefs or from the transcript what the findings were in the Davis case. This seems to be due to the mechanics of preparation in that several pages are omitted and the proffered record has no sequence. Did we deem it of sufficient import we would be inclined to permit the record to be corrected in this respect.

[5] Lastly, it is urged that the portion of the judgment hereinbefore referred to as commission construction is ambiguous and meaningless. While the evidence is not presented to us on argument and appellant satisfied itself with the bald statement that the construction is unintelligible, we have no difficulty on construing this provision as decreed by the court.

Again, and perhaps we overemphasize this point, we are pointed to none of the testimony presented to the trial court in aid of its construction of the contract. But as to its intelligibility it shows a determination that the cause relating to commissions was to apply only to earned commission; that the defendant was not entitled to subtract 20 per cent. of the proceeds as a condition precedent to plaintiff's right, but that such an amount was to be allowed defendant only on units or per cents where and when such commission had been earned. In other words, if defendant should make a net sale without commission, the actual transaction should be reflected in an accounting.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, Acting P. J.

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137 Cal.App. 432

In re POMIN.

HYLAND v. CHILDREN'S HOME SOC. OF CALIFORNIA.

Civ. 4905.

District Court of Appeal, Third District, California.

March 19, 1934.

1. Guardian and ward ⚷13(4).

Evidence in proceeding for appointment as minor's guardian *held* sufficient to support court's finding that petitioner was proper person to act as guardian, and that minor's moral and general welfare would be best subserved by petitioner's appointment (Probate Code, § 1406).

2. Guardian and ward ⚷10.

In selecting minor child's guardian as between others than her parents, paramount consideration is child's best welfare and interest (Probate Code, § 1406).

3. Guardian and ward ⚷10.

Children's Home Society, authorized by its articles of incorporation merely to look after welfare of homeless children by finding appropriate homes for them, *held* not qualified to act as guardian of minor child.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding by Guy V. Hyland for appointment as guardian of the person and estate of Mae Pauline Pomin, a minor, opposed by the Children's Home Society of California, which filed a petition for appointment as the minor's guardian. From an order appointing petitioner Hyland as guardian and denying the society's petition, the society appeals.

Affirmed.

Clarence De Lancey, of Oakland, for appellant.

Elliott, Atkinson & Sitton and W. A. Latta, all of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from an order of the superior court of Sacramento county appointing Guy V. Hyland guardian of the person and estate of Mae Pauline Pomin, a minor.

The minor was born May 30, 1920, out of wedlock. Her mother, Anna Bahnsen, surrendered the custody of the child to her mothed, Nicolena Bahnsen, immediately after the birth of the child, who then promptly delivered the child to the Children's Home Society of California for the purpose of procuring a suitable home for her. This home-finding society immediately placed the child in the home of Mr. and Mrs. Elwood Pomin, with the expectation that they would formally adopt the child. The child lived in their home for nearly ten years. She was never adopted by them. After placing the child in the custody of Mr. and Mrs. Elwood Pomin, for the purpose of adoption, the Children's Home Society of California took no further steps to procure the consummation of the adoption. Several years later Mrs. Elwood Pomin died. The child continued to remain in the home of Mr. Elwood Pomin until his death, which occurred in May, 1930. Upon petition therefor the superior court of Sacramento county appointed J. E. Pomin, a brother of Elwood Pomin, deceased, as guardian of the person and estate of the minor child. September 30, 1930, upon application therefor, the letters of guardianship which had been previously issued to J. E. Pomin were revoked. No appeal was taken from that judgment, and it became final.

On June 30, 1930, this respondent, Guy V. Hyland, filed his petition in the superior court of Sacramento county, praying to be appointed guardian of the person and estate of the minor. Notice of the hearing of this petition was duly served on the Children's Home Society of California, which appeared and filed an answer thereto, opposing the appointment of the petitioner as guardian of the minor, and praying that, in the event the court deemed it necessary to appoint a guardian of the minor, the society be appointed as such guardian. The answer of this appellant alleges that the petitioner, Guy V. Hyland, is not a fit or proper person to assume the custody or become the guardian of the minor, and, upon the contrary, alleges that it will be for the best interest of the minor that the Children's Home Society of California be given the custody and guardianship of her person and estate. On September 20, 1930, for the first time, the Children's Home Society of California procured from Anna Bahnsen, the mother of the minor, a relinquishment of her maternal control of the child, which was duly filed with the department of social welfare of the state of California, as required by law. The petition for letters of guardianship was heard on October 4, 1930. Oral and documentary evidence was adduced. It appears that the petitioner, Guy V. Hyland, is married, and maintains a comfortable home at Sacramento; that Mr. and Mrs. Hyland had known the minor for many years while she lived in the Pomin home; that at the time of the death of Mrs. Pomin, Mrs. Hyland was requested by her to care for the minor child, which she promised to do; that upon the death of Elwood Pomin, the petitioner and his wife without opposition immediately took the child with them and maintained and cared for her in their home as their own child; that the child has no estate or property. Mae was called to the witness stand and testified that she had been well and kindly treated by the petitioner and his wife, and that she was happy and contented there and wished to remain with them.

The court thereupon adopted findings to the effect that the petitioner, Guy V. Hyland, is a fit and proper person; that he is able to maintain and care for the minor; that the home of Mr. and Mrs. Hyland is a fit and proper place for her to abide; and that it is for the best interest and welfare of the minor that he be appointed her guardian. Thereupon the opposition of the Children's Home Society of California to the petition of Hyland was overruled; the petition of the society to be appointed guardian was denied; and Guy V. Hyland was appointed guardian of the person and estate of Mae Pauline Pomin, upon giving a bond in the sum of $200. From this order the Children's Home Society of California has appealed.

It is contended the court abused its discretion in denying appellant's petition for letters of guardianship, and in appointing Guy V. Hyland as guardian of the person and estate of the minor child.

[1, 2] The evidence abundantly supports the findings of court that the petitioner, Guy V. Hyland, is a fit, proper, and competent person to act as such guardian, and that the moral and general welfare of the minor, Mae Pauline Pomin, will be best subserved by his appointment as guardian of her person and estate. It sufficiently appears that for nearly fourteen years Anna Bahnsen, the mother of the child, has neglected and abandoned her child, contributing nothing to her maintenance or support; that the Children's Home Society of California took no active interest in procuring her adoption by the parties to whom she was intrusted; that within about two months of the present time the minor will have attained the age of fourteen years, when she will be entitled to select her own guardian. It is a well-established rule regarding the selection of a guardian for a minor child, as between those who do not sustain the relationship of parents, that the court should give paramount preference to what appears to be for the best welfare and interest of the child. Section 1406, Probate Code. When a minor arrives at the age of fourteen years, he may nominate his own guardian, subject only to the approval of the court. Section 1406 of the Probate Code provides in that regard: "In appointing a general guardian of a minor, the court is to be guided by what appears to be for the best interest of the child in respect to its temporal and mental and moral welfare; and if the child is of sufficient age to form an intelligent preference, the court may consider that preference in determining the question. If the child resides in this state and is over fourteen years of age, he may nominate his own guardian, either of his own accord or within ten days after being duly cited by the court; and such nominee must be appointed if approved by the court. When a guardian has been appointed for a minor under fourteen years of age, the minor, at any time after he attains that age, may nominate his own guardian, subject to the approval of the court."

No abuse of discretion on the part of the court appears in the appointment of Guy V. Hyland as guardian of the person and estate of Mae Pauline Pomin, a minor child.

[3] Moreover, in the present case, we are of the opinion the appellant, Children's Home

Society of California, as a corporation, is not qualified to act as the guardian of the person and estate of a minor child. Its articles of incorporation merely authorize it to look after the welfare of homeless and neglected children by finding appropriate homes for them in suitable families into which they may or may not be adopted. Section 2 of its articles of incorporation provides in that regard: "The purposes for which it is formed are and shall be to seek out homeless and grossly neglected children, to place the same in good homes, with adoption or otherwise, and to maintain, until such children reach their majority, an inspection over them and their surroundings; and to assist young women in fitting themselves for the requirements of life; and to conduct such work in harmony and co-operation with the National Children's Home Society; and for these ends to acquire, by purchase, donation, gift, devise, and bequest, real and personal property as the law may permit."

The court therefore properly denied the petition of the Children's Home Society of California to be appointed guardian of the person and estate of the minor.

The order is affirmed.

I concur: PLUMMER, J.

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137 Cal.App. 299

JAMES MILLS ORCHARD CO. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.*

Civ. 4972.

District Court of Appeal, Third District, California.

March 10, 1934.

Rehearing Denied April 9, 1934.

Hearing Denied by Supreme Court May 7, 1934.

1. Banks and banking 🔑154(8).

Evidence *held* to show that bank had actual notice that funds deposited to credit of commission brokers who were indebted to bank were proceeds of plaintiff's grain, and hence bank was liable to plaintiff in conversion to extent of amount of brokers' check presented by plaintiff when bank applied deposit in payment of brokers' debt (Civ. Code, § 3054).

Evidence disclosed that the bank knew that its debtors were commission brokers engaged in selling grain for commission, that the brokers' draft was for the purchase price of the grain as shown by attached warehouse receipts, that the bank knew that the drawing of the draft for the purchase price of the grain with attached warehouse receipts and delivery of brokers' check to plaintiff bore the same date and were part of same transaction, that the check was presented to the bank for payment before the draft was honored, and before payment thereof was returned to the bank, and that at the time the bank dishonored the check on the ground of insufficient funds, there were ample funds in the bank to the credit of the brokers.

2. Banks and banking 🔑154(6).

Where commission brokers, who were indebted to bank, deposited draft for purchase price of barley accompanied by negotiable warehouse receipts indorsed by plaintiff, plaintiff, to recover from bank in conversion, must prove actual knowledge of defect of title of receipts or circumstances amounting to bad faith on part of bank in appropriating funds to payment of brokers' debt (Civ. Code, §§ 19, 3054, 3137).

3. Banks and banking 🔑130(3).

Where commission brokers deposited draft accompanied by negotiable warehouse receipts with bank for collection, bank could not escape liability for conversion as against payee of brokers' check when bank credited amount of draft against brokers' debt to bank, where bank was not holder in due course, in that it had notice of infirmity of title in draft (Civ. Code, § 3133).

4. Estoppel 🔑75.

Plaintiff *held* not estopped to assert title to proceeds of sale of its grain because it indorsed negotiable warehouse receipts and placed them in hands of brokers to enable them to negotiate sale, where bank, which had draft and receipts for collection and applied proceeds in payment of brokers' debt to bank, was in possession of facts charging it with knowledge that plaintiff was entitled to proceeds of draft (Civ. Code, §§ 19, 3054, 3133, 3137).

5. Appeal and error 🔑1050(1).

In suit against bank for conversion of proceeds of sale of plaintiff's grain, error in admitting evidence of oral agreement between plaintiff and its agents of mere consignment of grain for purpose of sale *held* harmless, where same facts were adequately supplied by subsequent letter of instructions which was properly admitted in evidence.

Appeal from Superior Court, Butte County; R. M. Rankin, Judge.

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*Hearing denied 32 P.(2d) 342.

Action by the James Mills Orchard Company against the Bank of America National Trust and Savings Association. Judgment for plaintiff, and defendant appeals.

Affirmed.

W. T. Belieu, of Willows, and C. H. White, Louis Ferrari, and W. E. Johnson, all of San Francisco, for appellant.

George R. Freeman, of Willows, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant has appealed from a judgment of $4,148.79, which was rendered against it in a suit for conversion of money on deposit in its bank. The appellant contends the money was deposited to the credit of Kitrick & Hall, who were grain merchants and brokers, and that it was derived from the proceeds of the sale of barley previously sold and delivered to them by the plaintiff as evidenced by three negotiable warehouse receipts therefor, and that the bank lawfully applied the money to the payment of an existing debt of the brokers represented by their promissory note, pursuant to section 3054 of the Civil Code, without knowledge on its part of any defect of title thereto. It is asserted the finding to the effect that Kitrick & Hall were not the owners of the fund which was credited to the payment of their promissory note, with implied knowledge on the part of the bank of the lack of title thereto, is not supported by the evidence.

In support of the judgment, the respondent declares that the warehouse receipts for the grain which was held in storage by the brokers were indorsed and delivered to Kitrick & Hall in trust, for the sole purpose of enabling them to sell the grain as directed, and that the bank had knowledge of the brokers' lack of title thereto.

The plaintiff is a corporation which owned 3,756 sacks of barley, aggregating 402,700 pounds, which were stored in the De Pue warehouse of Kitrick & Hall at Orland, evidenced by three warehouse receipts therefor. Kitrick & Hall owned and operated several warehouses, including the one where the grain was stored. They were depositors in the defendant's branch of the Bank of America at Oroville, where they had an open current account. They were also indebted to the defendant bank in the sum of $8,000 upon a promissory note due July 7, 1931, and secured by certain designated certificates of stock. About April 22, 1931, James Mills, Jr., vice president of the plaintiff corporation, instructed W. S. Hall, of the firm of Kitrick & Hall, to sell the 3,756 sacks of barley. The following letter was sent to Mr. Hall, directing the sale of the barley for plaintiff:

"James Mills Orchard Corporation, Main
Office, Hamilton City, California.

"April 22, 1931.

"Mr. W. S. Hall, Chico, California.

"Dear Bill: I have been trying to get you by phone but the wind apparently does not permit. I have a hunch that we might get a shower out of this condition today. Buyers in barley have been hounding me now for three days so the market is hot. Some intimated over $1.00. I believe you can get between $1.05 and $1.10. I will leave the price over a dollar entirely to your judgment, so will you make sale of our barley today or tomorrow, getting as much as you can warehouse receipt. The amounts in the different lots are as reported to you last week. Thanks.

"I haven't made a definite check against warehouse, so sell approximate amounts, subject to our check. We won't be many sacks off one way or the other. I will have warehouse receipts brought up to date and deliver them to you when sale is consummated. Scott is checking now and will advise you definitely the number of sacks as soon as telephone conditions permit.

"Yours sincerely,

"Jas. Mills, Jr."

Pursuant to the foregoing directions, Mr. Hall promptly sold the barley to Kettenbach Grain Company of San Francisco for $1.05 per hundred pounds. It was agreed the usual commission of 25 cents per ton was to be charged by the brokers for the sale of the grain. The net amount which remained for the credit of plaintiff upon the sale of the barley was the sum of $4,148.79. Upon receipt of the foregoing authorization to sell the barley, Mr. Hall called the vice president of the plaintiff corporation on the telephone and told him he had a sale for the barley at $1.05 per hundred pounds. The three warehouse receipts for the grain were thereupon indorsed, "James Mills Orchard Co., By B. H. Scott, Asst. Sect.," and personally delivered to Mr. Hall, with direction to sell the grain for $1.05 per hundred. The plaintiff instructed Mr. Scott to accept Kitrick & Hall's "check for that (amount) in lieu of the passing the whole transaction through our name, simply as an accommodation." Mr. Mills, Jr., testified the grain was not sold to the brokers. April 24, 1931, Kitrick & Hall, in compliance with the foregoing agreement, drew their check on the defendant bank in favor of plaintiff for the sum of $4,148.79, which represented the full selling price of the barley, less agreed commissions. The check was presented to the defendant bank for payment April 28, 1931.

On April 24, 1931, which is the date upon which Kitrick & Hall received the warehouse receipts from plaintiff, they drew a draft on Kettenbach Grain Company of San Francisco for $4,198.36, the purchase price of the grain. The three warehouse receipts were attached thereto, and forwarded to them through the defendant bank for collection. The following day this sum, together with other deposited amounts aggregating $5,729.91, was credited to the account of Kitrick & Hall in the bank of the defendant at Oroville. Two days later, on April 27th, W. S. Hall died. Notice of his death was conveyed to the defendant the same day. The return from the Kettenbach draft was actually paid to the defendant bank April 29th. This deposit gave Kitrick & Hall's bank account a total credit of $6,601.96.

Upon notice of the death of Mr. Hall, the defendant bank began an investigation concerning the adequacy of the collateral securities which it held for the payment of the Kitrick & Hall promissory note of $8,000. On April 28th the defendant bank charged against the account of Kitrick & Hall the entire balance to their current account, except the sum of $1.96, and credited the amount of $6,600 to the payment of their promissory note of $8,000. This transfer was made by the bank without notice to plaintiff of the defendant's claim of right to satisfy the banker's lien for the payment of the promissory note pursuant to the provisions of section 3054 of the Civil Code. The appellant claims this transfer of funds was made without knowledge on its part of any infirmity of title of Kitrick & Hall to the negotiable warehouse receipts, or that the plaintiff asserted title to the proceeds of the sale of the grain, and upon the contrary, that the grain was actually sold and delivered to the brokers.

Mr. Stapleton, assistant cashier of the First National Bank of Oroville, testified that he presented to the defendant bank the Kitrick & Hall check of $4,148.79 in favor of the plaintiff, prior to 10 o'clcok on April 28th. This was the same day the bank debited the account of Kitrick & Hall, and credited their promissory note with the sum of $6,600. Payment of this check was refused by the bank on the alleged ground of "insufficiency of funds," although there was then adequate funds with which to pay the check. It was admitted by Mr. Ashley, assistant manager of the defendant bank, that the account of Kitrick & Hall was not debited with the $6,600 item until the afternoon of April 28th. The account of Kitrick & Hall therefore possessed ample funds in the defendant's bank with which to pay the plaintiff's check of $4,148.79 at the time it was presented for payment. Mr. Humphrey the manager of the defendant bank, was in Chico on the day this check was presented to his bank for payment, investigating the value of the securities which the bank held for the payment of the Kitrick & Hall note. Mr. Humphrey then knew of the draft upon the Kettenbach Grain Company of San Francisco and of the warehouse receipts attached thereto, and of the presenting of the $4,148.79 check for payment by the plaintiff.

At the trial, upon evidence of the foregoing facts, the court adopted findings to the effect that plaintiff was the owner of 3,756 sacks of barley which were stored in the De Pue warehouse of Kitrick & Hall at Oroville, evidenced by the three negotiable warehouse receipts therefor; that the grain was consigned to the brokers as its agents, on April 23, 1931, for sale at $1.05 per hundredweight, with an agreement to pay 25 cents per ton as commission for negotiating the sale; that the warehouse receipts were indorsed by the owner and delivered to the brokers in trust for the sole purpose of enabling them to sell and deliver the grain as directed; that the grain was sold to Kettenbach Grain Company of San Francisco on April 24th at the agreed price of $1.05 per hundred pounds, and was paid for by Kitrick & Hall drawing and delivering to plaintiff their check for $4,148.79 on the last-mentioned date, and at the same time drawing a draft upon the San Francisco purchasers thereof for that amount plus commissions, to which draft the indorsed warehouse receipts were attached, and forwarded for collection through the defendant bank at Oroville, which then credited the Kitrick & Hall account in its bank with the full amount of the draft; that the grain was not sold to Kitrick & Hall, and that they had no title or interest therein except as commission brokers for the purpose of consummating the sale of grain as directed by the plaintiff; that at the time of transferring the amount of $6,600 from the account of Kitrick & Hall to the credit of their promissory note, which was held by its bank, the defendant "had notice of the fact that neither said W. S. Hall nor Kitrick & Hall Warehouse Company, a corporation, was the owner of the grain represented by said warehouse receipts, and had notice that said warehouse receipts and the proceeds to be collected on said draft * * * was the property of the plaintiff herein, and had notice that said W. S. Hall was acting as an agent for plaintiff in the transaction for the sale of said barley." The court thereupon rendered judgment against the defendant for conversion in the amount of $4,148.79. From this judgment an appeal was perfected.

The evidence heretofore recited is adequate to support the finding that plaintiff is the owner of the proceeds of sale of barley which belonged to it, amounting to the sum of $4,148.79, which was deposited in defendant's bank to the credit of the account of Kitrick & Hall.

[1, 2] We are of the opinion there is sufficient evidence in the record to show that the defendant had actual notice of the fact that the money which was deposited to the credit of Kitrick & Hall on April 25th, to the extent of the amount of their check of $4,148.79, for the sale of the grain, belonged to the plaintiff, and that the defendant's appropriation of that amount to the payment of the $8,000 note of Kitrick & Hall amounted to a wrongful conversion thereof.

The respondent contends that it is unnecessary to show that the bank had actual knowledge of the defect of Kitrick & Hall's title, and upon the contrary that all that is required is proof of "circumstances sufficient to put a prudent man upon inquiry" regarding that matter. Section 19, Civ. Code; Keeney v. Bank of Italy, 33 Cal. App. 515, 165 P. 735; Lady Washington Cons. Co. v. Wood, 113 Cal. 482, 45 P. 809; 20 Cal. Jur. 234, § 4. Since the draft upon Kettenbach Grain Company for the purchase price of the barley was accompanied by the negotiable warehouse receipts indorsed by the plaintiff, we assume that the law required proof of either actual knowledge of the defect of title of the negotiable instruments or proof of circumstances amounting to bad faith on the part of the defendant in appropriating the funds to the payment of its note of Kitrick & Hall. Section 3137, Civ. Code; Robb v. Cardoza, 110 Cal. App. 116, 122, 293 P. 851; Goodale v. Thorn, 199 Cal. 307, 314, 249 P. 11. Section 3137, supra, provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The following circumstances which are disclosed by the record or reasonably inferred therefrom afford adequate support of the findings and judgment to the effect that the defendant possessed actual knowledge of the fact that the proceeds of sale of the grain, to the extent of $4,148.79, belonged to plaintiff, to wit: The defendant knew that Kitrick & Hall were commission brokers engaged in selling grain for commissions; they knew the 3,756 sacks of barley formerly belonged to plaintiff and were stored in the warehouse of Kitrick & Hall, as the warehouse receipts clearly showed; they knew that the draft upon Kettenbach Grain Company of San Francisco was for the purchase price of this grain as shown by the attached warehouse receipts; they knew that the drawing of the draft for the purchase price of the grain with the attached warehouse receipts, and the delivery of the Kitrick & Hall check of $4,148.79, bearing the same date of April 24th, were a part of the same transaction; the check was presented to the bank for payment before the draft was honored and before the payment thereof was returned to the bank; there were ample funds in the bank to the credit of Kitrick & Hall at the time the defendant refused to pay the plaintiff's check upon the alleged ground of "insufficient funds"; the bank must have known Kitrick & Hall were not the purchasers of the grain, for at the time their check of $4,148.79 was drawn in favor of plaintiff, they had to their credit in the bank only the sum of $2,273.86. Not until after the death of Mr. Hall did the defendant exercise itself to apply the fund to the payment of the $8,000 note. These, and other circumstances disclosed by the record, would seem to be sufficient to charge the defendant with knowledge of the fact that the grain belonged to plaintiff, and that the warehouse receipts conveyed no title to Kitrick & Hall, but upon the contrary were attached to the draft by them as brokers and deposited in the bank for collection against the purchaser of the barley.

It does not appear that the collateral security for the payment of the $8,000 note which is held by the defendant is insufficient with which to satisfy that obligation. It would be a grave injustice to permit the arbitrary conversion of plaintiff's money to the payment of the brokers' note under the circumstances of this case. We are of the opinion there is sufficient evidence to charge the defendant with knowledge of the transaction including the fact that Kitrick & Hall were not the actual owners or holders of the warehouse receipts.

[3] For the foregoing reasons it follows that the defendant did not become the holder of the warehouse receipts in due course of business, under the provisions of section 3133 of the Civil Code, for the reason that it had notice of the infirmity of the title thereto.

[4] Nor is the plaintiff estopped from asserting title to the proceeds of the sale of its grain, merely because it indorsed the warehouse receipts and placed them in the hands of its agents to enable them to negotiate the sale, since the bank was in possession of facts which charge it with knowledge of the fact that plaintiff was the real owner thereof.

[5] The admission of evidence of an oral agreement between the plaintiff and its agents Kitrick & Hall of the mere consignment of the grain for the purpose of sale is harmless, since the same facts are adequately supplied by the subsequent letter of instructions which was properly admitted in evidence and therefore becomes cumulative.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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138 Cal.App.(Supp.) 785

DERSCH v. THOMAS et al.

Civ. 2227.

Appellate Department, Superior Court, Los Angeles County, California.

Feb. 28, 1934.

1. Accession 🔑2.

Under conditional sales contract providing that all parts added to truck by buyer thereof should belong to seller, seller's assignee need not have taken actual possession of new body added to truck by buyer in order to protect its title thereto as against third party who bought body in good faith (Civ. Code, § 3440).

2. Fraudulent conveyances 🔑135.

Statute protecting creditors of possessor of personal property by requiring transfers thereof to be followed by actual change of possession requires such change of possession as is usual and reasonably to be expected under the circumstances (Civ. Code, § 3440).

3. Fraudulent conveyances 🔑132(1).

Alterations in, or additions to, personal property belonging to another do not constitute "transfers" of title within statute providing that transfers of personal property are presumed fraudulent against creditors of possessor if made by him and not followed by actual change of possession (Civ. Code, § 3440).

[Ed. Note.—For other definitions of "Transfer," see Words & Phrases.]

4. Accession 🔑1.

Title passes by accession, and not by transfer, if addition to personal property belonging to another is of such nature that it cannot be removed without injury, or if removable without injury, it becomes component part of property and title passes under contract (Civ. Code, §§ 1025, 3440).

5. Accession 🔑2.

In action for conversion of new body which buyer added to truck, by one who in good faith bought body against assignee of seller of truck under conditional sales contract reserving title to added parts in seller, instruction that new body did not belong to seller's assignee if removable from truck without injury *held* erroneous (Civ. Code, §§ 1025, 3440).

6. Accession 🔑2.

Assignee of seller of truck under conditional sales contract reserving title to added parts in seller *held* not estopped from claiming title to new body added by buyer as against one who bought body in good faith (Civ. Code, §§ 1025, 3440).

7. Accession 🔑2.

Under conditional sales contract providing that all parts added to truck by buyer thereof should belong to seller, title to new body added by buyer was in seller's assignee and could be defeated only by acts or circumstances rendering it inequitable to assert it against claim of subsequent good faith buyer (Civ. Code, §§ 1025, 3440).

8. Accession 🔑2.

Buyer of body of truck must have made inquiry as to state of title regardless of any circumstances arousing his suspicions, and statements of seller which should have aroused his suspicions required him to make more diligent inquiry.

9. Accession 🔑2.

Possession of truck by seller, though some evidence of title, is not sufficient to justify reliance thereon by buyer of body of truck.

Appeal from Municipal Court of Los Angeles; William Frederickson, Judge.

Action by Otto B. Dersch against Charles R. Thomas and others. From a judgment in favor of plaintiff, the Commercial Discount Company and others appeal.

Reversed and remanded for a new trial.

Hardy & Ludwick and Vernon W. Hunt, all of Los Angeles, for appellants.

Charles Robert McCarty, of Los Angeles, for respondent.

SHINN, Judge pro tem.

This is an appeal by defendants Commercial Discount Company, L. Clark Conner, and R. S. Tatum from a judgment entered against them after verdict, in an action for conversion of an auto truck body.

Commercial Discount Company (herein referred to as appellant), as assignee of Conner, held a conditional sales contract on a combined autotruck and trailer (hereinafter called the truck) sold to one De La Cuesta.

The contract was in the usual form of conditional sales contracts, and provided, among other things, that all parts, accessories, and equipment added to the truck should become a part thereof and belong to the vendor. De La Cuesta removed the body which was on the truck and built a new body thereon, securely bolted to the chassis, but removable without damage. He used the truck and body for several months, during which time he became indebted to respondent Dersch in the sum of approximately $400. Dersch demanded payment of the account and De La Cuesta brought the truck to Dersch, had the latter remove the body and take it for the bill. There is some doubt whether title passed to Dersch under this agreement, inasmuch as there was also an agreement to resell to De La Cuesta, but it is not material whether Dersch became a purchaser or pledgee. We shall therefore take his construction of the contract and assume that he was a purchaser.

De La Cuesta defaulted in payments under the conditional sales contract and appellant, Commercial Discount Company, repossessed the truck, and at a later date took possession of the truck body in a replevin action against Dersch. The latter thereupon sued and recovered damages, both compensatory and exemplary, for the taking, upon the theory that he was a purchaser of the body in good faith. Conner and Tatum were held liable because they took an active part in the repossession by the company.

[1] At the request of respondent, the jury was instructed in substance that section 3440, Civ. Code, was applicable to the case, and that the claim of title of appellant was fraudulent and void as against a purchaser in good faith unless possession of the new body had been taken and retained by appellant. The evidence shows without conflict that after the body was built it remained in the possession of De La Cuesta until it was sold to respondent, and appellant makes no claim that it ever had possession thereof. In view of these admitted facts, the effect of the instruction complained of was to tell the jury that the provision of the contract, that added parts would belong to the vendor, was void as against respondent, provided he was a purchaser in good faith.

[2] This instruction was given under a misapprehension of the scope of the section. The Supreme Court said in Cosby v. Cline, 186 Cal. 698, 200 P. 801, 802: "Section 3440, on which the defendant relies, describes a certain variety of constructive fraud, whereby a transfer is declared to be fraudulent as a matter of law, regardless of the actual motives or intentions of the parties. Such a provision cannot be extended beyond its plain meaning, nor be made to apply to cases which do not meet the conditions there described." To apply the provisions of the section to the transaction in question would give them a meaning which, clearly, was never intended. The purpose of the provisions which are material here, is to protect against fraud and deception arising out of secret transfers and ostensible ownership inferable from the fact of possession. The change of possession required is that which is usual and reasonably to be expected under the circumstances. The section by its terms excludes certain classes of property, actual delivery of which, by removal from one location to another, would be impracticable. The manifest purpose is to dispense with an actual change of possession where that would be unreasonably burdensome and where to require it would lead to absurd results.

[3, 4] Alterations in or additions to articles of personal property belonging to another do not constitute transfers of title within the meaning of the section. If the addition is of such a nature that the thing added cannot be removed without injury, title passes by accession and not by transfer. Civ. Code, § 1025. Even though the thing added is removable without injury, if it becomes a component part of that to which it is added, and if, by virtue of contract, title passes, the transac-

tion has all the characteristics of a title acquired by accession. Such are the facts we have before us. Delivery of the truck body to appellant would have defeated the purpose of the parties not only in the construction of the body, but in the sale of the truck as well. The possession retained by De La Cuesta was not of the body as a separate piece of property but as a part of the truck itself. Appellant's title was acquired not by purchase, but by addition to that which it already owned. De La Cuesta had a right to possession of the whole. Respondent's attempted purchase was of a part, only, of a truck belonging to appellant. We are not considering a purchase of the body as a separate unit by one who had no knowledge that it was in use as a part of a motor vehicle. We are unable to see how the provisions of section 3440 can reasonably be applied to these facts. Certainly there can be found no language in the section which makes it applicable unless the transaction is one clearly included in the class of transfers intended to be regulated. We hold the reverse to be true and that the section does not relate to cases where personal property is altered or added to in such a manner that the parts added become and remain a part of the property itself. We conclude, therefore, that a transfer of possession to appellant was nonessential to the full protection of its title. It was error for the court to give the instruction.

[5] The jury was also instructed as to the law of accession, as found in section 1025, Civ. Code, but the instruction went further and declared in substance that the body could be lawfully removed if such removal could be accomplished without injury, and that there was no law by which the body, under such circumstances, would belong to the owner of the truck.

This instruction ignored the right of the parties to contract with relation to such added parts. In effect it told the jury that the question of appellant's title depended upon the removability of the body without injury, and that if it could be so removed it would belong to the vendee and not the vendor. No other instruction was given which gave any effect to the provision of the contract which reserved title in the vendor. All of the evidence on the subject was to the effect that the body could be removed without injury and the jury, in considering this evidence and in following the instruction, naturally would have concluded that it was lawful for De La Cuesta to remove and sell the truck body, notwithstanding the provisions of the contract. The giving of this instruction, without other instructions giving recognition to the rights of the parties to contract as to the title, constituted error.

[6] The more serious question is presented whether the attempted sale by De La Cuesta passed any title to respondent. He had only a conditional title to sell and that was in the truck as a whole. If his vendee acquired a better title it could only be because the bona fides of his purchase, coupled with some act or omission of the holder of the reserved title, precluded the latter from asserting his rights in opposition to those of the purchaser. We do not see how this could be true under the facts of the case as they are shown by the record.

When the truck was sold to De La Cuesta, it was with the understanding that it was not suitable for his purposes, namely, hauling cattle, and that he would have to rebuild the body or construct a new one. The vendor Conner knew that a new one was built, and later saw it in use on the truck. He had no reason to anticipate that the alteration was not permanent or that it was the intention of De La Cuesta to remove the new body. He was not guilty of negligence in allowing De La Cuesta to retain possession of the body; he had no alternative, for De La Cuesta was entitled to possession. Appellant, as assignee of Conner, is in the same position. The body was a part of the truck from the time it was built until it was removed therefrom by respondent at the request of De La Cuesta, and the latter at no time had possession of the body except while it was a part of the truck. When respondent demanded payment of his bill, De La Cuesta surrendered the body to him, as heretofore stated, and later rented the body from respondent for $10 per month; the payments to continue until the debt was fully paid. The body was placed upon another truck, belonging to a third party, which was used by De La Cuesta. There was nothing in the rental transaction that would operate to impair such rights as Dersch had acquired as pledgee, or purchaser. Appellant had no knowledge of the removal or disposal of the body.

[7] The rights of a vendor of property under a conditional sales contract, in so far as the same are here involved, are firmly established by the decisions. Appellant held the legal title, and that title could be defeated only by acts or circumstances rendering it inequitable to assert it against the claims of creditors or a subsequent purchaser in good faith. Van Allen v. Francis, 123 Cal. 474,

56 P. 339; Lundy Furniture Co. v. White, 128 Cal. 170, 60 P. 759, 79 Am. St. Rep. 41; Bice v. Harold L. Arnold, Inc., 75 Cal. App. 629, 243 P. 468. Appellant was not negligent in allowing its property to remain in the possession of De La Cuesta in accordance with the terms of the contract, nor was it required to anticipate that he would remove the body and sell it. Greene v. Carmichael, 24 Cal. App. 27, 140 P. 45; Pac. Accept. Corp. v. Bank of Italy, 59 Cal. App. 76, 209 P. 1024.

When it is shown that appellant, or its assignor, has not been guilty of any act or omission, nor responsible for any deceitful appearances which contributed to respondent's act of purchase, the claim of estoppel is sufficiently answered. But the same conclusion is reached from a consideration of the acts of respondent preceding and connected with his acquiring possession of the property.

[8] At the time the body was delivered to respondent, he was informed by De La Cuesta that he was being "pressed"; that he was having trouble with the finance company; that they were pressing him hard and taking all that he had; that he could not pay respondent's bill "on account of the finance company crippling him to a certain extent." These statements gave respondent good reason to suspect that the truck was being purchased under contract held by the finance company. They were sufficient to require a considerably greater measure of caution and more diligent inquiry as to the title to the property than would have been required had the statements not been made. Marker v. Williams, 39 Cal. App. 674, 179 P. 735. Respondent, however, made no such inquiry. He testified that he had no information as to the provision of the contract reserving title to such parts as might be added to the truck and did not know of any adverse claims to the body, but he did not deny that he knew the truck was being purchased under a conditional sales contract, nor state that he believed De La Cuesta to be the owner thereof. It is somewhat significant that he was not questioned concerning the matter. He made no inquiry as to the right of De La Cuesta to remove the body from the truck and sell it. It does not appear that he knew the body was newly built or that it was a different body from the one that was on the truck at the time of its purchase.

It was, of course, the duty of respondent, regardless of any circumstances arousing his suspicions, to make inquiry as to the state of the title to the property. The rule of caveat emptor applies.

It must be assumed that inquiry would have disclosed the fact that De La Cuesta had only a conditional title and could make no sale of the body apart from the truck, and that in no event could he convey a clear title to either until he had paid out the contract in full.

[9] Respondent was especially remiss in failing to make inquiry as to the title he sought to acquire, for the reason that he had ample warning that De La Cuesta was obligated to a finance company, with which he was having difficulty on account of his straitened financial circumstances. Respondent was not diligent; he acted voluntarily and his good faith does not excuse or overcome the results of his negligence. The use of the conditional sales contract has become common, if not customary, in the purchase of motor vehicles. Possession of such a vehicle, while some evidence of title, is far from sufficient to justify reliance thereon by a purchaser. See cases cited, supra.

We find in the foregoing facts no dereliction of duty upon the part of appellant, or its assignor Conner, no act which misled respondent or upon which he acted, and consequently no basis for the application of the doctrine of equitable estoppel against appellant. Upon the contrary, we believe it clearly appears that respondent's present position is due solely to his imprudent purchase without even an attempt to ascertain the facts he should have known before he acted.

Respondent was awarded $400 actual and $1,600 exemplary damages against Commercial Discount Company, Conner, and Tatum. It is urged on behalf of each defendant that the evidence does not warrant an award of exemplary damages. Our conclusions expressed as to the insufficiency of the evidence to justify the verdict dispose of the entire case. As appellants had a right to take possession of the truck body, their motives in repossessing it are not material, and they incurred no liability in taking what rightfully belonged to appellant Commercial Discount Company.

The judgment is reversed, and the cause remanded for a new trial; appellants to recover costs of appeal.

BISHOP, Acting **P. J.**, and **FOX, J.**, concur.

139 Cal.App.(Supp.) 791

PEOPLE v. BABDATY.

Cr. A. 1020.

Appellate Department, Superior Court, Los Angeles County, California.

March 14, 1934.

1. Lotteries ⚷3.

"Lottery" consists in disposition of property, on contingency determined by chance, to person who has paid valuable consideration for the chance of winning the prize (Pen. Code, §§ 319, 320).

[Ed. Note.—For other definitions of "Lottery," see Words & Phrases.]

2. Lotteries ⚷3.

Tango game, as conducted in defendant's parlor, *held* "lottery," authorizing conviction of contriving and drawing lottery notwithstanding game also included right of each player to use of a "skill ball," which is one whose lodging place was counted on his card and not on that of other players (Pen. Code, §§ 319, 320).

Evidence disclosed that $5 worth of merchandise was offered as prize; that some sixty players participated, each having obtained cards at 10 cents a piece; that the cards bore 24 numerals, selected from among the numerals 1 to 75 inclusive, arranged in five rows, with middle space in middle row left blank; that numbered boxes, divided into 75 2-inch compartments, were placed across counter, convenient to players; that each participant in turn threw ball into one of compartments and, as numbers were called, players noted them on cards by covering them with markers; that game ended when a player had a row covered with markers; and that person with winning row received merchandise put up as prize.

3. Criminal law ⚷200(1).

Person may not be convicted and sentenced for crime and also convicted and punished for act which is incident of such crime.

4. Criminal law ⚷200(1).

Where defendant was convicted on count charging contriving and drawing of lottery, conviction on another count for violation of ordinance prohibiting possession of devices used in contriving and drawing lottery, revealed by same evidence, was unauthorized (Pen. Code, § 320).

5. Criminal law ⚷200(1).

Where defendant, who conducted tango parlor, was convicted on count charging conducting and drawing of lottery, conviction on another count charging him with keeping, conducting, and maintaining place where certain game, not specifically mentioned in statute, was played was unauthorized (Pen. Code, §§ 320, 330, 330a).

6. Gaming ⚷87(4).

Count charging that defendant conducted banking game for money, but not alleging that game was "played" with device for money or other representative of value, *held* not to charge offense under statute denouncing dealing or carrying on of banking game "played" with device for money or other representative of value (Pen. Code, § 330).

[Ed. Note.—For other definitions of "Play," see Words & Phrases.]

7. Criminal law ⚷984, 1188.

Where conviction was sustainable only on first count, and trial court, on first count, had imposed jail sentence to be suspended on condition that defendant pay fine on second count, sentence on first count became inoperative, requiring judgment to be set aside for rendition of new and proper judgment.

Appeal from Municipal Court of City of Los Angeles; Thomas L. Ambrose, Judge.

Albert Babdaty was convicted on one count for violation of Penal Code, § 320; on a second count for violation of section 330; on a third count charging the keeping and maintaining of a place where a certain game was played; and on a fourth count charging a violation of an ordinance of the City of Los Angeles prohibiting the possession of instruments, devices, and objects used and intended to be used in contriving, preparing, setting up, and drawing a lottery; and he appeals.

Reversed, with directions.

J. Q. Gilchrist and Hardy & Ludwick, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Ernest K. Maine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

BISHOP, Judge.

[1, 2] Appellant was found guilty and sentenced on each of four counts, all arising out of the fact that on October 28, 1933, he conducted a tango parlor in the city of Los Angeles. In count one appellant was charged with violating section 320 of the Penal Code, in that he contrived, prepared, set up, proposed, and drew a lottery. That tango, as played in appellant's parlor, was a lottery is too clear to permit of serious argument to the contrary. As pointed out in People v. Hecht (1931) 119 Cal. App. (Supp.) 778, 784, 3 P.(2d) 399, 401,

and more recently in People v. Cardas (Cal. Super. 1933) 28 P.(2d) 99: "the elements of a lottery are (1) The disposition of property (2) upon a contingency determined by chance (3) to a person who has paid a valuable consideration for the chance of winning the prize." This analysis is based on the definition of lottery given in section 319 of the Penal Code, which concludes with the declaration that a lottery is a lottery "by whatever name the same may be known."

Fitting the pattern to the problem presented by appellant's game of tango we find no element lacking and none without full effect. $5 worth of merchandise was offered as a prize. Some sixty players took part, each having obtained one or more cards for which he had paid 10 cents a piece. These cards had twenty-four numerals, selected from among the numerals one to seventy-five, inclusive, arranged in five rows with the middle space in the middle row left blank. Boxes divided into seventy-five compartments, each two inches square, and numbered one to seventy-five, were placed across the counter from, but convenient to, each player. A game proceeded by each participant in turn throwing a ball into one of the compartments, the number of which was then publicly declared. As those numbers were called the players noted them, if present on their cards, by covering them with markers provided for the purpose. The game ended when a player had a row covered with markers; that is, when all the numbers in any row on any one of his cards had been called. This might take place, of course, before his turn came to throw the ball; it always did take place before his turn came to throw the ball the second time. To the person with the winning row the merchandise put up as a prize was delivered. Whether or not appellant's game also included the right of each player to the use of a "skill ball," that is, one whose lodging place was counted on his card and not on that of the other players, does not affect the conclusion. As to each player, the fact remained that he won or did not win, depending perhaps not at all, at most only in part, on his "skill" in throwing a ball into a compartment of his choice. Essentially, the merchandise put up as a prize was awarded to a person who had paid a valuable consideration for the chance of winning, and the award was based on a contingency determined by chance. The game thus described is a lottery and appellant was properly convicted of having contrived and drawn a lottery.

[3, 4] A charge closely related to the first count was made in count IV. Here a violation of section 4 of Los Angeles City Ordinance No. 37737 was alleged, that section prohibiting the possession of instruments, devices, and objects used and intended to be used in contriving, preparing, setting up, and drawing a lottery. As the evidence which revealed the possession of the means whereby a lottery was conducted also revealed that it was conducted, this case falls squarely within the rule that one may not be convicted and sentenced for a crime and also be convicted and punished for an act which is an incident of that crime. For example, it was held in People v. Clemett (1929) 208 Cal. 142, 280 P. 681, that one convicted and sentenced because he operated a still could not also be punished for possession of the still. For other applications of the principle see People v. Buchanan (1929) 106 Cal. App. (Supp.) 765, 288 P. 50, and In re Crawford (1930) 109 Cal. App. 33, 292 P. 520. The acts alleged in count IV are plainly an incident of those set forth in count I; the judgment, in so far as it is based on count IV, may not stand.

[5] We must reach the same conclusion with respect to count III, under which appellant was charged with keeping, conducting, and maintaining a place where a game, not mentioned in sections 330 or 330a of the Penal Code, was played. Whatever else may be said of this count, at best it charges but another incident of the same public offense as that alleged in count I. In so far as the judgment is based on count III, it is without foundation.

[6] In count II there was an attempt to charge a violation of section 330, Penal Code, the section which makes it a misdemeanor to deal or carry on a banking game played with any device, for money or other representative of value. Of count II, however, we may speak as the court did in People v. Carroll (1889) 80 Cal. 153, 155, 22 P. 129, 130: "The information charges no offense under this section of the Code, or any other. To constitute it an offense to conduct the game it must be '*played* for money, checks, credit, or any other representative of value.' The information does not charge that the game was *played* for money, but that defendant conducted it for money." (Italics by the court.) It is not the dealer's amateur standing which the law seeks to protect, but its aim rather, is to prohibit him from carrying on a gambling game at which money is staked. In re Capanna (1920) 45 Cal. App. 501, 187 P. 1077, and In re Clark (1921) 54 Cal. App. 507, 202

P. 50, follow People v. Carroll, supra, in declaring that allegations such as are found in count II do not state a public offense. It follows, of course, that a judgment may not be based upon it.

[7] So far as based on counts II, III, and IV, therefore, the judgment must be reversed with directions to the trial court to dismiss the case as to those counts, and it is so ordered. As to count I, the court imposed a jail sentence of thirty days, "to be suspended on condition defendant paid the fine of $100.00 on Count II." As the fine on count II has fallen, the sentence on count I becomes inoperative. The judgment as to count I should, therefore, be set aside with directions to the trial court to arraign appellant for judgment and thereupon render a new and proper judgment, People v. Marks (1927) 83 Cal. App. 370, 257 P. 92; and see cases cited in People v. O'Brien (1932) 122 Cal. App. 147, 158, 9 P.(2d) 902, 906, and it is so ordered.

SHAW, P. J., and FOX, J., concur.

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139 Cal.App.(Supp.) 796

TREIMAN v. KENNON et al.

Civ. 2304.

Appellate Department, Superior Court, Los Angeles County, California.

March 16, 1934.

1. Courts 🔑190(2).

Order of municipal court granting new trial in case in which trial by jury was matter of right, but which was tried by judge without jury, jury having been waived, is appealable (Code Civ. Proc. § 983, as added by St. 1925, p. 942, as amended by St. 1927, p. 118, § 1).

2. Statutes 🔑212.

Words employed in statute, which have been construed to have particular meaning in former statute on same or analogous subject, are presumed, in absence of clearly expressed contrary intent, to be used in same sense in new statute, unless phraseology of two statutes is essentially dissimilar.

3. Statutes 🔑212.

Change of legislative purpose is to be presumed from material change in wording of statute.

4. Statutes 🔑188.

Punctuation is not necessarily controlling factor in statutory construction, and will not be permitted to render statute absurd, but is resorted to as aid to construction.

5. Statutes 🔑188.

Where statute as punctuated is neither inconsistent, absurd, nor ambiguous, but has reasonable meaning apparently in accord with legislative intent, punctuation will be followed and statute construed accordingly.

Appeal from Municipal Court of Los Angeles; Arthur Crum, Judge.

Action by Morris Treiman against Willis J. Kennon and others. From an order granting a new trial, plaintiff appeals. On motion to dismiss.

Motion denied.

Licker & Licker, of Los Angeles, for appellant.

J. M. Clements and John H. Gordon, both of Los Angeles, for respondents.

SHAW, Presiding Judge.

[1-5] Plaintiff has appealed from an order of the municipal court granting a new trial in a case in which trial by jury was a matter of right under our State Constitution, but which was tried by a judge without a jury, a jury having been waived. Respondents' motion to dismiss the appeal presents the question whether such an order of the municipal court is appealable. Before the amendment of section 983 of the Code of Civil Procedure in 1933 (added by St. 1925, p. 942, as amended by St. 1927, p. 118, § 1), the answer to this question was obviously "No", for that section then expressly excepted an order granting a new trial from the category of appealable orders.

But in 1933 this section was completely recast (St. 1933, p. 1893, § 156). The words expressly excepting an order granting a new trial were omitted, appeals from such orders were authorized in some cases at least, and several other orders not previously appealable were made so. The last-mentioned change specified orders of a class not previously within the jurisdiction of the municipal courts, and was no doubt due to the increase in the jurisdiction of those courts, which was provided by other legislation enacted at the same session of the Legislature. Looking for the source of this amendment of section 983, we find it in section 963 of the same Code (as amended by St. 1931, p.

1924), specifying the decisions of a superior court from which an appeal may be taken, as it stood before an amendment made in 1933 (St. 1933, p. 2472). The form of section 983 has been changed so as to conform to section 963, and all of the provisions of section 963 which, in view of the jurisdiction of municipal courts, could be made applicable to them, have been inserted in section 983. But in transferring the first clause of subdivision 2 to section 983, a change in punctuation has been made. Before 1933 the part of section 963 that is material here read thus: "An appeal may be taken from a superior court in the following cases: * * * 2. From an order granting a new trial or denying a motion for judgment notwithstanding the verdict in an action or proceeding tried by a jury where such trial by jury is a matter of right." By the amendment of 1933 the part of section 983 which concerns us now was made to read as follows: "An appeal may be taken from a municipal court upon questions of law alone, in the following cases * * * 2. From an order granting a new trial, or denying a motion for judgment notwithstanding the verdict in an action or proceeding tried by a jury, where such trial by jury is a matter of right;".

It is well-established that the language above quoted from section 963 does not authorize an appeal from an order granting a new trial, even where a trial by jury is a matter of right, unless the case has been actually tried by a jury. Hirsch v. All Persons, 173 Cal. 268, 159 P. 712; Estate of Waters, 181 Cal. 584, 586, 185 P. 951; Diamond v. Superior Court, 189 Cal. 732, 739, 210 P. 36; Estate of Baird, 195 Cal. 59, 68, 231 P. 744; Moffit v. Ford Motor Co., 212 Cal. 73, 75, 297 P. 553; Evans v. Gibson, 217 Cal. 171, 17 P.(2d) 701; McGoldrick v. Visalia, etc., Co., 58 Cal. App. 280, 208 P. 334; Nason v. Shinjo, 72 Cal. App. 530, 237 P. 559.

It is a rule of statutory construction that, "where words and phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a former statute on the same subject, or one analogous to it, they are presumed in the absence of a clearly expressed intent to the contrary to be used in the same sense in the new statute as in the previous statute." Dalton v. Lelande, 22 Cal. App. 481, 486, 135 P. 54, 56. See, also, Hyatt v. Allen, 54 Cal. 353, 356; In re Nowak, 184 Cal. 701, 706, 195 P. 402. But this rule does not apply where the phraseology of the two statutes is essentially dissimilar (McGregor v. Board of Trustees, 159 Cal. 441, 445, 114 P. 566), and a change of legislative purpose is to be presumed from a material change in the wording of a statute (McCarthy v. Board of Fire Com'rs, 37 Cal. App. 495, 497, 174 P. 402; Lundquist v. Lundstrom, 94 Cal. App. 109, 112, 270 P. 696).

There is a difference between the present provision of section 983 and the provision of section 963 which has been judicially construed, that difference consisting of the insertion of two commas in the provisions of section 983. Punctuation, it is held, is not necessarily a controlling factor in statutory construction (Mitchell v. Superior Court, 76 Cal. App. 734, 739, 245 P. 1109; Abbey v. Board of Directors, 58 Cal. App. 757, 763, 209 P. 709), and will not be permitted to have the effect to render the statute absurd (Randolph v. Bayue, 44 Cal. 366, 369; Rocca v. Boyle, 166 Cal. 94, 99, 135 P. 34, Ann. Cas. 1915B, 857; Mitchell v. Superior Court, supra). But punctuation is resorted to as an aid to construction (Mitchell v. Superior Court, supra; Ex parte Pfirrmann, 134 Cal. 143, 148, 66 P. 205; 59 Corp. Jur. 990, 991), and, where the statute as punctuated is neither inconsistent, absurd, nor ambiguous, but has a reasonable meaning apparently in accord with the legislative intent, the punctuation will be followed and the statute construed accordingly (Rocca v. Boyle, supra).

As the provision in question read in section 963, it contained no commas or other punctuation marks, and thus the words "tried by a jury" were made applicable to both orders mentioned therein; but, as it now appears in section 983, the commas set off these words with others descriptive of one only of the two orders into a single phrase, the meaning of which is clear and fits into the rest of the section. Giving to these two commas their natural force of setting off one phrase from the other, we have the provision in question divided into two parts descriptive of the two different orders to which it applies, thus: (1) "An order granting a new trial"; (2) "or denying a motion for a judgment notwithstanding the verdict in an action or proceeding tried by a jury"—and both of these parts are followed by a third which is applicable to and limits both of them, that is, "where such trial by jury is a matter of right." This gives the provision the meaning that an appeal may be taken from an order of a municipal court granting a new trial in any case where trial by jury is a matter of right, even though such trial was in fact waived and the case tried by a judge. As so construed it is neither absurd, inconsistent, nor ambiguous, and some effect is given to the action of the Legislature in inserting the commas, which by any other construction would become futile. Moreover, it harmonizes with the legislative intent as disclosed by other acts passed by the same Legislature. The amendment of section 983 is part of a statute making many amendments to the Code of Civil Procedure, one of the purposes of which is to secure as far as possible uniformity in the practice in municipal and superior courts, and this statute is one of a series of statutes evidently passed in furtherance of the same purpose, one of which expressly states it by amending section 34 of the Code of Civil Procedure (St. 1933, p. 1806, § 2) to declare that the provisions of the Code relating to practice, etc., in the trial courts shall apply to all such courts except as otherwise specially provided. This section probably does not cover the present case, but it shows the legislative intent. The same Legislature amended section 963 by striking out entirely from the language in question the words "tried by a jury," thus unquestionably giving to that section the meaning which we have just attributed to section 983. Our construction of section 983 therefore carries out the general legislative intent of assimilating the practice in the municipal and superior courts, and it may well be that the two commas were inserted in section 983 for this purpose.

The motion to dismiss the appeal is therefore denied. The cause is restored to the calendar for argument on the merits, March 29, 1934, 2 p. m.

We concur: BISHOP, J.; FOX, J.

FRICK et al. v. CALMIN MORTGAGE CORPORATION, LIMITED, et al.*

L. A. 13965.

Supreme Court of California.
March 30, 1934.

Rehearing Granted April 26, 1934.

Corporations ⚷557(2).

Where complaint against corporation for appointment of receiver alleged that corporation was in imminent danger of insolvency and had duly consented in writing to appointment of receiver, court had jurisdiction to appoint receiver (Code Civ. Proc. § 564, subd. 5).

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by C. P. Frick, Alu M. G. Saewert, and others against the Calmin Mortgage Corporation, Limited, and others. From an adverse order, second named plaintiff appeals.

Reversed.

G. M. Cuthbertson, of Los Angeles, for appellant.

H. L. Pratt, of Los Angeles, for respondents.

PRESTON, Justice.

This is an appeal from an order made September 12, 1932, purporting to vacate and annul a previous order, made on August 10, 1931, appointing a receiver to take possession of all the assets, property, claims, and demands of the above-mentioned corporation, and "hold the same subject to the further order of this court." A supplemental nunc pro tunc order, dated October 19, 1932, is in the record and shows that the basis of the court's action was his finding that the first order of appointment was in excess of the jurisdiction of the court.

The action was in the nature of a general creditors' bill by plaintiffs, a judgment creditor and two stockholders of defendant corporation, who alleged that the financial condition of the corporation was such that it was at least "in imminent danger of insolvency" within the meaning of section 564, subd. 5, of the Code of Civil Procedure.

A résumé of the financial condition of the corporation is found in the complaint but it need not be here set forth as respondents have submitted the cause without filing a reply brief. Moreover, the corporation, through its president and secretary, duly consented in writing to the appointment of the receiver.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Rehearing granted 32 P.(2d) 619.

We are pointed to no ground upon which the setting aside of the order can be justified and none occurs to us.

The allegations of the complaint seem to bring the cause within the holding of Boyle v. Superior Court, 176 Cal. 671, 674, 170 P. 1140, L. R. A. 1918D, 226. See, also, 6a Cal. Jur., § 907, pp. 1525, 1526.

The order is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

NIELSEN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 14945.

Supreme Court of California.
March 22, 1934.

In Bank.

Application for certiorari to review an order of the Industrial Accident Commission denying compensation for death.

Prior opinion, 29 P.(2d) 852.

John C. Scott and H. C. Kelsey, both of Oakland, for petitioners.

Arthur I. Townsend, B. E. Pemberton, Ivan A. Schwab, and Everett A. Corten, all of San Francisco, for respondents.

R. P. Wisecarver, of San Francisco, amicus curiæ.

PER CURIAM.

The opinion herein is modified by striking therefrom the following in the next to the last paragraph thereof (29 P.(2d) 852, 854): "What was held in the Winthrop Case [213 Cal. 351, 2 P.(2d) 142] was that the probative value of the witness' opinion is lacking if in the course of its development he has not been made acquainted with all of the essential facts in evidence, whether or not they are to be believed, and which would have a bearing upon or would influence the conclusion of the witness. The conclusion followed that, if the witness' opinion was without probative value because not based on the facts in the record, it could not support a finding based thereon. This was the extent of the holding in the Winthrop Case, and, pursuant to the well-defined power of the court on review, is the utmost that was intended by the holding in that case," and by inserting in lieu thereof the following: "What was held in the Winthrop Case was that the probative value of the witness' opinion is lacking if in the course of its development he has not been made acquainted with all of the essential facts. This was the extent of the holding in that case, and, pursuant to the well-defined power of the court on review, is the utmost that was intended by the holding."

CARPENTER v. SMALLPAGE et al.

Sac. 4813.

Supreme Court of California.
March 24, 1934.

In Bank.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

For former opinion, see 29 P.(2d) 841.

A. H. Carpenter and B. M. Bainbridge, both of Stockton, and Frederick L. Felton, of Los Angeles, for appellant.

Lafayette J. Smallpage and Charles H. Epperson, both of Stockton, for respondents.

PER CURIAM.

In the above-entitled action it is hereby ordered that the following portion of said opinion be stricken out: "'Fraud is never presumed. Whenever fraud constitutes an element of a cause of action or defense which is of an affirmative nature the facts must be alleged. One against whom charges of fraud are made is entitled to averments of the acts of which he is accused, so that he may admit or deny them.' 12 Cal. Jur. 800." And in lieu thereof the following be inserted in said opinion: "Burris v. Adams, 96 Cal. 664, 667, 668, 31 P. 565; Maison v. Puntenney, 212 Cal. 134, 137, 298 P. 33.)"

220 Cal. 166

PEOPLE v. HALL.

Cr. 3652.

Supreme Court of California.
March 29, 1934.

In Bank.

Appeal from Superior Court, Siskiyou County; C. J. Luttrell, Judge.

On rehearing.

For former opinion, see 30 P.(2d) 23.

S. Luke Howe and O. F. Meldon, both of Sacramento, and William V. Cowan, of Yreka, for appellant.

U. S. Webb, Atty. Gen. and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM.

The petition of the appellant for a rehearing in this cause is denied.

Due consideration has been given to the renewed contention of the appellant that when, at the time of the arraignment of the defendant, he remained mute, the court below should have directed the clerk to enter a plea of "not guilty by reason of insanity," as well as the plea of "not guilty" which was entered.

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220 Cal. 418

GUY COBURN, Inc., v. TIFFANY PRODUCTIONS, Inc., et al.

L. A. 13121.

Supreme Court of California.
March 30, 1934.

Trial 🔑169.

Compulsory judgment of nonsuit at close of plaintiff's evidence for failure to insert in complaint allegation that plaintiff asking for an accounting relied in part on written instruments *held* error (Code Civ. Proc. § 447).

In Bank.

Appeal from Superior Sourt, Los Angeles County; Daily S. Stafford, Judge.

Action for accounting by Guy Coburn, Inc., against the Tiffany Productions, Inc., and others. From a judgment of nonsuit entered at close of plaintiff's case, plaintiff appeals.

Reversed and remanded with directions.

Jerome H. Kann and Milton Cohen, both of Los Angeles, for appellant.

C. C. Montgomery and Sam Wolf, both of Los Angeles, for respondents.

WASTE, Chief Justice.

This is an appeal from judgment of nonsuit entered pursuant to motion of defendants at the close of plaintiff's case. Plaintiff asked an accounting of moneys received by defendants from the distribution and sale of motion picture films in which the plaintiff corporation claimed an interest by reason of the assignment to it of the beneficial rights of one of the parties, and the asserted ratification thereof and recognition of plaintiff's rights by the other original party to the contract.

The transcript was filed in this court in July, 1931, and the appellant's opening brief was filed September 12, 1931. No brief was filed on behalf of respondents, and after several extensions of time therefor, there was no further application. The plaintiff and appellant having failed to request that the case proceed in regular order, notwithstanding respondents' failure to file brief, as would have been appropriate under the circumstances, an order was issued to respondents to show cause why the judgment should not be reversed or other appropriate order made upon the appeal. On the day fixed in said order there was no appearance on behalf of respondents and no explanation has been made of the default. It is provided in section 1 of rule V of this court that in such a situation the court may, in its discretion, decide the case upon the statement of facts contained in appellant's opening brief. In this cause an extended statement of facts seems unnecessary. At the inception of the trial in the court below, attorneys for defendants and the trial judge brought to the attention of plaintiff a defect in the complaint consisting of failure to include therein an allegation that the plaintiff relied in part upon written instruments, as was then required by section 447 of the Code of Civil Procedure. In the ensuing discussion attorney for plaintiff stated: "If it is necessary to amend to that extent we would ask leave to do so," to which counsel for defendants replied: "We object to that procedure. We have been trying to find out what they were relying on. We took a deposition of the defendants [plaintiff] to try to find out what they relied on and we could not find out anything about it so we object to anything of the kind at this time." There was no ruling by the court upon the request to amend nor the objection thereto, and it does not appear that plaintiff renewed the request or sought a ruling thereon.

There are fifteen documents attached to the record as exhibits, some of which were admitted in evidence and others marked for identification, and it seems obvious that as a matter of fact the plaintiff was relying upon written instruments to establish the cause of action; and it seems equally obvious from an inspection of the reporter's transcript that objections to evidence were predicated upon, and the rulings of the trial court were influenced largely by, plaintiff's failure to insert what was deemed by the court to be an essential allegation, under the provisions of section 447 of the Code of Civil Procedure as it then stood.

While failure to plead a cause of action may be raised at any stage of the litigation, that point was not included in the grounds of the motion for nonsuit. In view of the evidence before us, the motion for nonsuit should have been denied, and the granting thereof was error.

It may be well to here note the fact that the Legislature of 1933 (St. 1933, p. 2548, § 1) removed from section 447 the provision which appellant attacks herein.

The judgment is reversed and the cause remanded to the trial court with directions to proceed with the trial from the point where plaintiff rested its case.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.

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220 Cal. 379

EDWARDS et al. v. MULLIN.

L. A. 14521.

Supreme Court of California.
March 27, 1934.

1. Contracts 🔑137(4).

Where partnership dissolution agreement contained covenants in restraint of trade under which defendant assigned to plaintiffs business in "San Francisco territory," including entire state north of Bakersfield, rule of severability will be invoked to uphold validity of contract as to city of San Francisco (Civ. Code, §§ 1673–1675).

2. Contracts 🔑137(4).

Courts will strain to put such construction on covenant in restraint of trade in partnership dissolution agreement as to save it in part (Civ. Code, §§ 1673–1675).

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Thomas Stanley Edwards and another, individually and as copartners, doing business under the firm name and style of Edwards & Vickery, against John Joseph Mullin, individually and as doing business under the firm name and style of the Mullin Travel Service, to recover damages for breach of contract. From a judgment for defendant, plaintiffs appeal.

Reversed, with directions.

For prior opinion, see 24 P.(2d) 936.

Gavin McNab, Schmulowitz, Wyman, Aikins & Brune, Nat Schmulowitz, and George B. Harris, all of San Francisco, and Loyd Wright and Charles E. Millikan, both of Los Angeles, for appellants.

Finlayson, Bennett & Morrow and Henry L. Knoop, all of Los Angeles, for respondent.

PRESTON, Justice.

The determination of this appeal rests upon our consideration of the main issue presented, to wit: Whether covenants in restraint of trade, contained in the contract which forms the basis of this action, renders said contract illegal and void, in whole or in part, under sections 1673, 1674, and 1675 of the Civil Code.

Section 1673, supra, declares that: "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind * * * is to that extent void." Section 1675 makes an exception in favor of partnership arrangements, declaring that partners may, in anticipation of dissolution of the partnership, "agree that none of them will carry on a similar business *within the same city or town* where the partnership business has been transacted, or within a specified part thereof."

On April 15, 1927, the parties to this action executed a written agreement for dissolution of their copartnership. The agreement recited that they had engaged "in the tourist brokerage business *in the state of California*," conducting an office in San Francisco and one in Los Angeles, and that they owned certain agency rights and agreements with Franco-Belgique Tours Company, Limited, and other organizations. Said contract then set a time and place for final accounting and adjustment, and liquidation of the partnership affairs. Thereupon it provided for assignment by defendant to plaintiffs of all his aforesaid rights or agreements "in and for that territory in the northern portion of the state of California generally designated as the *San Francisco territory*, commencing immediately north of Bakersfield, Kern County, California, and extending northerly to the northernmost border of said state, together with all business and goodwill of said copartnership in the said above-named territory, including said office of said copartnership, with all its furniture, furnishings, fixtures and equipment, located at No. 582 Market street, San Francisco, California." Plaintiffs made a similar assignment to defendant covering all that "territory in the southern part of the state of California generally designated as the Los Angeles territory," from and including Bakersfield to the southernmost border of the state, together with the business and good will of the copartnership in said territory, including the office, etc., at 756 South Broadway, Los Angeles. Having thus divided their properties, the parties each covenanted to refrain from injuring one another or engaging in a like business in the other's territory for a period of twenty-five years.

Plaintiffs brought this action to recover damages in the sum of $14,000, caused by defendant's alleged breach of said contract in soliciting and accepting, through said Franco-Belgique Tours Company, Limited, business originating in the city and county of San Francisco. Defendant objected to the introduction of any evidence under plaintiffs' second amended complaint on the ground that it failed to state a cause of action, in that said contract was void, being violative of said sections 1673, 1674 and 1675 of the Civil Code. The court below sustained the objection and entered judgment for defendant. Plaintiffs appealed.

It is apparent that the area embraced within the respective covenants of the contract exceeds the territorial limits prescribed by said sections of the Civil Code. Appellants claim that the territory designated is divisible, so that said agreement may be upheld in so far as it applies to the city and county of San Francisco, even conceding its invalidity as to the remaining portion of the so-called "San Francisco territory." Respondent urges that the parties were engaged in a business state-wide in scope, evidenced by the language of the contract and the known character of a tourist brokerage business, of which the court will take judicial notice, and that these facts render the entire agreement indivisible, illegal, and void. To state respondent's position in his own language: "Since the parties expressly covenanted with respect to entire areas, each of which greatly exceeds the limits permitted by statute, and with respect to a business that was conducted throughout those areas, the court cannot sever either area, and consequently each covenant is unenforceable in its entirety. To enforce either as to any portion of the area to which it relates would be to make a new contract for the parties and this the courts cannot do. * * * The covenants are mutual and one constitutes the consideration for the other. Since the consideration for each is in part unlawful, both covenants are entirely void."

Appellants call our attention to the declaration of the statute (section 1673) that a contract which restrains trade is only "to that extent void"; containing no element of moral turpitude, it is not malum in se, as distinguished from that which is merely proscribed by statute malum prohibitum. Appellants also urge that we should have no difficulty in construing this contract as divisible, for the partnership maintained an office and transacted business at No. 582 Market street, in the city and county of San Francisco, the boundaries of which city are definite and certain, and the area within the restriction imposed upon the remainder of the so-called "San Francisco territory" is capable of ascertainment and segregation. Furthermore, to so construe the contract as to perhaps permit defendant to profit from his alleged deliberate violation of his covenant would not promote fair dealing and the ends of justice.

[1, 2] We agree with appellants that the rule of severability may be here invoked to uphold the validity of that portion of said contract not violative of statute. Further discussion or review of the numerous authorities cited on both sides would not clarify this pronouncement. We recognize that the question is a close one and one upon which the authorities have long been divided. The effect of earlier decisions was to uphold part of a covenant of this character only when it appeared in divisible form. Later cases, however, even viewed in the light of respondent's effort to distinguish them, have gone far in the other direction and indeed the courts will

now "strain to put such a construction upon the covenant so as to save it in part." Stanley Co. v. Lagomarsino (D. C.) 53 F.(2d) 112, 115. We therefore choose in this cause to state the holding which promises to promote justice and which conforms to the trend of modern authority as indicated by recent decisions wherein will be found a review of this subject, digest of earlier rulings and full citation of authority. See Stanley Co. v. Lagomarsino, supra, and General Paint Corp. v. Seymour, 124 Cal. App. 611, 12 P.(2d) 990.

The judgment is reversed, with directions to the court below to proceed with trial of the cause.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.; SEAWELL, J.

* * *

137 Cal.App. 462

McKEE v. EDGAR et al.

FOREMAN v. SAME.

Civ. 8305, 8672.

District Court of Appeal, Second District, Division 1, California.

March 20, 1934.

Rehearing Denied April 16, 1934.

Hearing Denied by Supreme Court May 17, 1934.

1. Schools and school districts 🔑141(2, 6).

Person who, after serving four years as elementary teacher in Long Beach city school district, served one year as junior high school teacher in Long Beach city high school district, *held* not "permanent teacher," as respects dismissal, and was not entitled to reinstatement as elementary teacher, since the two districts were separate legal entities, though governed by same board of education (School Code, § 2.1040, and § 5.500 et seq., enacted by St. 1931, p. 1394; St. 1921, pp. 2094, 2095, §§ 114–116; Const. art. 9, §§ 5, 6).

[Ed. Note.—For other definitions of "Permanent Teacher," see Words & Phrases.]

2. Schools and school districts 🔑141(2, 6).

Person who, after serving two years as elementary teacher in Long Beach city school district, immediately thereafter served two years as junior high school teacher in Long Beach city high school district, *held* not "permanent teacher," as respects dismissal, and was not entitled to reinstatement as junior high school teacher, though the two districts were governed by same board of education (School Code, § 2.1040, and § 5.500 et seq., enacted by St. 1931, p. 1394; St. 1921, pp. 2094, 2095, §§ 114–116; Const. art. 9, §§ 5, 6).

3. Schools and school districts 🔑25.

City charter provisions relating to school districts must be read in light of Constitution and general laws (St. 1921, pp. 2094, 2095, §§ 114–116).

Appeal from Superior Court, Los Angeles County; Robert B. Lambert and Walter J. Desmond, Judges.

Mandamus proceedings by Mattiene Bragg McKee and by Leone Foreman against Mrs. John M. Edgar and others. From a judgment granting the writ in the first case, defendants appeal, and, from a judgment denying the writ in the second case, petitioner in that case appeals.

Judgment in the first case reversed, and judgment in the second case affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for plaintiffs.

Everett W. Mattoon, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for defendants.

CONREY, Presiding Justice.

Pursuant to stipulation between counsel for the respective parties, these appeals have been presented by a single set of briefs, and are to be treated as if consolidated; the entire records and evidence to be considered by the court as being properly in the record and before the court in each case.

In each of these proceedings the defendants constitute the membership of the board of education which governs the school department of the city of Long Beach, which department is in the city charter described as the "Long Beach City School District." Each proceeding was brought by a school teacher claiming permanent tenure. The plaintiff in the first proceeding, Mrs. McKee, had served four years as an elementary teacher in the Long Beach school district and immediately thereafter one year as a junior high school teacher in the Long Beach city high school district; the plaintiff in the second proceeding, Mrs. Foreman, two years in the elementary school, and immediately thereafter two years as a teacher in the junior high school. At the end of these respective periods of service each teacher was dismissed by defendant board of education; notice of dismissal being given in the manner required by statute for dismissal of probationary teachers. Thereupon they instituted these proceedings separately, each one applying for a writ of mandate. Petitioner McKee asks that by said writ the defendants be directed to reinstate her as an elementary teacher in the Long Beach school district; petitioner Foreman asks that by said writ defendants be directed to reinstate her as a junior high school teacher. In the McKee Case the application for the writ was granted, in the Foreman Case the application was denied. From the judgments thus rendered these appeals are prosecuted.

As stated by the county counsel: "It is the contention of the Board of Education that the two petitioners were probationary teachers, and the board had power to dismiss them as such. It is conceded by the board that if the petitioners had the status of permanent teachers the attempted dismissal would be ineffective. The question turns upon the existence of the Long Beach City School District and the Long Beach City High School District as separate and distinct legal entities, and the effect of service therein." The county counsel states that the question involved in the appeal is: "Does a teacher who leaves the service of a city elementary school district to enter the employ of a city high school district, governed by the same board of education, thereby lose any permanent tenure rights he may have against the elementary district?"

The School Code (section 5.500 et seq.) provides for classification of persons employed by school districts in positions requiring certification qualifications. This includes school teachers. The classification includes permanent employees, probationary employees, and substitute employees. See Deering's Gen. Laws, 1931 Ed. p. 4179, Act 7519.

In the case of Mrs. McKee, the contention on her behalf is that she did not lose her status as permanent teacher "by accepting promotion as a junior high school teacher in said City of Long Beach where the elementary and the junior high schools so taught by petitioner are both under the jurisdiction of the same Board of Education." In the case of Mrs. Foreman, the contention in her behalf is that, by virtue of her two years of service in the elementary school, immediately followed by two years in the junior high school, she had acquired the right to classification as a permanent teacher.

The right of a public school teacher in this state to classification as a permanent employee is derived from a statute and is limited by the terms of the statute. One limitation is that the classification refers solely to the employing school district and the status of the teacher as an employee of that district. School Code, § 5.500 et seq., St. 1931, p. 1394. A permanent employee may not be dismissed except for cause and after hearing upon charges made, as provided by statute. This protection against arbitrary dismissal is the distinguishing feature of the so-called "permanent tenure."

[1-3] It is admitted that the petitioners in these present cases were lawfully dismissed unless they had acquired the right to classification as permanent employees of the district. But at this point they are confronted with an awkward question, "What district?" Not the Long Beach school district which maintains and operates the elementary schools in Long Beach; for Mrs. McKee, by becoming an employee of the "high school district," had voluntarily ceased to be an employee of the "school district"; and Mrs. Foreman never was a permanent employee of the "school district." Again, "What district?" Not the high school district; for neither of the petitioners had been employed therein long enough for "permanent" classification. In order to justify any conclusion that these petitioners have any right to classification as permanent teachers, two things would have to be done: First, these two school districts would have to be regarded as having been united into one district. Second, the successive periods of service of petitioners in the two districts would have to be combined into one continuous period of service. On behalf of petitioners, it is sought to find authority for such right, in the provisions of the city charter. The sections relied upon are numbered 114, 115, and 116. St. 1921, pp. 2094, 2095. We have read those sections, considering them in connection with the provisions of the State Constitution (article 9, § 5 and § 6), relating to a public school system, and also in connection with the statutes providing for the incorporation and organization of school districts and of high school districts. The existence and organization of common schools is so different from the existence and organization of high schools in their origin and history and in the resulting legislation that for various reasons of convenience or necessity the state law contemplates the existence of high school districts as entities separate and distinct from elementary or common school districts. The charter provisions to which we have referred must be read in the light of the Constitution and general laws. So considered, they recognize the sep-

arate existence of the two districts, but, treating them as a part of the municipal life, place them under the control of a board of education authorized to care for the administration of the schools in both of the districts. The School Code (section 2.1040) directly provides for this method of government. Prior to the School Code the same provision was contained in section 1726 of the Political Code. This convenient agency of government of public schools in cities is contemplated by the law of the state, but there has never been any evidence of legislative intention that this identity of control of the districts should modify or change their status as separate legal entities. They are as completely separate and distinct "as though the two were in separate cities and governed by separate boards." Gould v. Santa Ana High School District, 131 Cal. App. 345, 348, 21 P.(2d) 623, 624. In the case here cited, the city was a city of the fifth class; and governed the two school districts by virtue of the state laws, School Code, 2.1040, and Statutes of 1883, pp. 93, 262, § 795, as amended. In view of the law as thus ascertained, we are of the opinion that the separate existence of the two school districts remains unaffected by the charter. It follows, that the petitioners were not "permanent" employees, and that they are not entitled to the demanded writs.

The judgment granting the application of the petitioner McKee for a writ of mandate is reversed. The judgment denying the application of the petitioner Foreman for a writ of mandate is affirmed.

We concur: HOUSER, J.; YORK, J.

STONEBURNER v. THEODORATOS et al.*

Civ. 4827.

District Court of Appeal, Third District, California.
March 21, 1934.

Rehearing Granted April 20, 1934.

1. Automobiles 🔑**6.**
1931 statute, repealing statute allowing recovery to automobile guest for gross negligence, *held* not bar to recovery for gross negligence of host on June 18, 1930 (St. 1931, p. 1693, § 141¾).

2. Death 🔑**31(7).**
Mother of illegitimate child has right of action for child's death; existence of putative father not being necessary to maintenance of action and right of action in mother not depending on putative father having first established a family relationship, followed by abandonment and desertion (Code Civ. Proc. § 376; Probate Code, §§ 255, 256).

3. Automobiles 🔑**245(26).**
In action for death of automobile guest, evidence *held* sufficient to justify finding that defendant and not decedent was driving car.

Testimony showed that decedent received several cuts and bruises while defendant escaped uninjured, and would justify jury in concluding that decedent was riding on right-hand side of car and received injuries from which he died by coming in contact with fence, with which car collided, which was on right-hand side of car.

4. Automobiles 🔑**181(1).**
In action for death of automobile guest, driver making turn *held* under obligation to exercise care commensurate with hazards attending course about to be taken.

5. Automobiles 🔑**245(24).**
In action for death of automobile guest based on gross negligence, evidence as to speed at obviously dangerous intersection *held* sufficient for jury.

6. Negligence 🔑**136(14).**
Negligence is jury question, and, when liability attaches, jury should determine whether negligence should be classed as gross.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Rose Stoneburner against George Theodoratos and others, to recover damages for the death of plaintiff's minor son while riding as a guest in an automobile. From an adverse judgment, defendants appeal.

Affirmed.

Irving D. Gibson, of Sacramento, for appellants.

Ralph H. Lewis and George E. McCutchen, both of Sacramento, for respondent.

PLUMMER, Justice.

This cause comes to us upon an appeal by the defendants from a judgment awarding the plaintiff damages for and on account of the death of her minor son, Frank Stoneburner, while riding as a guest in an automobile driven by the defendant George Theodo-

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*Rehearing granted 31 P.(2d) 1042.

ratos, also a minor. The verdict against the other defendants, the parents of George Theodoratos, is based upon the fact of their having signed and filed with the division of motor vehicles of the state of California an application for the issuance of an operator's license to operate automobiles on the state highways of the state of California by the said George Theodoratos.

The facts disclosed by the record are substantially as follows: On the 18th of June, 1930, at about the hour of 9:30 p. m., a roadster belonging to the defendant George Theodoratos, and found by the jury to have been then and there operated by him while traveling on the Garden highway near the intersection of said highway with what is known as and called the Power road, left the improved highway and overturned upon a levee some 14½ feet in height, resulting in the death of Frank Stoneburner, who was then and there riding with the defendant George Theodoratos. Frank Stoneburner was a minor of the age of about 17 years. The Garden highway parallels the east bank of the Sacramento river, and the scene of the accident is about 11 miles northwest of the city of Sacramento. The boys were en route to a ranch where they were employed, situate on the Power road some miles distant from the intersection of the Power road and the Garden highway. In going to the place of their employment, the boys would ordinarily travel on the Garden highway to the point where the Power road leads off the right, which road they would follow to their destination. The two roads form what may be called a "Y." In driving out on the highway on the evening mentioned, it appears that the automobile, instead of properly turning to the right and passing on over the Power road, failed to turn at the intersection of the two roads and went directly forward, passing over the levee between the Garden highway and the Power road. The testimony also shows that, at the point of the intersection of the two roads, the Garden highway turns slightly to the left. The car went over the levee, which we have stated was 14½ feet in height, traveled a distance of some 75 feet, or more, knocked down several posts of a wire fence, and turned over on its top at the base of the levee. Frank Stoneburner was killed.

The record shows that Frank Stoneburner was the illegitimate child of Rose Stoneburner, having borne that name after the marriage of his mother to a man by the name of Stoneburner. The father of Frank Stoneburner was a man by the name of Robert Friscia.

The complaint alleges that Robert Friscia deserted a family alleged to have consisted of plaintiff and a minor child. The record, however, without conflict, shows that Robert Friscia was never married to the plaintiff; that the plaintiff and Robert Friscia never established a home, and never resided together after the birth of the minor known as Frank Stoneburner.

[1] This action is based upon section 376 of the Code of Civil Procedure, together with certain sections of the Probate Code relative to the right of inheritance. The complaint alleges that the defendant George Theodoratos was operating the automobile at the time of the accident in a grossly negligent manner. The first point made by the appellant that under the act of the Legislature of 1931 (St. 1931, p. 1693), repealing that portion of section 141¾ of the California Vehicle Act (St. 1923, p. 517 as added by St. 1929, p. 1580), allowing recovery for gross negligence, took away the right of action, if any existed, in favor of the plaintiff in this case.

Some twenty-odd pages of the appellants' opening brief is devoted to a discussion of the effect of the change made by the Legislature in section 141¾ of the California Vehicle Act, but following the decision of the Supreme Court in the case of Stotts v. Blickle, 30 P.(2d) 392, decided February 28, 1934, it must be held that the act of the Legislature in 1931, referred to, did not affect the right of the plaintiff in this action, and does not now constitute any bar to a recovery herein, if otherwise the plaintiff is shown to be entitled to a judgment.

[2] For the first time in this state, so far as we have been able to ascertain, the question is presented as to whether the mother of an illegitimate child is entitled to recover damages against one who has wrongfully caused his death. Section 376, Code of Civil Procedure, so far as applicable here, reads: "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child," etc. The record shows that there was never the establishment of any family by Robert Friscia and the plaintiff in the usually accepted meaning of that word. It further shows that Robert Friscia never lived with the plaintiff as her husband, never supported her, and never in any way contributed to the support of the minor known as Frank Stoneburner. Under these circumstances the appellants contend that there

never having been any family relationship, there could be no desertion on the part of Robert Friscia, and therefore a requisite basis is not established by the plaintiff upon which to found her right for instituting this action.

The testimony in the record is to the effect that Robert Friscia has not been heard of, or from, for some five or six years. In 18 C. J. p. 969, we find two definitions of the word "desertion." The first is in the following words: "In legal phraseology the word is usually used to denote a wilful abandonment of an employment or duty in violation of a legal or moral obligation." The second part of the definition reads: "The act by which a man quits the society of his wife, children, or either of them, and renounces his duties toward them."

There is no question but that Robert Friscia willfully abandoned the duty or moral obligation of supporting his minor child, and, under the law as it now stands, he has failed to comply with what the courts would declare to be a legal duty, upon proper proceedings being had therefor. That he has not renounced and abandoned a family relationship must be conceded. Does this fact deprive the mother of the illegitimate child of a right of action? Under the rigorous doctrine of the common law enunciating a principle contrary to natural right, an illegitimate child had in law neither father nor mother. Feeling bound by the decisions based upon the common law, many courts have held that no recovery could be had against one who wrongfully caused the death of an illegitimate child. Likewise, under the common law, no right of inheritance existed in an illegitimate child. In this state the Legislature has modified the harsh terms of the common law, and sections 255 and 256 of the Probate Code fix the right of inheritance of an illegitimate child from its mother and also the right of inheritance on the part of the mother in and to the estate of her illegitimate child.

The evident intent of the Legislature in adopting section 376, supra, was to provide that one having the right of inheritance to the estate of a minor child should prosecute an action against any one wrongfully causing his death. That right of inheritance coupled with it the right to control the proceeds of any judgment that might be rendered in such action.

In the first instance, the father being lawfully entitled to the custody and control of the community property, was named as the one to begin the action. Secondly, where that right of control had been abandoned, or did not exist, the mother was permitted to maintain the action. Applying this doctrine to the present case, the mother, under the provisions of the Probate Code, is the one entitled to the proceeds of any judgment that should be obtained against any person wrongfully causing the death of the minor. The mother in the instant case has had personal custody, control, supervision, and care of the minor from his birth, making sole provision for him. This places her, we think, in the position of the one within the intent and contemplation of the Legislature when enacting section 376, supra.

In 17 C. J. pp. 1219 and 1220, treating on the subject of illegitimates, it is first stated that statutory rights of action given kindred for injuries done another do not embrace illegitimate kindred without express mention (citing cases upholding the rule of the common law to which we have heretofore referred). After stating the conditions under which no right of action exists, the textwriter points out the circumstances upon which a right of action may be based, to wit: "But where there are statutes substantially legitimizing bastards as to the mother, or conferring on them the right to inherit or transmit inheritance from or through the mother, a mother may recover for the death of her bastard child, and such child may recover from its mother under the designation of parent, child, or next of kin. * * * But such a statute does not affect the situation as between the child and its father, and neither can recover for the death of the other."

In this state, as we have stated, the right of inheritance exists between a mother and her illegitimate child. The father is excluded from such right of inheritance. The mother, following the doctrine just stated in the text, is included within the designation of section 376, supra, as the one entitled to maintain an action for the wrongful death of her illegitimate minor child.

While the precise question involved here has not been decided by any of the appellate courts of this state, the Supreme Court of Washington, in the case of Goldmyer v. Van Bibber, 130 Wash. 8, 225 P. 821, 822, has ruled that a section of the Code in that state almost identical with ours gives the right of action to a mother under the circumstances presented in this case. In the Washington case the Code section under consideration is set forth in these words: "A father, or in case of the death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward." Rem. Comp. Stat. § 184. It is likewise pointed out in that case that the laws of Washington make the common law, so far as not inconsistent with the constitutional laws of the United States, and of the state of Washington, etc., a ruling decision. The case then proceeds to set forth the different provisions of the statutes of the state of Washington to the effect that the mother is given the right of inheritance to the estate of her illegitimate child, and an illegitimate child is given the right of inheritance to the estate of its mother.

The opinion in the Washington case sets forth an excerpt from the case of Hadley v. City of Tallahassee, 67 Fla. 436, 65 So. 545, Ann. Cas. 1916C, 719, as follows: "In the broad language of the statute itself, it was to furnish a remedy for the death of 'any minor child' by the wrongful act, negligence, or carelessness of another. Could it have been the intention of our lawmaking power in the enactment of this law to exclude from its remedial provisions the unfortunate illegitimate for whose misfortune of birth he has no sort of personal responsibility, thereby making him a double outcast, with no right to the protection of the law for his life, leaving him the unprotected target for the willful, negligent, and careless on every hand? We are not inclined to give the statute such a construction; but our better judgment leads us to hold, with those courts, that in the construction of statutes similar in all material respects to ours, have held that the mother of an illegitimate minor child, and the mother alone, has the right to sue for and recover damages for the death of such child by the wrongful act, negligence, carelessness, or default of another." The court then proceeds to cite a number of cases having to do with the succession to the estates of illegitimates, and the construction of statutes giving a right of action for damages, etc. Nearly all of these cases, however, which in principle support the case of Goldmyer v. Van Bibber, are based upon statutes giving the right of action to next of kin, etc., and are not exactly upon all fours with the circumstances presented in the case now before us.

The language of the Supreme Court of Washington further appeals to us as stating the correct rule, to wit: "It is contended by respondent that the words of the statute, 'a father, or in case of the death or desertion of his family, the mother may maintain an action,' do not permit the mother to maintain an action until after there is a recognized father and his death or desertion of the family occur. Under the theory of counsel, if the father were to recognize in writing his illegitimate son, and his death occur, or if he should desert his family, the mother then would have the right to institute this action, it certainly cannot be the law that the mother's right is defeated because of the failure of the father to perform his duty in the recognition of his child."

In the case of Hadley v. City of Tallahassee, supra, the statute giving the right of inheritance is found in the opinion as follows: "Bastards shall be capable of inheriting or transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother." In that case the mother was allowed to maintain an action for the wrongful death of her illegitimate child. As reported in Ann. Cas. 1916C, 719, the opinion of the court is supported by a number of cases cited in the annotations beginning on page 720 of the same volume.

We do not need to enter into a discussion of the common law which held that an illegitimate child was nobody's child, for that harsh rule no longer prevails in this state. The natural law of right has been incorporated into our Codes by the acts of the Legislature, and the relationship between the mother and the child under such circumstances is fixed so far as the right of inheritance is concerned, as though legitimacy prevailed. In this we think not only the natural right has been recognized, but the morality of the condition far better subserved. Both the mother's duty to support and the mother's right to maintain an action for the minor's protection is recognized.

We therefore hold that the mother of an illegitimate child has a right of action under the provisions of section 376, supra, and the existence of a putative father is not necessary to the maintenance of such an action, and that the right of action in the mother does not depend upon the putative father having first established a family relationship, followed by abandonment and desertion.

[3] Appellants further contend that there is no substantial evidence showing that the defendant George Theodoratos was driving the car, and likewise no substantial evidence of any gross negligence.

The defendant George Theodoratos testified that, after leaving the city of Sacramento and traveling about five miles, he became sick and asked Frank Stoneburner to take the wheel. As against this statement the record shows the following: A witness by the name of Burhl Scruggs testified that the boys were at his home on the evening of the accident, and left at about 9 p. m. in a Chrysler roadster belonging to George Theodoratos; that George was driving at the time. Mrs. Stoneburner, the mother of Frank Stoneburner, testified that Frank had lived in her household his entire life; that she had exercised control over him during that time; that she had never seen him drive an automobile, nor had she ever seen him try to drive one. After the accident, George Theodoratos went to the home of Mr. and Mrs. Stahl and asked if they had a car, stating that he and his partner had had an accident and that his partner was badly hurt. No mention was made by George at the time as to how the accident occurred. Mr. Stahl and George went to the scene of the accident, after which Mr. Stahl returned to his home to telephone to the coroner. On the second trip Mrs. Stahl accompanied her husband to the scene of the wrecked automobile. They remained there some time, the witness Mrs. Stahl could not state just how long, but during the time they were waiting for the arrival of the coroner Mrs. Stahl and George sat in the Stahl automobile. George stated to her that he was sitting in the rumble seat of the roadster wrapped in a blanket preceding the accident. Later he stated he was sitting in the front seat beside Frank Stoneburner. While they were sitting in the automobile, as just stated, George Theodoratos said to Mrs. Stahl: "Well, there is my last car; I will never drive another one; that is two I have wrecked."

Mrs. Stahl also testified that she detected the odor of liquor on the breath of George; that the odor smelled like sour wine, and it was her opinion that George was intoxicated. Mr. Stahl testified that George stated to him he did not know how it happened; that he was riding in the rumble seat; suddenly woke up, and was traveling through the air.

Upon the witness stand the defendant George Theodoratos denied that he had said to either of the Stahls that he was riding in the rumble seat at the time of the accident. The testimony also shows that after the accident George Theodoratos displayed no sign of sickness. The only testimony in the record as to speed is that for the first five miles the automobile was propelled at a speed of about thirty miles an hour. At the same speed it would have taken about ten minutes to cover the distance between where George Theodoratos stated that he became sick and the place where the car was wrecked.

The deceased died from an injury to the right lobe of the liver. The testimony shows that the automobile collided with a fence which was along the right-hand side of the car, traveling about 75 feet after it left the highway, knocking down several posts and pulling the wires constituting the structure of the fence with it. It does not appear in the record that the posts referred to were set in solid ground and may possibly have been easily dislodged. As we have stated, at the intersection of the two roads the Garden highway bears slightly to the left; the Power road turns to the right, down the levee and on over comparatively level country. For a short distance after the Power road diverges from the Garden highway, the descent down the levee is quite precipitous, and we think the record is sufficient to justify the jury in concluding that it would be hazardous for an automobile driver to attempt to negotiate that part of the Power road at a speed of thirty miles per hour.

Mr. Stahl also testified that he detected the odor of sour wine on the breath of George Theodoratos, but was of the opinion that he was not intoxicated. The testimony shows also that Frank Stoneburner received several cuts and bruises, while the defendant George Theodoratos escaped uninjured. The testimony thus referred to would justify the jury in coming to the conclusion that Frank Stoneburner was riding on the right-hand side of the car, and received the injuries from which he died by coming in contact with the fence with which the car collided, and which we have stated was on the right-hand side of the automobile.

It is true that the circumstances relied upon to show that George Theodoratos was driving the automobile are circumstantial, and are contradicted by the testimony of the defendant George Theodoratos. However, in view of these contradicted statements, the jury taking such matters into consideration, and hearing him testify, might readily have come to the conclusion that his testimony was not worthy of credence.

[4, 5] There is sufficient in the record also to indicate that the defendant George Theodoratos was familiar with the highway and consequently had knowledge of the fact that, in order to safely turn from the Garden highway down the levee along the Power road, greater caution should be exercised than when moving along other portions of the highway leading to the point of intersection of the highways where the accident took place. Thirty miles an hour a few miles from the

point where the two roads diverge could of course not be called reckless driving. Perhaps a speed much greater than that would not be considered excessive.

Just as stated in the case of Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474, it must likewise be borne in mind that an automobile accident on the open highway is entirely different from an accident occurring within city limits, because of the difference in the two hazards, and that occurring on the open highway might reasonably be held only negligence. Applying this language to the instant case, had the automobile overturned at some point other than at the divergence of the two roads, the jury might reasonably conclude that no negligence had been established, but, in view of what we have said, the conditions are substantially changed. At the point of intersection, the driver intending to turn off the levee and down the Power road would be under obligations to exercise care commensurate with the hazards attending the course about to be taken. We agree with the appellants that the automobile left the Garden highway at an obviously dangerous intersection, and from the distance that the automobile proceeded after it left the Garden highway, we likewise think that the jury was warranted in concluding that the car before reaching the point of intersection, had been driven at an excessively high rate of speed under the conditions then and there existing, and that little or no care was exercised by the driver of the car either for his own safety, or for the safety of his guest.

[6] As said in Malone v. Clemow, 111 Cal. App. 13, 295 P. 70, the question of negligence is a question for the jury, and likewise, in substance, that, when liability attaches for negligence, it is for the jury to determine whether the negligence should or should not be classed as gross.

Both in the case of Malone v. Clemow and Kastel v. Stieber, supra, the question of what constitutes gross negligence is fully considered. Likewise, in the opinions in both of those cases, where the speed of the car is relied upon as showing gross negligence under the conditions presented in the respective cases, the authorities are carefully collected and cited, and it would only unnecessarily extend this opinion to restate what is there said. The questions which we have been considering were questions to be decided by the jury, and we think the record discloses sufficient testimony to support the conclusions at which the jury arrived.

The motion of the appellants for a directed verdict, and also for judgment in their favor, notwithstanding the verdict, were properly denied.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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137 Cal.App. 436

COOK v. WESTERN TRUST & SAVINGS BANK.

Civ. 5086.

District Court of Appeal, Third District, California.

March 19, 1934.

Rehearing Denied April 18, 1934.

Hearing Denied by Supreme Court May 17, 1934.

1. Interest ⊂⇒66.

In action against bank for wrongful withholding of money, where no dispute existed as to time bank received payments of oil royalty due plaintiff on receipt by bank, complaint praying that bank account for royalty with interest at 7 per cent. *held* to put in issue question of interest due (Civ. Code, §§ 3287, 3302).

2. Banks and banking ⊂⇒90.

Where bank which received oil royalty for payment to persons entitled thereto was authorized to deduct 15 cents for each check drawn in apportioning installments of royalty, bank deducting total charges for all checks to be drawn before apportioning installments *held* liable for overcharges for checks to person entitled to greater part of royalty.

3. Estoppel ⊂⇒90(3).

Where owner of royalty notified bank of erroneous method of calculating charges for drawing checks in apportioning installments of oil royalty on discovery of error, and bank continued to make charges for several months thereafter, owner *held* not estopped from claiming excess charges made.

4. Interest ⊂⇒14.

Where bank which received oil royalty for apportionment between owners delayed payment for several months after it was due, interest could be charged for time bank withheld money (Civ. Code, §§ 3287, 3302).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Josephine P. Cook against the Western Trust & Savings Bank. Judgment for plaintiff, and defendant appeals.

Affirmed.

Clock, McWhinney & Clock, of Long Beach, for appellant.

J. Edward Johnson, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This action was begun by the plaintiff to recover of and from the defendant certain moneys received by the defendant from the Shell Oil Company, royalties belonging to the plaintiff by reason of her ownership in and to certain premises or units in and to certain premises operated by the Shell Oil Company in the extraction of oil and other hydrocarbon products. The entire tract of land included 20 acres. It appears from the record, however, that the plaintiff's interest related only to a certain 5 acres thereof, being 1095/2500ths part of the 5 acres. The land originally belonged to a man by the name of Coseboom. Coseboom had made a contract with Walter H. Cook for the purchase of an interest in said 5-acre tract and in the royalty of the oils produced therefrom, the agreement with Cook providing that the deeds from Coseboom should go directly to those who should purchase from Cook. The record shows that on April 3, 1923, Cook transferred his interest in the lands, rents, and royalties referred to herein to his mother and father. On the 6th day of April, 1923, an attachment was issued against Walter H. Cook, garnishment process served upon the defendant herein, to which the defendant replied, "This bank has no funds or personal property in hand belonging to Walter H. Cook. He has a prospective interest in and to a certain contract for real estate not yet available." No attachment was levied upon the real estate or upon the interest or alleged interest of Walter H. Cook, in or to the same, or to any products, rents, or royalties to be derived therefrom.

On June 21, 1923, by a written instrument, the plaintiff became the owner of the interest in and to said 5-acre tract, and the rents, issues, and royalties to be obtained from the operation thereof, in the proportion set out in the complaint. On December 20, 1923 Coseboom executed a grant deed conveying to the plaintiff title to said 1095/2500ths interest in said 5 acres, and a like interest in and to 24½ per cent. of the lessors' interest in and to the rents and royalties accruing under the lease. This deed was executed in the office of the defendant bank, the acknowledgment being taken by the trust officer of the bank. The first moneys under the royalty belonging to the plaintiff were paid to the bank on the 15th day of December, 1923, in the sum of $657. Thereafter, payments continued to be made to the bank by the Shell Oil Company, and as the value of the oil belonging to the plaintiff, or her interest therein from time to time, in various sums aggregating in all $10,800, the first of these moneys referred to being received by the bank, as stated, on December 15, 1923, and the last sum on April 15, 1925. All of these moneys were received, as shown by the record, long after the garnishment served upon the defendant bank in the case of the suit of House v. Cook on April 6, 1923, at which time the defendant had no moneys nor any property whatsoever in its possession belonging to Walter H. Cook. The money so received by the defendant was kept in its possession until on or about February 10, 1928, until after the determination of the action entitled "House v. Cook," in favor of the defendant. After this action was begun it appears from the record that it was not brought to trial until after the determination of the action of House v. Cook to which we have just referred.

On or about the 9th day of April, 1928, the defendant paid into court and deposited with the clerk thereof the sum of $10,800. This payment was made pursuant to the following order of the superior court, in which the action was pending: "It is now therefore ordered, adjudged and decreed that the Western Trust and Savings Bank deposit with L. E. Lampton, county clerk, the sum of $10,800.00, but that the said defendant, Western Trust and Savings Bank, shall not at this time be dismissed from said action nor discharged from all liability to the plaintiff or interveners, but that the liability of any, over and above said sum of $10,800.00, shall be determined at the trial of the above entitled action."

The interveners referred to abandoned their complaints, and the question before the trial court was simply the amount of interest or damages to which the plaintiff was entitled.

The record which we have just set forth shows that the payment of $10,800 was not made under any theory that the defendant would be relieved from any existing liability to pay interest on account of having withheld from the plaintiff the various amounts received by it from time to time from the Shell

Oil Company, for the uses and benefit of the plaintiff.

[1] The first point made by the appellant in its objection to the allowance of interest is that recovery of interest is not sought by the complaint in this action. In making this contention the appellant draws a wrong inference from the plaintiff's pleadings in this action. The complaint, as originally filed, sets forth the amount of money to which the plaintiff claims to be entitled, and that demand has been made therefor, the refusal of the defendant, and concludes with the prayer that the defendant be required to account for all moneys received from the Shell Oil Company, for a judgment fixing the amount of her interest therein, with interest thereon at 7 per cent. per annum, and also for costs. The amount of the interest, of course, would be only a mere matter of calculation. The cases cited by the appellant in support of the contention that the pleadings do not put in issue the question of interest, do not sustain the appellant's contention.

In the case of Parkford v. Union Drilling, etc., Co., 118 Cal. App. 538, 5 P.(2d) 440, decided by this court, no reference is made to interest in any part of the pleadings. Further, it may be observed that the amount to be recovered was not a matter of mere calculation. The opinion in the Parkford Case shows that it involved the value of supplies and work done in the drilling of an oil well to a considerable depth in excess of that specified in the written contract.

In the case of Burks v. Weast, 67 Cal. App. 745, 228 P. 541, decided by this court, the point decided was that in an action for the balance due for goods, wares, and merchandise sold and delivered, the beginning of the suit constitutes a demand, and that interest allowed from an earlier date was erroneous.

In the instant case there is no controversy as to the date of the receipt of the different sums paid as royalty by the Shell Oil Company, which were apportioned to the interest in the property belonging to the plaintiff in this action. These various items became due and payable to the plaintiff immediately upon their receipt. The attachment referred to by the appellant and relied upon in argument shows that no interest of the plaintiff was ever covered thereby, nor was any interest owned therein by any of the predecessors of the plaintiff covered by the garnishee process served upon the defendant.

"Where money or property belonging to another is not paid or turned over to the person entitled to receive it at the time it should be paid or turned over, interest is generally allowed for such wrongful withholding thereof." 33 C. J. 203; sections 3287 and 3302, Civ. Code; Chambers v. Security Commercial & Savings Bank, 46 Cal. App. 32, 188 P. 818.

[2] It is further contended by the appellant that the court erred in allowing the plaintiff judgment for the sum of $1,368.80, for and on account of overcharges made by the defendant in receiving the money belonging to the plaintiff from the Shell Oil Company, and paying the same over to the plaintiff. The money was received by the defendant from the Shell Oil Company and disbursed by it by and under a certain power of attorney executed and delivered to it by C. W. Coseboom and Walter H. Cook. This power of attorney, among others, contained the following provisions: "The said party of the second part is hereby irrevocably authorized and directed to collect, accept, retain and receipt for, in the names of the parties of the first part (with full authority), to sell royalty oil taken in kind as provided in said lease with a reasonable compensation therefor, and to disburse the entire royalty to which the first parties may be entitled under said lease, in the manner following: To the registered owners and holders of deeds representing shares of undivided ownership in (property described), and in 24½% of the lessors' interest in the rents and royalties accruing under the lease hereinbefore described in proportion that each share of undivided ownership, as evidenced by such deeds, shall bear to the entire number of shares, amounting to 2500 undivided interests, less taxes which shall be chargeable against the interests of the respective owners in any funds in the hands of second party, and less collection charges of the party of the second part, on the basis herein provided; to C. W. Coseboom, or his assigns, 75½% of the lessors' interest in the rents and royalties accruing under that certain lease hereinbefore described. Party of the second part shall be entitled to deduct from the gross proceeds, as agent or attorney-in-fact, in the collecting and disbursing of said proceeds, in the manner as hereinbefore set forth, the charge of 15c on each check drawn by said attorney-in-fact."

Instead of charging the plaintiff in this action 15 cents for the drawing and delivery to her of each check covering the amount of the different installments belonging to her, received as royalty from the Shell Oil Company, the defendant proceeded first to deduct the total amount of money that would be represented by a 15-cent charge for each payment made to the several owners of interests. In the instant case the record shows that there were 700 persons to whom checks should be issued. The appellant deducted, as we have stated, the total amount of 15 cents on each check before making any apportionment of the moneys, and seeks to support such calculation by taking as example the sum of $800, which very nearly approximates some of the installments which should have been paid by the defendant to the plaintiff. Had each one of the 700 persons been an owner of an equal number of units, then the method of calculation adopted by the defendant would have been proper. However, such is not the case. An excessive charge was placed upon the plaintiff far in excess of the 15 cents for each check that should have been delivered to her. The illustration taking $800 as a basis, shows clearly the error of the defendant's calculation. With 700 checks at 15 cents a check, the total deduction would be $105, leaving a balance of $695 to be distributed. The plaintiff, being the owner of 1095/2500ths of the moneys to be distributed, would be entitled, upon apportionment, to the sum of $304.41. If, however, the apportionment had been made before the deduction of the $105, the plaintiff being the owner, as we have stated, would have been entitled to receive from the defendant the sum of $350.40, less 15-cent charge for the check. Thus, upon an apportionment where the royalty in the sum of $800 had been paid by the Shell Oil Company to the defendant, the defendant by its calculation wrongfully withheld from the plaintiff the sum of $45.84. In other words, the method adopted by the defendant in making its calculations required the plaintiff to pay almost one-half of the cost of the issuance of the checks. The court very properly charged the defendant with the amount of money so withheld. All of these items were capable of calculation and determination, and, therefore, fall within the provisions of the Civil Code to which we have called attention.

The record shows that the plaintiff was at all times mentioned in the complaint the owner of, and entitled to the moneys that had been received by the defendant for and on account of the royalties referred to herein, and that the amounts were capable at all times of being ascertained by calculation.

The defendant urges also that the plaintiff is estopped from claiming any sums for and on account of the erroneous calculations referred to herein. We find nothing in the record, however, upon which to base an estoppel.

[3] The language found in 12 California Jurisprudence, page 626, is applicable to the situation presented by the record in the instant case. Not a single thing presented by the record, required as shown by the text just referred to, appears either in the action, conduct, or representations on the part of the plaintiff of, to, or toward the defendant. The plaintiff did nothing to lead the defendant into its error in making its calculations. As soon as the plaintiff discovered the same, the defendant was notified but continued to make its erroneous calculations for several months thereafter. Under such circumstances, there can be no application of the principle of estoppel.

[4] The defendant cites a number of cases, notably, Peterson v. Chorley, 103 Cal. App. 783, 284 P. 956, 957, where it is held that "one who has received money for the use of another and is charged merely with the duty of holding the same and paying it over to the proper person, is not, in the absence of an agreement, chargeable with interest unless guilty of bad faith or unreasonable delay." These cases undoubtedly state the rule of law as applied to the circumstances of each particular case. Here, the testimony and the findings of the court are against the contentions of the defendant. A delay of many months after the money should have been paid over appears from the record, and consequently the defendant is justly chargeable with interest for the time it withheld the moneys from the plaintiff and retained the same for its own uses.

What we have said in relation to interest applies to all the smaller sums and items against which the defendant complains, and need not be specifically further dealt with herein.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

137 Cal.App. 517

PEOPLE v. COVEY.

Cr. 1325.

District Court of Appeal, Third District, California.
March 23, 1934.

Rehearing Denied April 7, 1934.

Hearing Denied by Supreme Court April 20, 1934.

Criminal law ⚿864.

In prosecution for murder by use of knife, trial court's advice to jury that granting of probation, recommended by jury, would be discretionary with court and that jury's recommendation would be given great weight, *held* reversible error, where jury thereafter returned verdict for manslaughter with recommendation of probation (Pen. Code, § 1203).

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Flora Covey was convicted of manslaughter, and she appeals.

Reversed.

R. B. Maxey and F. M. Brack, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and Jess Hession, Deputy Atty. Gen., for the People.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

The defendant was charged with the murder of her husband by means of the use of a knife. She was tried by a jury. After nearly thirty hours of deliberation, the jury returned into court, and, upon inquiry as to whether a recommendation for probation would be recognized in the event they found a verdict of manslaughter, they were informed that "the recommendation of the jury for mercy or anything of that kind is always given great weight by those in authority who are to fix the punishment." Within half an hour thereafter the jury returned a verdict of manslaughter to which this language was added, "and this jury recommends probation." Probation was necessarily denied under the provisions of section 1203 of the Penal Code, for the reason that a deadly weapon was used in the perpetration of the alleged crime. A motion for new trial was denied, and the defendant was sentenced to imprisonment in the state prison for the term prescribed by law. From the judgment of conviction and the order denying the motion for a new trial, the defendant has appealed.

It is contended the assurance of the court that a recommendation for probation is always given great weight encouraged the jury to believe that probation would be granted, and therefore resulted in a compromise verdict of manslaughter which would not otherwise have been rendered, and that the advice of the court therefore constituted prejudicial error. Many other assignments of error are alleged which it will be unnecessary to consider in view of our conclusion that the challenged advice of the court constitutes reversible error.

The homicide was the climax of an orgy. Both the defendant and her husband had been drinking intoxicating liquor. The deceased was drunk. The defendant had taken at least two drinks of liquor some time prior to the affray which resulted in the death of her husband. There is evidence to support the claim that she was engaged in paring potatoes with a knife in the kitchen of their home. The deceased threatened to take their automobile and return to town and "get good and drunk." The defendant, knife in hand, followed him out to the sidewalk, and protested against his carrying out his threat to continue his drinking bout. He seized her hands, and in the mêlée which followed he was cut in the abdomen, and died three days later as a result of the wound which he received. The defense was based upon a claim of an accidental killing. Upon the contrary, there is evidence to the effect that the defendant deliberately stabbed her husband with the knife, and also that he was cut on the head. There is evidence to indicate that the defendant possessed an exceedingly bad temper, and that the use of the knife was accompanied with a threat against her husband. Dr. O'Grady of Oakdale, who rendered medical service to the deceased while he was at the hospital, testified that just prior to Covey's death a conversation occurred between the defendant and her husband, which was admitted in evidence on the theory that it constituted a dying declaration made by Mr. Covey in the belief that death was imminent. Relating in the presence of her husband how the fatal wound was inflicted, the defendant said she "had her hands behind her back and he (her husband) was holding her hands and she either pushed back or he lunged forward, and at that time drove the knife into him." The defendant then asked her husband, "Isn't that right, Joe?" to which he replied, "Yes, that is right." This affirmance by the deceased of the possibility of having lunged forward onto the knife in his drunken condition gave credence to the defense which was predicated on the theory of an accidental cutting with the knife. If that theory were believed by the jury, or even if the jurors had a reasonable doubt regarding the alleged willful or negligent inflicting of the wound, it would account for the fact that they had failed to agree upon a verdict during their deliberations for nearly thirty hours. The further fact that a verdict of manslaughter with a recommendation of probation was secured within half an hour after the court had assured them that the recommendation of a jury "is always given great weight" enforces the conclusion that the verdict was the result of a compromise, and that it would probably not have been rendered except for the fact that the jury expected the defendant would be granted probation. If that be true, the verdict is invalid and void.

The colloquy upon which the appellant relies for a reversal in the present case occurred as follows:

"The Court: Members of the jury, * * do you want to communicate with the court?

"Foreman Duckart: Your Honor, the jury desires to know whether in case of a verdict for manslaughter with recommendation for probation, would be recognized and carried out by this court?

"The Court: Well, all such recommendations are considered by the court, whether, however, in this particular crime that would be carried out or not, I am not so sure. * *

"The law provides that upon an application for probation or recommendation by the jury, that the court shall refer it to the probation officer for investigation and report. In other words, the right to make the application for probation is a part of our law and it must be referred to the probation officer by the judge and the report then made to the court and then it is discretionary with the court what he shall do with that recommendation. The recommendation of the jury for mercy or anything of that kind is always given great weight by those in authority who are to fix the punishment. Under our system, I might go on and still state further, after one is convicted and sentenced to the term prescribed by law, then the prison board of the state fixes the term. In other words, it varies, depending on the conduct of the prisoner. In other words, there is a chance for those higher above the judge—[Here the court was interrupted by counsel for the defense who took an exception to the court's explanation regarding the fixing of sentence.]

"The Court: I am simply trying to give the jury information on just how the legal mechanics of dealing with a verdict—

"Foreman Duckart: That is what we want to know, Your Honor.

"The Court: I thought that was necessarily included in the information you desired.

"Mr. Brack [attorney for the defendant]: If it please the court, just for the purpose of keeping the record clear, we will make an assignment of error on that."

The clear import of this colloquy is an assurance by the court that, if the jury rendered a verdict of manslaughter with a recommendation of probation, the granting of probation would be "discretionary with the court," with the suggestion that the court was uncertain "in this particular crime whether (the recommendation) would be carried out." But the court clearly encouraged the jury to believe that it would be granted, for he afterwards says: "It is discretionary with the court what he shall do with that recommendation. The recommendation of the jury for mercy or anything of that kind is always given great weight by those in authority." It is immaterial whether this language inferred that the court or the prison board would give the recommendation great weight. It is in direct violation of the statute for any tribunal to grant probation under the circumstances of this case. The jury should have been instructed that its only duty was to determine the guilt or innocence of the accused, and that under no circumstances had it the right to take into consideration the penalty which might be imposed in the event of conviction.

Of course, the response of the trial judge to the jury's inquiry as to whether its recommendation for probation would be recognized and followed by the court was inadvertently given without intention of misleading the jury. Nevertheless it must have been understood by the jury to mean that at least it would receive serious consideration by either the court or the prison directors, with the inference that it was likely to be granted. That is unfortunate, since the jury evidently anticipated that the defendant would not be imprisoned if they rendered a verdict of manslaughter with an accompanying recommendation for probation. It is reasonably certain this expectation procured a verdict which would not otherwise have been rendered. The result of this misunderstanding is peculiarly prejudicial, since under no circumstances may the court or the prison board grant probation in this case, since it would be in direct conflict with the express inhibition of the provisions of section 1203 of the Penal Code, which reads in part: "* * * Probation shall not be granted to any defendant * * * who used or attempted to use a deadly weapon in connection with the perpetration of the crime of which he was convicted, nor to one who in the perpetration of the crime of which he was convicted inflicted great bodily injury."

The respondent argues that the purport of the court's advice upon the inquiry of the jury regarding the attitude of the court with respect to a recommendation for probation is that a petition for probation would be merely considered by the court or by the prison directors, and not necessarily granted. It is anomalous to contend that the court intended to assure the jury that either it or the prison board would consider a petition for probation which the law expressly prohibited the authority to grant. We are certain the court intended to convey no such misleading impression. The honesty of the judge in furnishing the desired information to the jury is not doubted. It is evident that in his haste, without the opportunity at hand of refreshing his memory with respect to the amended section of the Code, the court overlooked the fact that probation could not be granted under any circumstances to one who used a deadly weapon in connection with the perpetration of the crime of which he is convicted.

The right to consider, to grant or to deny probation, as distinguished from parole, is ordinarily exclusively the province of the court. Even though the assurance of the court is construed to mean that the prison board only would consider the recommendation of probation, it is equally fatally misleading, for the reason that neither the court, the board, nor any other tribunal has the authority to grant probation under the circumstances of this case.

The recommendation of the jury in the present case was not for leniency only in the administration of punishment for the offense; it was a recommendation that the court forego imprisonment altogether. The statement which was made by the court was not in reply to an inquiry from the jury as to whether leniency in administering punishment would be granted, or whether their request for probation would be considered. It contained an inquiry as to whether such recommendation would be approved and "carried out by the court." While the judge did not state that it would be carried out, and upon the contrary did say he was not sure it would be carried out "in this particular crime," the assurance that "it is discretionary with the court," and that such recommendations from a jury are always given great weight, must have encouraged the jurors to believe that probation would be granted. Since the undisputed fact in this case that the crime with which the defendant was accused was accomplished by means of a deadly weapon, which fact necessarily requires the unqualified denial of probation, it follows that the jury should have been informed that the law absolutely prohibited the granting of probation under such circumstances. Any other reply is necessarily misleading, since neither the court nor the prison board had any discretion in that regard. The court, however, was warranted in answering the question by stating that it is the sole province of the jury to determine the guilt or the innocence of the accused, and that the administration of the penalty therefor rested solely with the court and the prison board pursuant to law. Under the circumstances of this case, it is not a mere question as to whether it was proper for the jury to recommend mercy, or even whether the court or the board, in a proper case, could or would grant clemency. This is a clear case in which clemency may not be exercised. The recommendation of the jury for probation was therefore futile.

The respondent has filed an excellent brief, carefully and ably reviewing the authorities upon this subject. We are cited to no authority in this or other jurisdictions which upholds a judgment of conviction where language such as was used in this case so strongly tended to mislead the jury. It would be useless to consume the space necessary to distinguish these numerous cases. In the case of People v. Bruno, 49 Cal. App. 372, 193 P. 511, upon which the respondent chiefly relies, there was no recommendation for leniency. The jury found the defendant guilty as charged. When the jury, after deliberation, asked the court whether "all of the verdicts of guilty carried a state prison sentence," the judge properly replied that this "was a matter with which they had nothing to do." While it is true in that case that the judge proceeded to explain to the jury "the extent of the punishment that might be imposed" under the various forms of verdicts which had been submitted to it, including the legal right of the accused, in the event of conviction, to move for a new trial or apply for probation, there was no intimation that a recommendation for clemency or probation would be granted or considered by the court. The court then directed the jury to resume its deliberations with the admonition for it to agree upon one of the forms of verdicts with which it had been supplied, including that of not guilty. The jury promptly returned a verdict of guilty as charged, without a recommendation of mercy. Upon appeal the judgment was affirmed. That case furnishes no authority in support of the present judgment. In that case probation might have been properly granted. In the present case it is specifically prohibited by law. Moreover, in the Bruno Case there was no recommendation for probation or clemency, and no suggestion that either would be given consideration.

In the case of State v. Evans, 90 Kan. 795, 136 P. 270, 271, also relied upon by the respondent, after several hours of deliberation upon their verdict by the jury, the judge was asked by the foreman "if it would be proper to return a verdict with such a recommendation (for clemency)?" to which the judge replied, "There would be nothing improper in such a verdict, if the jury saw fit to make it, but he would not say whether the recommendation would be considered, nor would he make any promise as to what he would do in such a case." The jury promptly returned a verdict of guilty as charged, with an oral recommendation for clemency. On appeal, it was held the inquiry of the jury related only to the proper form of the verdict, and that, in effect, the court merely instructed the jury that a verdict was not rendered invalid merely because it contained a recommendation for clemency, and that no inducement was held out by the court for the jury to agree upon a verdict with the anticipation that leniency would be exercised in administering punishment for the crime. In that case the jury were not told that a recommendation for mercy or probation is usually given great weight by a court or prison board in fixing the penalty. That decision therefore affords no precedent in support of the judgment in the present case. The other cases which are cited by the respondent on this appeal may be likewise distinguished. We are able to find no case which goes to the extreme length of supporting a judgment of conviction under circumstances similar to those which exist in the present case.

The respondent asserts that the defendant waived her objection to the prejudicial nature of the court's remarks, for the reason that no objection thereto was made. In this assertion, the respondent is in error. There was a direct and specific exception registered to the remarks of the court with relation to the recommendation for probation, when the attorney for the defendant said, at the close of the colloquy: "If it please the court, just for the purpose of keeping the record clear, we will make an assignment of error on that."

The judgment and the order are reversed.

We concur: PULLEN, P. J.; PLUMMER, J.

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137 Cal.App. 449

HALL v. SOUTHERN CALIFORNIA EDISON CO., Limited, et al.

Civ. 1457.

District Court of Appeal, Fourth District, California.

March 19, 1934.

Rehearing Denied April 17, 1934.

1. Appeal and error 🔑927(3).

On appeal from judgment of nonsuit, every inference of fact and intendment of law must be liberally construed in favor of sustaining case made by appellant so that cause may be determined on its merits.

2. Negligence 🔑2.

Negligence can exist only if there is some duty or obligation which must be performed by party charged with negligence in favor of injured party.

3. Negligence 🔑32(1), 33(1).

Owner of property owes trespasser or licensee no duty to keep premises in safe condition, but only to abstain from willful or wanton injury, but owes to invitee duty to keep premises in safe condition.

4. Electricity 🔑15(1).

Electrical contractor's employee directed by contractor to cut power lines on pole electric company maintained on its customer's premises *held* not invitee of electric company, so as to render company liable for employee's injuries when partially decayed pole broke and fell, where customer had engaged contractor to disconnect electrical power.

5. Negligence 🔑32(2).

Property owners failing to discover that electric company's pole supporting power lines on owners' premises was decayed beneath ground *held* not negligent, so as to be liable for injuries to electrician when pole he climbed on to cut wires broke and fell, though electrician was invitee, in absence of showing property owners knew pole was unsafe.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

Action by Harry H. Hall against the Southern California Edison Company, Limited, and others. From a judgment for defendants, plaintiff appeals.

Affirmed.

Harold A. McCabe, of Santa Ana, for appellant.

Roy V. Reppy and E. W. Cunningham, both of Los Angeles, for respondent Southern California Edison Co.

Launer & Thompson by Albert Launer, all of Fullerton, for respondents E. H. and Merton Little.

JENNINGS, Justice.

Plaintiff instituted this action to recover compensatory damages for personal injuries alleged to have been caused by the negligence of defendants. Upon the trial of the action, plaintiff presented evidence tending to sustain the allegations of his complaint and rested his case. The defendants thereupon moved the court for a nonsuit which was granted. Judgment in favor of defendants was rendered. Plaintiff thereafter moved for a new trial, which motion was denied and he has now appealed from the judgment and from the court's order denying the motion for a new trial.

The record discloses that the following facts were shown by the evidence submitted during the trial: On August 27, 1931, the defendants E. H. Little and Merton Little were in possession of a tract of land comprising 6.84 acres in Orange county. On this tract of land was a small pumphouse containing a pump which was operated by electricity. The power used in the operation of the pump was furnished by the defendant Southern California Edison Company. This company had erected a pole on the premises which were in the possession of the Littles. The pole was located a short distance from the pumphouse, and from it wires which transmitted electrical energy extended to the pumphouse. The Southern California Edison Company owned the pole and wires which were employed as aforesaid in furnishing power for the operation of the pump, and were permitted by their codefendants, the Littles, to maintain the pole on the land which was in the possession of said codefendants. Some time prior to August 27, 1931, the defendant E. H. Little decided that he would dismantle the pumphouse and move the pump to another location. Since the accomplishment of this program necessitated disconnecting the power conveying wires from the pumphouse, E. H. Little went to the office of the Southern California Edison Company and informed this company of his intention to dismantle the pumphouse and to move the pump. He then inquired if the company "would make the change," for him, and was informed that, if he had the starting switch and equipment moved to a new location, the company would make the change of wires for him. The defendant E. H. Little thereupon engaged one J. G. Jenks, an electrical contractor, to perform the work of disconnecting the electrical power from the pumphouse. The plaintiff Harry H. Hall was an employee of J. G. Jenks and was requested by his employer to go to the Little premises and do the work. Upon arriving at the pumphouse and learning what was desired, the plaintiff decided to ascend the pole and to cut the wires which conveyed the power to the pumphouse at a point close to the pole. His reason for pursuing this plan was that thereby live wires would not be left lying on the ground. The plaintiff thereupon attempted to shake the pole, and, finding that it appeared to be solid, he ascended. Immediately after the wires were severed, the pole fell to the ground, and plaintiff sustained injuries to compensate for which he sought to recover damages by the institution of the present action. It was discovered that the reason for the pole falling was that it had become partially decayed and broke off at a point approximately six inches beneath the surface of the ground. Until the wires running to the pumphouse were cut by plaintiff, the pole was supported by three sets of wires of practically equal weight extending from it at approximately equal angles. When plaintiff cut the wires which extended to the pumphouse, this condition no longer existed, and the pole broke and fell.

[1] It is appellant's position that the trial court improperly granted a nonsuit both as to the respondent Southern California Edison Company and as to respondents E. H. Little and Merton Little. In this connection, it must be borne in mind that, since we are here considering an appeal which has been taken from a judgment of nonsuit, every inference of fact and intendment of law must be liberally construed in favor of sustaining the case made by appellant to the end that the cause may be determined on its merits. Coakley v. Ajuria, 209 Cal. 745, 290 P. 33; Hargrove v. Henderson, 108 Cal. App. 667,

292 P. 148. It will be proper first to consider appellant's claim that the evidence which developed the above-narrated facts was sufficient to fasten upon the Edison Company liability for the injuries sustained by him through the breaking of the pole and that the court therefore erred in granting the motion of the Edison Company for a nonsuit.

In giving consideration to this contention, it should be observed at the outset that the primary question presented is whether, in view of the establishment of the above-mentioned facts, the Edison Company could, as a matter of law, be guilty of negligence.

[2] It is fundamental that negligence can exist only if there is some duty or obligation which must be performed by the party charged with negligence in favor of the injured party. Schmidt v. Bauer, 80 Cal. 565, 568, 22 P. 256, 5 L. R. A. 580; Jacobson v. Northwestern Pacific R. R. Co., 175 Cal. 468, 472, 166 P. 3; Smelser v. Deutsche Evangelische, etc., 88 Cal. App. 469, 475, 263 P. 838. In other words, the party charged with lack of due care cannot be said to be negligent as to the injured party unless it appears that the party charged owed to the injured party a duty of care. Dahms v. General Elevator Co., 214 Cal. 733, 737, 7 P.(2d) 1013.

[3] It is also settled that the owner of property owes to a trespasser or licensee no duty to keep the premises in safe condition. Grundel v. Union Iron Works, 141 Cal. 564, 566, 75 P. 184; Means v. Southern Calif. Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; Giannini v. Campodonico, 176 Cal. 548, 550, 169 P. 80; Roberts v. Pacific Gas & Electric Co., 102 Cal. App. 422, 429, 283 P. 353; Brust v. C. J. Kubach Co., 130 Cal. App. 152, 19 P. (2d) 845. The only duty which the owner of property owes to a trespasser or licensee is to abstain from willful or wanton injury. Giannini v. Campodonico, supra. On the other hand, the property owner owes to an invitee the duty to keep the premises in safe condition. It becomes important, therefore, to determine whether, from the facts which were developed by the evidence, it can be said that a jury could have properly found that appellant was an invitee.

[4] We think that it must be conceded that, as to the Southern California Edison Company, appellant had not been expressly invited to enter upon their property. There is no evidence which in the slightest degree indicates that there was an express invitation. However, it must also be conceded that it is not essential that there was an express invitation by the Edison Company to appellant in order that it may be said that appellant was an invitee. It is sufficient if it may fairly be declared that the evidence discloses that there was an implied invitation. Aguilar v. Riverdale O. C. Ass'n, 104 Cal. App. 263, 285 P. 889. The existence of an implied invitation depends, in the final analysis, on the nature of the business which brought appellant upon the premises of the Edison Company. Appellant contends that his purpose in ascending the pole, which was the property of the Edison Company, was one which was of mutual benefit to himself and the company. It is argued that it was of benefit to him because he would receive remuneration for doing the work in which he was engaged and of benefit to the Edison Company because by the accomplishment of this work the Edison Company would be enabled to continue the sale of electric energy to a satisfied customer. The contention is ingenious but not impelling. The work upon which appellant was engaged cannot fairly be said to have been beneficial to the Edison Company. It was beneficial to the Littles because they desired to change the location of the pump and they had procured appellant to perform the work which was necessary to be done to effect this change of location. The Edison Company was not at all interested in the proposed change of location of the pump. There was no contractual relation between the Edison Company and appellant or appellant's employer. We think, therefore, that the evidence clearly indicated that appellant entered upon the property of the Edison Company for purposes of his own and of the Littles and that the work in which appellant was engaged at the time the injury occurred bore no relation to the business of the Edison Company, owner of the pole. Aguilar v. Riverdale C. C. Ass'n, supra. It follows that the trial court's action in granting the nonsuit as to respondent Southern California Edison Company was correct and must be sustained.

[5] We are also of the opinion that the court's action in granting the motion of respondents E. H. Little and Merton Little for a nonsuit was correct. Although appellant was an invitee on the premises of these respondents, no evidence was produced which showed that the Littles knew that the pole was unsafe. Nor do we think that it may fairly be said that these respondents owed to appellant the duty of discovering the hidden defect which caused the pole to break. The evidence therefore entirely failed to dis-

close that these respondents were guilty of negligence in any respect.

For the reasons stated, the judgment and order from which this appeal was taken are affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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137 Cal.App. 484

STORY v. CHRISTIN et al.

Civ. 7689.

District Court of Appeal, Second District, Division 1, California.

March 22, 1934.

Venue ⚷43.

Where motion for change of venue was made and denied, defendant could not renew motion.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Charles W. Story against Estelle Porter Christin and husband. From an order granting a motion for a change of venue, plaintiff appeals.

Reversed.

Clyde C. Shoemaker, of Los Angeles (J. F. Moroney and John Stewart Ross, both of Los Angeles, of counsel), for appellant.

Charles A. Christin, of San Francisco, for respondents.

HOUSER, Justice.

The pertinent facts as they appear in the brief filed by the appellant, and with which statement of facts "respondents agree," are as follows:

"The defendants filed a demurrer to the complaint, and a demand for a change of venue, accompanied by an affidavit of merits and a notice of motion. The motion was noticed for Monday, the 7th day of April, 1930, but was continued from time to time, and was finally heard on May 16, 1930. However, prior to the hearing upon said motion and upon the demurrer, to-wit, on April 28, 1930, the plaintiff served and filed an amended complaint, as of course, and this amended complaint was, therefore, on file on May 16, 1930, when defendants' motion was heard.

"The motion for the change of venue was presented and argued on May 16, 1930, and the court on said date made an order denying the motion. Thereafter, to-wit, on or about June 3, 1930, the defendants served and filed a demurrer to the amended complaint, a motion to strike and a new demand for a change of venue upon the same grounds, accompanied by an affidavit of merits and a notice of motion, in which notice was given that the defendants would on Monday, the 16th day of June, 1930, move the court for its order transferring said cause from the county of Los Angeles to the city and county of San Francisco.

"The said amended complaint, filed on April 28, 1930, was for the same cause of action stated in the original complaint, and, except for a slight change in paragraph II with respect to the parties, the only difference between the two complaints was that in paragraph V of the amended complaint the facts were pleaded a little more fully than in paragraph V of the original complaint.

"The hearing on defendants' second motion for a change of venue was continued from time to time and was finally heard on June 26, 1930, at which time the matter was argued and submitted, and on July 17, 1930, the court in effect reversed its previous position and made an order granting the defendants' motion for change of venue from the Superior Court of Los Angeles county to the Superior Court of the city and county of San Francisco. It is from this latter order that the present appeal is prosecuted."

The case of Jones v. Frost, 28 Cal. 245, contains an indication that unless an amended complaint changes "the identity of the action," no new or additional rights are created by such amended complaint in favor of, or conferred upon, the defendant to move for a change of venue.

In Buell v. Dodge, 57 Cal. 645, it is said: "Dodge's right to a change of the place of trial is to be determined by the then conditions of the case, and could not be taken away by statements in an amended complaint subsequently filed."

In Remington S. M. Co. v. Cole, 62 Cal. 311, it was held that the right to an order by which a motion for change of venue may be granted "is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action."

After reviewing several authorities, in the case of Brady v. Times-Mirror Co., 106 Cal.

56, 39 P. 209, 211, it was ruled to the same effect as in the case last hereinbefore cited. In part, the court said: "The statute requires the motion to be made 'at the time' the defendant appears and answers or demurs. If he does not then make the motion, he is not entitled to make it at any subsequent stage of the proceedings, even though the condition of the case may be such that, if it could be then made, it would be granted. Remington S. M. Co. v. Cole [62 Cal. 318], supra. * * *"

See, also, Ah Fong v. Sternes, 79 Cal. 30, 33, 21 P. 381; Hennessy v. Nicol, 105 Cal. 138, 38 P. 649; McClung v. Watt, 190 Cal. 155, 159, 211 P. 17.

In addition to such authorities, the ruling in the case of McNeill & Co. v. Doe, 163 Cal. 338, 125 P. 345, 346, would seem to be determinative of the question here at issue. In effect, it was there held that when a motion for a change of venue has been made and the motion denied, the power on the part of the defendant to again move for a change of venue does not exist, but "is exhausted"; and the defendant may not renew the motion. The following language is indicative of the decision by the court: "Section 395, Code of Civil Procedure, gives to a defendant sued in an action, such as was brought against appellant here, the right to a trial of the cause in the county where he resided when suit was brought. The procedure for securing this right—the filing of a demand that it be had in the county of his residence, made at the time he answers or demurs, accompanied by an affidavit of merits—is provided for by section 396 of the Code of Civil Procedure. Thereunder but one right is given to a defendant to move on that ground, and but one time fixed when he may assert it; and he is only then entitled to an order therefor upon a sufficient showing in his affidavit of merits. The appellant here was required to make his motion for the change when he filed his demurrer, and he did so; but, as his affidavit of merits was entirely insufficient, within the plain requirements of the law, the court properly denied his motion. He accepted this ruling as correct, as it undoubtedly was; and it was conclusive of any right to subsequently renew his motion on his own initiative, and on the same ground. His right to move ended with that denial. Hence, when he made this third motion on the same ground of residence in Tulare county, the court properly denied it, as his right to move in that respect was exhausted with the denial of his original application."

Since none of the authorities cited by respondents are in conflict with the several precedents to which attention has hereinbefore been directed, it follows that the order from which the appeal is taken should be reversed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

137 Cal.App. 497

HENRY H. CROSS CO. OF CALIFORNIA v. PRENTICE.

Civ. 1085.

District Court of Appeal, Fourth District, California.
March 22, 1934.

1. Appeal and error 🔑801(1).

Motion to dismiss appeal or to affirm judgment amounts, in effect, to demurrer to appellant's brief, and motion will be denied if it appears that extended examination of record is required for intelligent consideration of motion.

2. Appeal and error 🔑1011(1).

Finding of fact by trial court on conflicting evidence will not be disturbed on appeal.

3. Contracts 🔑237(2).

Debtor's payment of part of past-due indebtedness *held* no consideration for creditor's agreement to extend time for payment.

4. Sales 🔑89.

Debtor's promise to continue purchasing petroleum products from creditor *held* no consideration for alleged agreement extending time for payment of past-due indebtedness covering goods previously purchased.

Debtor's promise to continue purchasing petroleum products from creditor furnished no consideration for agreement to extend time for payment of past-due indebtedness, because promise was too indefinite and uncertain, since the debtor did not agree to purchase any definite amount of petroleum products at any definite time, but only when he needed the products if the creditor's price was right, and therefore the making of such promise involved no detriment to the debtor and conferred no benefit on the creditor.

5. Appeal and error 🔑1050(1).

In action for goods sold and delivered, consideration of contents of telegram where telegram itself was not admitted in evidence, if error, *held* not prejudicial, in view of other evidence.

6. Appeal and error 🔑1050(1).

In action for goods sold and delivered, error, if any, in admitting evidence respecting general practice of conducting plaintiff's business, *held* not prejudicial.

7. Appeal and error 🔑786.

Where consideration of questions presented by appellant produced conviction that questions raised were unsubstantial and that appeal was taken solely for delay, appeal was dismissed (Rules for Supreme Court and District Courts of Appeal, Rule 5, § 3).

Appeal from Superior Court, San Diego County; Lloyd E. Griffin, Judge.

Action by the Henry H. Cross Company of California against Burr H. Prentice, doing business under the fictitious firm name of the Smileage Gasoline Company. From a judgment in favor of the defendant, the plaintiff appeals. On motion to dismiss the appeal.

Motion granted, and the appeal dismissed.

Stickney & Stickney, of San Diego, for appellant.

Lewis E. Whitehead and Earl Glen Whitehead, both of Los Angeles, and Hunter M. Muir, of San Diego, for respondent.

JENNINGS, Justice.

The respondent has moved this court to dismiss the appeal taken by appellant from a judgment rendered by the trial court in favor of respondent or to affirm the judgment of the trial court. The motion is presented in accordance with the provisions of section 3 of rule V of the Rules for the Supreme Court and for the District Courts of Appeal. The grounds of the motion are that the appeal has been taken solely for the purpose of delay and that the questions upon which the decision of the cause depends are so unsubstantial as to require no further argument.

Examination of appellant's opening brief discloses that the following questions are stated as those which are presented upon this appeal: (1) The admission, over appellant's objection, of incompetent evidence; (2) that the trial court erroneously found that no agreement had been made by the parties for an extension of time within which appellant might pay his debt to respondent; (3) that the court considered evidence outside the record.

[1] The most important of these three questions is that the court made an erroneous finding that no agreement had been entered into by the parties that appellant should have an extension of time within which to pay an admitted indebtedness to respondent. This finding is attacked on the familiar ground that it is lacking in evidentiary support. Ordinarily, the very statement of such an objection impels the conclusion that its consideration requires an examination of the transcript on appeal which places upon the reviewing court an unwarranted burden, since, if the motion is denied, the court is required twice to make a detailed examination of the record. For this reason, it has been the policy of this court to consider that a motion to dismiss an appeal or to affirm the judgment amounts, in its practical effect, to a demurrer to appellant's brief, and to deny such motion if it appears that an extended examination of the record is required in order that the motion may receive intelligent consideration. Los Angeles v. Los Angeles-Inyo Farms Co., 126 Cal. App. 61, 14 P.(2d) 339; Thompson v. Boyer, 127 Cal. App. 149, 15 P.(2d) 541.

[2] On this appeal, however, we have the advantage of having before us not only the opening brief of appellant, but also respondent's reply brief. Furthermore, no extended examination of the record is required. Upon the question of the insufficiency of the evidence to support the court's finding that no agreement for an extension of time was made between the parties, appellant sets out in his brief the testimony of certain witnesses to the effect that such an agreement was made. Respondent's reply brief, however, discloses that a witness who was called by respondent testified positively that no such agreement was made by respondent. It is apparent, therefore, that upon this question there was a conflict of evidence, and no rule of appellate procedure is more conclusively established than that which prohibits the setting aside of a finding of fact made by a trial court when it appears that the evidence upon which the finding rests is conflicting.

[3, 4] A more cogent reason for sustaining respondent's contention regarding appellant's objection that the court improperly found that there was no agreement between the parties for an extension of time appears on the face of appellant's opening brief. It is there admitted that at the time the alleged extension agreement was made appellant was indebted to respondent in the amount of $3,000,

and it is declared that the evidence produced by appellant showed that respondent agreed to grant a six months' extension of time within which this past-due indebtedness should be paid, and that in return for this promise to extend the time of payment appellant paid approximately $600 on his account, and agreed that in the future he would continue to purchase petroleum products from respondent at such times as appellant should require such products and provided respondent's prices for such products were right.

It is settled that the payment by a debtor of a part of his indebtedness furnishes no consideration for an agreement of the character here being considered. Liening v. Gould, 13 Cal. 598; Hughes v. Davis, 40 Cal. 117; Dean v. Sedan Milling Co., 19 Cal. App. 28, 124 P. 736; Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 147 P. 486.

It is also clear that appellant's promise to continue purchasing petroleum products from respondent could furnish no consideration for an agreement to grant an extension of time for the payment of an admitted indebtedness. Appellant's promise was too indefinite and uncertain. According to his own testimony, he did not agree to purchase any definite amount of such products at any definite time. He would purchase when he needed the products if respondent's price was right. The making of such a promise involved no detriment to him, and by the same token it conferred no benefit on respondent. We think, therefore, that if, for the sake of argument, it be conceded that the evidence established that respondent agreed to an extension of six months within which appellant should pay the indebtedness he owed to respondent upon payment by appellant of a portion of his indebtedness and upon his promise to continue purchasing products from respondent upon the conditions heretofore described, such extension agreement was, under the circumstances, entirely unsupported by any legal consideration and was nudum pactum.

[5] Appellant also objects that the court incorrectly admitted incompetent evidence and that it improperly considered evidence which was not before it. Since it appears that these objections relate to the same evidence, they may be considered together.

It is contended that the court permitted evidence to be given regarding the contents of a telegram which it was testified was sent by respondent to appellant, and that, although the telegram was never offered in evidence, the court nevertheless took it into consideration in arriving at its decision. It appears that the only possible bearing the telegram had related to the question of whether appellant's appearance at the Los Angeles office of respondent was entirely voluntary on his part or whether it was in response to a telegram sent him by respondent. In this connection it is interesting to observe that respondent in its reply brief has included a copy of Respondent's Exhibit 1, which is a letter sent by appellant to respondent on February 12, 1932. This letter contains the following language: "We wish to acknowledge receipt of your telegram. Mr. Prentice expected to be in Los Angeles yesterday but was called to Victorville. He will be in Los Angeles Monday or Tuesday and will see you at that time." The conclusion is inescapable that the telegram to which reference was made in the above-quoted letter is the same telegram which a witness for respondent testified was sent to appellant, and the court was warranted in concluding that appellant's appearance at respondent's office was not entirely voluntary. Furthermore, it does not appear that it was at all material whether appellant's appearance was of his own volition or whether he went to respondent's office in response to a telegram. If, therefore, it be conceded that evidence regarding the telegram was improperly admitted and that the court, although the telegram was not in evidence, arrived at the conclusion that appellant's appearance at respondent's office was not of his own volition, but was in response to the telegram, we are unable to discover how appellant was prejudiced thereby or that any different result would have been achieved if no evidence regarding the telegram had been admitted and no consideration had been given to the fact that a telegram had been sent.

[6] Appellant also complains that the court, over his objection, improperly admitted evidence respecting the general practice of conducting respondent's business. This evidence, which is set out in appellant's opening brief, consists of the voluntary statement of a certain witness who was testifying in behalf of respondent and responses of this witness to questions propounded by the court. It is apparent that the evidence was not material to any issue presented in the case, and, if it be conceded that it was improperly admitted, it does not appear that appellant suffered any prejudice by its reception.

[7] Careful consideration of the various questions stated in appellant's opening brief

and the arguments presented in support of the contentions there advanced produces the conviction that the questions raised on this appeal are not of sufficient substantiality to require further consideration of the appeal.

It is therefore ordered that respondent's motion for dismissal of the appeal be granted and that the appeal be dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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137 Cal.App. 509

PLUMPE v. TANNER MOTOR LIVERY, Inc., et al.

Civ. 9062.

District Court of Appeal, Second District, Division 2, California.
March 23, 1934.

Automobiles ⇨388.

Hirer assumed risk of being killed when he consented to having his valet drive automobile which he had hired with chauffeur, as respects chauffeur's and owner's liability therefor.

Appeal from Superior Court, Los Angeles County; Leroy Dawson, Judge.

Action by Ottillie Plumpe against the Tanner Motor Livery, Incorporated, and another. From a judgment of nonsuit, plaintiff appeals, and defendants file a motion to dismiss the appeal or to affirm the judgment.

Judgment affirmed.

Ratzer, Bridge & Gebhardt, and H. A. Gebhardt, all of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondents.

STEPHENS, Presiding Justice.

This is an appeal from a judgment of nonsuit in favor of defendants and against the plaintiff. Upon the filing of appellant's opening brief, respondents (defendants below) moved the dismissal of the appeal or the affirmance of the judgment.

An automobile with chauffeur was hired, and the hirer's valet took the wheel with the hirer's consent. The vehicle upset and killed the hirer. His mother brought suit against the chauffeur and the owner.

The hirer's consent to his valet's operation of the vehicle was in effect a complete assumption of all risks encountered thereby, so far as the chauffeur and the owner are concerned.

The judgment is affirmed.

We concur: CRAIG, J.; HAHN, Justice pro tem.

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137 Cal.App. 556

SMITH et al. v. WAGNER.

Civ. 822.

District Court of Appeal, Fourth District, California.
March 26, 1934.

1. Infants ⇨87.

Judgment against minor defendant in personal injury action *held* not reversible for failure to appoint guardian ad litem where minor appeared by attorney, announced readiness for trial, admitted minority on cross-examination, made no request for appointment of guardian ad litem, and complained of matter for first time in motion for new trial (Code Civ. Proc, § 2055).

2. Automobiles ⇨6.

Action for death of automobile guest *held* governed by law in force at time of accident and guest's death, which permitted recovery for host's gross negligence, though gross negligence as basis of recovery was withdrawn by statute before trial (St. 1931, p. 1693, § 141¾).

3. Automobiles ⇨245(24).

Whether automobile host was grossly negligent in entering curve having an angle of approximately 66 degrees and at a speed of between 50 and 60 miles per hour *held* for jury (St. 1931, p. 1693, § 141¾).

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Ben Smith and Dorcas A. Smith against Frank Wagner. From a judgment for plaintiffs, defendant appeals, and also attempts to appeal from court's order denying a motion for a new trial.

Judgment affirmed, and attempted appeal from order denying motion for new trial dismissed.

See, also, 129 Cal. App. 694, 19 P.(2d) 250.

Borton & Petrini, of Bakersfield, for appellant.

Walter Hoye, of Los Angeles, and Jackson Mahon, of Bakersfield, for respondents.

JENNINGS, Justice.

This is an appeal by the defendant from a judgment in favor of plaintiffs rendered by the trial court and an attempted appeal from the court's order denying a motion for a new trial. The action was instituted by plaintiffs to recover damages for the death of their minor son, which was alleged to have been caused by the gross negligence and willful misconduct of defendant in operating an automobile in which the deceased was riding as the guest of defendant. The action was tried before a jury, which returned a verdict in favor of plaintiffs in the amount of $3,500.

[1] Appellant's first contention is that he was a minor at the time the trial of the action occurred and that the failure of the trial court to appoint a guardian ad litem for him rendered the judgment voidable, and that by reason of the failure to appoint a guardian appellant was entitled to disaffirm the judgment, and that appeal from the voidable judgment is a proper method of disaffirmance.

The record on appeal fails to disclose that appellant applied to the trial court for the appointment of a guardian ad litem. It does disclose that through his counsel he filed an answer verified by himself to the amended complaint; that on the date appointed for the trial of the action he appeared in court and through his counsel he announced that he was ready for trial; that he proceeded to trial; that he testified as a witness in his own behalf and that another witness testified for him; that he did not specifically direct the court's attention to the fact that he was a minor; that the only information respecting appellant's age which was conveyed to the court during the trial of the action was presented by appellant when he was called by respondents as a witness under section 2055 of the Code of Civil Procedure and during his cross-examination by respondents' counsel was asked, "How old are you?" to which he replied, "I am 19 now"; that at no time during the proceedings did he make any further reference to his minority; that after judgment was rendered against him he then for the first time formally advised the court of the fact of his minority on his motion for a new trial.

The above-narrated facts are so similar to those which appear in King v. Wilson, 116 Cal. App. 191, 2 P.(2d) 833, that we consider the opinion therein decisive of appellant's contention in this regard. If it be conceded that the failure to appoint a guardian ad litem was an irregularity it was not, under the circumstances disclosed by the record, such an irregularity as affected the substantial rights of appellant and does not constitute an error of such importance that of itself requires a reversal of the judgment.

[2] Appellant's second contention is that section 141¾ of the California Vehicle Act (St. 1923, p. 517, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), popularly known as the "Guest Law," was so amended in 1931 that it eliminated gross negligence as a basis for the recovery of damages in an action of this character. The record discloses that the accident which caused the death of respondents' minor son occurred on May 19, 1931. At that time the above-mentioned statute permitted a recovery by a guest either for gross negligence or for willful misconduct. The California Legislature so amended the law in 1931 that it eliminated gross negligence as a basis for the recovery of damages by a guest. This amendment to the law did not take effect until some time subsequent to the happening of the accident and the death of respondents' son which resulted from it. It is appellant's contention that the right of respondents to plead gross negligence as a basis for the recovery of damages is purely remedial and that the amendment of 1931 is retroactive and its effect is to cut off the remedy for the recovery of damages for gross negligence. The very recent decision of the Supreme Court in Stotts v. Blickle, 30 P.(2d) 392, is adverse to appellant's contention and is decisive of the question.

[3] We do not understand that there is any contention by appellant that no evidence tending to prove that appellant was guilty of gross negligence was submitted to the jury. Such contention, if advanced, would be untenable. Evidence was produced by respondents which showed that appellant, immediately prior to the occurrence of the accident, drove the automobile around a curve having an angle of approximately 66 degrees at a speed of between 50 and 60 miles per hour. The question of gross negligence was one for the jury under proper instructions given by the court. Krause v. Rarity, 210 Cal. 644,

293 P. 62, 77 A. L. R. 1327; Anderson v. Ott, 127 Cal. App. 122, 15 P.(2d) 526. Appellant makes no contention that the jury was not fully and properly instructed as to the law.

For the reasons stated the judgment is affirmed, and the attempted appeal from the order is dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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137 Cal.App. 487

KASHIKU NAKAMURA v. LOS ANGELES GAS & ELECTRIC CORPORATION et al.

Civ. 7791.

District Court of Appeal, Second District,
Division 1, California.
March 22, 1934.

1. New trial 🔑71.

Where evidence concerning negligence and contributory negligence was conflicting, grant of new trial because of admission of evidence concerning plaintiff's straitened financial condition *held* not abuse of discretion, notwithstanding there was no claim that verdict was excessive.

2. New trial 🔑40(2).

Failure to make motion to strike out answers to questions objected to, or to request instruction regarding them, *held* not waiver of error.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Kashiku Nakamura against the Los Angeles Gas & Electric Corporation and others. From an order granting defendants a new trial, plaintiff appeals.

Affirmed.

J. Marion Wright, of Los Angeles, for appellant.

Paul Overton, Douglas Van Dyke, and Neil G. Locke, all of Los Angeles, for respondents.

DESMOND, Justice pro tem.

[1] This appeal is from an order of the trial court granting a motion for a new trial in a case where a jury had awarded plaintiff damages in the sum of $2,500 for injuries received in an automobile accident. Appellant, conceding that the trial court is vested with broad discretion in ruling upon such a motion (2 Cal. Jur. 27), argues that in this case there was such an abuse of discretion as to warrant reversal. While the motion was based on various grounds, the decision to grant a new trial rested solely upon error in law occurring at the trial.

The plaintiff, a Japanese woman, thirty-four years of age, testified that while boarding the rear end of a street car on North Main street in the city of Los Angeles she was struck by an automobile, driven through the safety zone where she stood, by defendant Raines, a driver employed by defendant corporation, sustaining injuries which incapacitated her for a long period of months and necessitated protracted treatment by a surgeon. It appeared that at the time of the accident plaintiff was employed as a barber earning considerably more than $100 per month, and that after she returned to work, approximately a year later, her earnings were practically 50 per cent. less, she being unable to work as many days or for as long hours as previously. The following testimony was brought out while plaintiff's counsel was examining her through an interpreter:

"Q. Why were you working at this trade—

"Mr. Locke: Objected to as immaterial.

"The Court: Sustained.

"Mr. Wright: The idea was to show that she was supporting herself, that's the idea. I don't want to ask leading questions, but the jury wants to know whether she was supported by someone else, and if this was pastime or necessity, for her to work.

"Mr. Locke: Object to that as immaterial. As an offer of proof, I will object to the offer of proof as immaterial. It is immaterial whether she was supporting herself or not.

"The Court: Objection sustained.

"Mr. Wright: I offer to prove by this witness that she had to work to support herself, and had no other means of support except by her own earnings.

"Mr. Locke: I object to it as incompetent, irrelevant and immaterial; not tending to prove or disprove any issues in this case, and I object to the offer.

"The Court: Were you married at the time of this accident?

"The Witness: I was separated from my husband for a while.

"The Court: In view of the facts, I think that the question is proper and the ruling will be set aside. Objection overruled. Read the question. (Question read by the reporter.)

"A. If I don't work, I won't be able to eat.

"Q. Were you receiving money or compensation or support except from these earnings?

"Mr. Locke: The same objection.

"The Court: Overruled.

"A. No, sir; just what I earned."

In the mind of the trial court, the ruling by which the straitened financial condition of the plaintiff was so permitted to be placed before the jury, constituted so grave an error as to require a new trial. In view of the decisions in this state and elsewhere we cannot hold, on the facts disclosed by the transcript, that this order was an abuse of discretion. It is not contended by respondents that the amount awarded as damages was excessive considering the nature of the injuries received and the suffering, disability, and expense resulting therefrom. In fact, excessive damages was not set up as one of the grounds for a new trial. But respondents do contend that the inquiry by plaintiff's counsel which placed before the jury the fact that plaintiff had no means of support except what she earned may have created such sympathy for her in the minds of the jurors as to cause them to bring in a verdict for the plaintiff when otherwise they might have decided in favor of the defendant. It should be noted here that testimony was offered by the defendants to the effect that while plaintiff was standing in the safety zone, apparently waiting for a car, she suddenly left it to run to the curb at a time when no street car was in or near the safety zone, and was struck by or ran into the side of defendant's automobile at a point between the safety zone and the curb. Plaintiff had testified that she was struck by the automobile as she grasped the handrail of the street car.

Other points of serious difference between plaintiff's witnesses and defendants' witnesses might be cited, but to no purpose except to indicate that, according to one version plaintiff was entitled to recover and, under the other, she was not. It is conceivable that in such a situation, sympathy engendered by a realization of plaintiff's lack of financial resources might have led the jury to accept as the true story of the accident the one related by plaintiff's witnesses. As the court, speaking through Mr. Justice Lennon, said in Ensign v. Southern Pacific Co., 193 Cal. 311, 223 P. 953, 957: "Where the element of sympathy enters into a case, the difficulty is that it is as likely to result in the giving of a verdict against the evidence of nonliability as it is to increase the verdict where a liability exists. Sympathy permeates the whole case and introduces an irrelevant factor which may result not only in the giving of an excessive verdict but a verdict where none would otherwise be given." See, also, Wright v. Broadway Dept. Store, 199 Cal. 562, 568, 250 P. 572; Johnston v. Beadle, 6 Cal. App. 251, 91 P. 1011.

[2] Appellant calls our attention to the fact that no motion was made to strike out the answers to the objectionable questions, but failure to make such a motion is not to be taken as a waiver of the right to claim error. "If a question is objectionable from every standpoint, if on its face there appears no purpose whatever for which the evidence asked could be admissible, a general objection of irrelevancy, incompetency, and immateriality is sufficient." Short v. Frink, 151 Cal. 83, 90 P. 200, 201, citing authorities. Nor can it be held that failure of defendants to request that an instruction be given in regard to the objectionable testimony constituted a waiver by which the trial court was bound in ruling upon the motion for a new trial. Cases cited by appellant's counsel in support of that contention deal with situations where misconduct of an attorney was charged, usually relating to remarks made in arguments to a jury. "Respondents concede," to quote from their brief, "that the rule is that in such cases such misconduct must be objected to and the court requested to instruct the jury to disregard it before point may be made of such misconduct." "But," the respondents argue, and we quote further with approval from their brief, "such is not the situation in the case at bar. Respondents clearly voiced their objections to the testimony and to the offer of proof made by appellant's attorney at the time of trial, and in so doing preserved their objections for a later attack upon the proceeding."

This cause is remanded for a new trial in accordance with the order of the trial court, which is hereby affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

137 Cal.App. 610

RUBINI v. RUBINI et al.

Civ. 8237.

District Court of Appeal, Second District, Division 2, California.

March 29, 1934.

Divorce ⚷255.

Judgment in divorce action awarding household property to husband *held* res adjudicata in subsequent claim and delivery action by former wife to recover possession thereof as against former husband.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Diane Rubini against Jan C. Rubini and another. From a judgment for the plaintiff, the defendants appeal.

Judgment reversed in accordance with opinion.

Philip Cohen, of Los Angeles, for appellants.

Luke J. McNamee, of Los Angeles, for respondent.

CRAIG, Justice.

This is an appeal from a judgment entered in an action based upon a claim and delivery, instituted by respondent herein, in which plaintiff obtained judgment for the possession of certain furniture.

It is the contention of appellants that the issues raised in the instant case were all settled in a former divorce action between the parties and are therefore res adjudicata.

It appears that there was such a divorce proceeding, in which the plaintiff in the instant case was plaintiff and Jan C. Rubini was defendant. The record before us reveals that in said divorce action the court found that the parties, at the date of the commencement of said action, owned said property, which was community property and was enumerated therein as "furniture situate in the premises known as 934 Third Avenue, Los Angeles, California"; and in the conclusions of law following said findings is the following: "That the defendant is entitled to the ownership and possession of * * * together with the furniture and furnishings situated therein, and all of which were in and upon said premises, to wit, 934 Third Avenue, Los Angeles, California, at the date of the commencement of this action." It is too clear for argument that unless in the instant case it appears that the personal property in question is other than that covered by the above finding and conclusion, appellants' contention must be upheld.

Referring now to the case before us, the court finds that on the 11th day of August, 1928, the plaintiff was the owner of certain property enumerated in said finding, "all of which was situate and located in the premises known as 934 Third Avenue, in the city of Los Angeles, County of Los Angeles, State of California." In the next finding it is said "that all of said articles above mentioned were situate in the premises known as 934 Third Avenue, Los Angeles, California, at and prior to the commencement of this action." These are the only findings which in any way bear upon the issues here presented. Obviously the ownership of this property was determined in the first action. However, we find in the defendants' answer in the instant case an admission that certain articles, to wit: "1 Large Teakwood Stand; 1 Small Teakwood Stand; 1 Bronze Woman Figure, and 1 Green Marble Pedestal," are the property of the plaintiff in both actions, but it is alleged that prior to the beginning of the claim and delivery suit the defendant Rubini therein offered to deliver said articles to the plaintiff but that the latter had refused to accept the same. These articles are only a small part of those that were claimed in the last-named suit. We find no finding on the issue presented by this allegation in the answer. This being so, the judgment in favor of the plaintiff is without support in the findings, even as to these specified articles.

The judgment is reversed, and the trial court is directed to enter a judgment in favor of defendants, except that it is directed to find that the articles admitted by defendants' answer to belong to the plaintiff are the plaintiff's, and as to them give judgment accordingly.

We concur: STEPHENS, P. J.; ARCHBALD, Justice pro tem.

DISTRICT BOND CO. v. HALY et al.*

Civ. 7731.

District Court of Appeal, Second District, Division 1, California.

March 28, 1934.

Rehearing Denied April 26, 1934.
Hearing Granted by Supreme Court May 24, 1934.

Usury ⇐101.

In action by creditor of corporation against stockholders to enforce statutory liability on account of money borrowed by corporation, usurious interest paid could be set off against principal debt.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the District Bond Company against George H. S. Haly and others. From a judgment for plaintiff, defendants appeal.

Judgment modified, and, as modified, affirmed.

Mott, Vallee & Grant and Birger Tinglof, all of Los Angeles, for appellants.

Dryer, Castle, McConlogue & Richards and Dryer, Castle & Richards, all of Los Angeles, for respondent.

HOUSER, Justice.

A judgment in favor of the plaintiff, District Bond Company, is the basis of the instant appeal, and was the result of an action brought by said plaintiff against certain stockholders of Syndicate Company, a corporation, to enforce the statutory liability as such stockholders on account of money alleged to have been borrowed by Syndicate Company from the plaintiff.

A large portion of the brief of the appellants is devoted to a consideration of each of several points, all of which being founded upon the basic question of whether the evidence adduced on the trial of the action was sufficient to sustain the several findings and the ensuing judgment. No useful purpose would be served by a statement of the gist of such evidence. Suffice it to say that, after a careful examination of the record herein, this court is convinced that the record is sufficient to justify the several conclusions thereon reached by the trial court; from which it follows that none of the several contentions of the appellants that are primarily dependent upon the asserted insufficiency of the evidence can be sustained.

It is also urged by the appellants that in each of several instances the trial court erred to the damage of the defense either in the admission or in the rejection of certain items of evidence. Upon an examination by this court of such specifications of error, although it may be that in strictness some of the proffered evidence that was ruled out might properly have been admitted or that some of the objections of the defendants to the admission of certain evidence which were sustained might well have been overruled, nevertheless, without conceding the existence of any such alleged error, but giving due weight to the probable combined effect of all of such assumed errors, it is clear that they could not have affected the final result of the trial.

Since the original promissory notes and each of the renewals thereof which evidenced the alleged indebtedness of Syndicate Company to District Bond Company, carried a provision by which, in the event that an action should be brought thereon, the obligor agreed to pay attorney's fees, it becomes manifest that the objection presented by appellants to the findings, the conclusion, and the judgment by the trial court with reference thereto, cannot prevail.

The original loans made by the plaintiff to Syndicate Company, of which the several defendants were stockholders, and which, as hereinbefore set forth, were evidenced by promissory notes, together with other written agreements or understandings between the interested parties, disclosed facts from which the ultimate conclusion was inevitable (as in effect was found by the trial court) that the agreed rate of interest to be paid by the borrower on each of such notes and the several renewals thereof was usurious. As in principle has been announced by the Supreme Court of this state in each of the cases of Haines v. Commercial Mortgage Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725, Ames v. Occidental L. I. Co., 210 Cal. 271, 291 P. 182, and Westman v. Dye, 214 Cal. 28, 4 P.(2d) 134, the payment of usurious interest may be set off against the principal debt. Without contradiction of the fact, the record herein shows that in accordance with the agreement of the interested parties a total of $45,697.07 was thus paid, and that in calculating the several amounts for which the respective stockholders were liable no account was taken of the said amount which should have been credited on the principal obligation.

In connection with the foregoing, it is ordered that finding No. XI, made by the trial court, be and it is amended so that, after such amendment has been made, it will read as follows: "That it is true that prior to the 21st day of June, 1926, the terms of the agreement between plaintiff and Syndicate Company required the payment of interest upon said indebtedness in excess of the rate of 12% per annum, and that subsequent to the 21st day of June, 1926, the terms of the agreement between the plaintiff and Syndicate Company required the payment of interest at the rate of 12% per annum compounded quarterly, and that the terms of said agreement between the said parties were void as to the payment of interest thereon; and the interest so agreed to be paid thereon was usurious; that the total amount of money paid by Syndicate Company to District Bond Company by way of such usurious interest was the sum of $45,697.07; and that no part thereof has been credited against the principal of said indebtedness."

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*For subsequent opinion see 41 P.2d 319.

It is further ordered that any other finding or findings, in whole or in part, made by the trial court, as far as in any respect the same may be, or which may appear to be, in conflict, or inconsistent with, finding No. XI as thus amended, shall be disregarded.

It is further ordered that, as to the appealing defendants, the total judgment against each of them be modified by reducing the amount thereof in the proportion that the sum of $45,697.07 bears to the total of the principal debt of Syndicate Company to the plaintiff, as found by the trial court. As thus modified, the judgment is affirmed; appellants to recover costs.

We concur: CONREY, P. J.; YORK, J.

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137 Cal.App. 385

PEOPLE v. RHODES.

Cr. 1774.

District Court of Appeal, First District, Division 2, California.

March 16, 1934.

1. Criminal law 🔑273.

Accused admitted allegations of information charging him with burglarizing inhabited dwelling when he entered plea of guilty (Pen. Code, § 459).

2. Criminal law 🔑1144(13).

Presumption is that conviction, upon plea of guilty, of first degree burglary, was based on competent evidence, where record did not disclose evidence taken (Pen. Code, § 1097).

3. Criminal law 🔑1144(17).

Where depositions taken at preliminary examination which were part of record showed that information charged burglary in first degree, it would be assumed, in absence of showing to contrary, that trial court made finding of first degree burglary in accordance with depositions (Pen. Code, § 1097).

4. Criminal law 🔑991(½).

Trial court, in rendering judgment in criminal action, need not make finding on fact not in issue.

5. Criminal law 🔑991(½).

Judgment of conviction of first degree burglary, which on its face recited every fact required by statutes, *held* not insufficient because not making finding as to whether accused was armed with deadly weapon, and as not showing facts to board of prison directors from which board could determine minimum term (Pen. Code, §§ 461, 1097, 1192, 1200, 1207, and § 1168, as amended by St. 1927, p. 1491).

6. Criminal law 🔑1177.

Accused convicted of first degree burglary could not complain because judgment did not specify whether accused was armed with deadly weapon, where judgment implied imprisonment for not less than five years, which was as favorable to accused as statutes permitted (Pen. Code, §§ 461, 1097, 1192, 1200, 1207, and § 1168 as amended by St. 1927, p. 1491).

7. Criminal law 🔑1188.

If judgment convicting of first degree burglary is uncertain, accused can ask only that judgment be set aside, and, if such relief is granted, accused is not entitled to be discharged, but merely to be remanded to trial court to reframe judgment.

8. Criminal law 🔑1177.

Alleged uncertainty of judgment convicting of first degree burglary, in not specifying whether accused was armed with deadly weapon, *held* not prejudicial, where, under statute, minimum punishment was imprisonment for five years whether accused was armed with deadly weapon or not (Pen. Code, § 461, subd. 1, as amended by St. 1933, p. 2216; § 1168, subd. 2 (a), as amended by St. 1933, p. 2156).

9. Burglary 🔑2.

Constitutional law 🔑250.

Statute providing that person entering house with intent to commit petit larceny or any felony is guilty of burglary *held* not unconstitutional as not operating uniformly throughout whole class of misdemeanor intents (Pen. Code, § 459; Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 11).

10. Burglary 🔑41(3).

Assault committed after entry into dwelling house may be considered in burglary prosecution, notwithstanding evidence of entrance into dwelling house with intent to commit assault may not be considered (Pen. Code, § 459).

11. Burglary 🔑41(3).

In burglary prosecution, to prove entry was made with intent to commit larceny, there need not be evidence that property in house entered was actually taken, stolen, and carried away, since intent may be proved by testimony or admission of person whose intent is question involved (Pen. Code, § 459).

12. Indictment and information 🔑41(1).

District attorney in framing information may base it on any offense shown by depositions taken before committing magistrate (Pen. Code, § 809).

13. Criminal law 🔑304(16).

Trial court takes judicial notice of its own records in proceeding on trial.

14. Criminal law 🔑980(2).

Trial judge, when determining degree of burglary upon accused's plea of guilty, may consult depositions returned by committing magistrate (Pen. Code, §§ 459, 686, 809, 995).

15. Criminal law 🔑1137(2).

Accused could not complain because trial court consulted depositions taken before committing magistrate in determining degree of burglary, on ground that depositions were not part of judgment roll, where accused based his motion to annul conviction on files, papers, proceedings, and records in office of county clerk, among which documents were depositions (Pen. Code, §§ 459, 686, 809, 995).

Appeal from Superior Court, Monterey County; H. C. Jorgensen, Judge.

Raymond Rhodes was convicted of burglary, and he appeals.

Affirmed.

Raymond Rhodes, in pro. per.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, Deputy Atty. Gen., for the People.

STURTEVANT, Justice.

On September 20, 1928, judgment was entered against the defendant convicting him of the crime of burglary. From that judgment no appeal was taken. Thereafter the defendant served notice that he would move the court for an order to annul, vacate, and set aside the judgment of conviction. That motion was made, and thereafter it was denied. From the order denying said motion, the defendant has appealed and has brought up a typewritten transcript certified by the clerk of the trial court. However, he has not brought up a reporter's transcript.

[1] Thereafter the clerk prepared a supplemental transcript, which was received in this court on January 8, 1934, and the reporter prepared a transcript of the proceedings had at the time of the arraignment for judgment. The latter transcript was received and filed January 17, 1934. From an inspection of the record as so made up it cannot be ascertained what evidence, if any, was offered in support of the defendant's motion to annul, etc. In the notice it was recited that: "Said motion will be made and based on the files, papers, proceedings and records of the above entitled case now on file in the office of the county clerk of the county of Monterey, state of California." Assuming that the motion was made and supported, as stated in said notice, the record shows as follows: The information charged the defendant with burglarizing an inhabited dwelling. All of those allegations were admitted by the defendant when he entered a plea of "guilty." The information was filed on August 10, 1927. On that same date there were filed the depositions taken on the preliminary examination. An examination of those depositions discloses that at about 4 p. m. on the 28th day of July, 1927, the defendant committed the act described in the information exactly as the same was pleaded in the information. The depositions also disclosed that, after having entered the house described, the defendant, while so in the house, assaulted Viola Nuttall. That fact was not recited in the judgment. Neither did it recite that the defendant was, or was not, armed with a deadly weapon. However, the entries made by the clerk in his minutes at the time that judgment was imposed, among others, included the following:

> "The District Attorney, with the defendant and his counsel, Paul Pioda, Esq., are present in court. The court determines that the crime of which defendant has been convicted is the crime of burglary of the first degree."

[2, 3] In his first point the defendant asserts that without evidence to prove the degree of burglary the court fixed it at the first degree, contrary to the provisions of section

1097 of the Penal Code. As we have just pointed out, the record does not show whether evidence was taken or was not taken; neither does it show what that evidence, if any was taken, consisted of. In this state of the record every presumption is that the finding attacked was made on competent evidence. Furthermore, as we have shown, the depositions taken at the preliminary examination were on file and a part of the record in the superior court. Those depositions showed that the charge stated in the information was burglary in the first degree. In the absence of any showing to the contrary, it will be assumed that the trial court examined those depositions and made its finding in accordance therewith. People v. Hall, 105 Cal. App. 359, 362, 287 P. 533.

[4, 5] The second and third points are closely related, and are but different statements of the same contention. The defendant asserts that the judgment is uncertain. As recited above, the trial court did determine the degree and did comply with the provisions of section 1192 of the Penal Code. But the defendant claims that in fixing the degree as first degree the court did not determine and make a finding as to whether the defendant was, at the time of the burglary, armed with a deadly weapon; that, if he was not so armed, his punishment should have been fixed at imprisonment in the state prison for not less than five years (Pen. Code, § 461); and, if he was so armed, his minimum term should have been fixed at seven years (Pen. Code, § 1168, as amended May 26, 1927, Stats. 1927, p. 1491). Continuing, the defendant argues that the judgment should have been so framed that on its face it would have shown the facts from which the board of prison directors could have definitely determined whether his minimum term was five or seven years. We think that the contention is not sound. It is not claimed that the judgment on its face does not recite every fact required by the statutes to be recited. Pen. Code, §§ 1192, 1200, and 1207. In rendering a judgment in a criminal action, the trial court, at common law, was not required to make a finding on a fact not in issue. 16 C. J. 1319, et seq. No statute prescribes any different rule of law. The judgment was sufficient. People v. Sherman, 127 Cal. App. 417, 15 P.(2d) 881. The defendant cites and relies on People v. Stratton (Cal. App.) 24 P.(2d) 174. No doubt there is some language contained in that decision supporting the defendant's contention. However, we are satisfied that the decision does not go as far as claimed by this defendant. The court that wrote it so held in a later case. People v. Bayne (Cal. App.) 28 P.(2d) 1068. As so explained, the Stratton Case contains nothing at variance with what we have said.

[6-8] We think it is clear that the judgment in the instant case implies a punishment of imprisonment for the minimum term of not less than five years. That is as favorable to a defendant convicted of burglary in the first degree as any statute has provided since April 28, 1925. If, as defendant claims, the judgment is uncertain, the greatest relief he can ask is that the judgment be set aside. But, in the event that such relief should be granted, it is settled law that the defendant is not entitled to be discharged but merely to be remanded to the trial court, and that it becomes the duty of the trial court to reframe the judgment. People v. Walker, 132 Cal. 137, 64 P. 133. If that course should be pursued, no advantage can possibly be gained by the defendant. The Act of May 26, 1927, amending section 1168 of the Penal Code, has since been amended. At the present time the minimum punishment of the defendant must necessarily be five years whether at the time he committed the offense he was armed with a deadly weapon or was not so armed. Pen. Code 1933, § 461, subd. 1, § 1168, subd. 2 (a), St. 1933, pp. 2156, 2216. It follows that, if to any extent the judgment was uncertain, the defendant has not been prejudiced thereby, and the order appealed from should stand. Pen. Code, § 1258; People v. Kelly, 120 Cal. 271, 274, 52 P. 587. In the cited case the information charged the defendant with having committed the crime of burglary. It also pleaded prior convictions, etc. By his plea Kelly admitted the prior convictions, but pleaded not guilty to the charge of burglary. The defendant was convicted. If there were no prior convictions under the statute as it then stood, the maximum punishment was five years. As the prior convictions were admitted, the maximum punishment was not less than ten years. In entering the judgment, the clerk should have recited the facts regarding the priors (Pen. Code, § 1207), but he did not do so. The judgment, however, designated the punishment as ten years. On appeal, the defendant claimed the judgment was uncertain and excessive. In affirming the judgment, on page 274 of 120 Cal., 52 P. 587, 588, the court said: "But here the judgment, while not in exact accord with the statutory requirement, recites all that was material to defendant. The offense charged is correctly designated, but there is a mere clerical misprision in omitting the statement of a fact going to augment the pun-

ishment, but which, notwithstanding such omission, the court, as we have seen, had a right to and did consider. In such a case it would be the idlest ceremony, so far as affecting any right of defendant, to reverse the judgment. All that we could do would be to remand the cause, with directions to have a formal judgment entered by the clerk. This could be of no possible benefit to appellant, while doing violence to that provision of our statute which requires that 'after hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.' Pen. Code, § 1258."

[9] In his last point the defendant contends that section 459 of the Penal Code does not operate uniformly throughout the whole class of misdemeanor intents, but arbitrarily singles out the intent to commit petit larceny, thereby violating the equality clause of section 1 of the Fourteenth Amendment to the Federal Constitution and section 11 of article 1 of the Constitution of California. The point is entirely without merit. The Legislature may not in one section or one statute be required to enact all of the penal laws. It has provided: "Every person who enters any house * * * with intent to commit * * * petit larceny or any felony is guilty of burglary." Pen. Code, § 459. All burglars who enter with the intent to commit petit larceny are included—no favorites shown; therefore there was no violation of the equality clause relied on.

[10] In his closing brief the defendant states that this court may not consider evidence of an entrance into any dwelling house with the intent to commit the misdemeanor of battery, simple assault, etc. It is not contended to the contrary. However, by virtue of section 459, it is proper to consider assaults committed after the entry has been made.

[11] Again, it is asserted that, to prove the entry was made with intent to commit larceny, there must be evidence that property, in the house entered was actually taken, stolen, and carried away. The contention is without merit. Intent may be proved by the testimony or the admission of the person whose intent is the question involved. Fanning v. Green, 156 Cal. 279, 104 P. 308.

[12-15] It is next contended that the depositions taken before the committing magistrate may not be considered, and the defendant cites section 686 of the Penal Code. That section is addressed to the direct evidence of witnesses on the trial of a criminal action. However, it contains nothing which supports the contention made by the defendant. He must concede at once that the district attorney, in framing an information, may base it on any offense shown by the depositions. Section 809, Pen. Code. Furthermore, if it be claimed that a defendant was not legally committed by a magistrate (section 995, Pen. Code), the committing papers are the record in support of, or refutation of, that contention. The trial court takes judicial notice of its own records in the proceeding on trial. 23 C. J. 109. No authority is cited and we know of no reason why the trial judge when determining the degree of burglary may not consult the depositions returned by the committing magistrate. People v. Paraskevopolis, 42 Cal. App. 325, 183 P. 585. In that case, at page 330 of 42 Cal. App., 183 P. 585, 587, the court said: "We are not, however, to be understood as holding that the voluntary admission by the defendant, whether in the form of a mere statement or in that of a plea to the charge, that he is guilty of a particular degree of a crime divided into degrees, will not constitute a sufficient evidentiary predicate for the determination by the court of the question of degree, notwithstanding that such statement may not be, or such plea is not, given under oath.. To the contrary, we think a voluntary statement or plea by the accused would be sufficient to uphold the determination by the court of the degree. But, even in such case, there must nevertheless be a determination by the court of the degree. In brief, there must be such a determination regardless of the character or nature of the evidence by which the fact is ascertained." See, also, People v. Hall, 105 Cal. App. 359, 362, 287 P. 533. People v. Middleton, 103 Cal. App. 135, 283 P. 976, contains nothing to the contrary. Continuing, the defendant asserts that the papers transmitted by the committing magistrate do not form a part of the judgment roll. That will be conceded, but the defendant based his motion on "the files, papers, proceedings and records in the above entitled cause now on file in the office of the county clerk of the county of Monterey, state of California." Among such documents were the papers received from the committing magistrate.

The order appealed from is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

137 Cal.App. 579

MARRS v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 9443.

District Court of Appeal, Second District, Division 1, California.
March 29, 1934.

1. Divorce ⚷238.

Allowance for support of guilty wife by decree granting husband divorce is beyond superior court's jurisdiction, unless based on property settlement contract.

2. Divorce ⚷238.

Provision of interlocutory decree, granting husband divorce from guilty wife, for payment of monthly sum by him for her support, pursuant to stipulation for payment of alimony, *held* void, in absence of record showing property settlement agreement.

Proceeding by William Lester Marrs for certiorari to review an order of the Superior Court in and for Los Angeles County, Parker Wood, Judge, adjudicating petitioner's guilt of contempt of court in failing to pay alimony and sentencing him to imprisonment in the county jail.

Order annulled.

Wilbert C. Hamilton, of Los Angeles, for petitioner.

Stoner & Gardner, of Los Angeles, for respondents.

YORK, Justice.

Elizabeth Arletta Marrs brought action against her husband, William Lester Marrs, the petitioner here, for separate maintenance and support; the defendant husband answered and filed a cross-complaint for divorce. The cause was heard March 20, 1933, and, no evidence having been offered on behalf of plaintiff and cross-defendant, an interlocutory decree of divorce was granted to defendant and cross-complainant, which provided that the husband pay to the wife the sum of $60 per month for her support and maintenance, also attorney fees and costs. On October 2, 1933, at the instance of the wife, an order to show cause in re contempt was issued. On October 13, 1933, the husband moved the court to modify the interlocutory judgment of divorce, which motion was continued. On October 26, 1933, both the order to show cause in re contempt for failure of the husband to pay alimony, and the motion of the husband to modify the interlocutory decree of divorce came on for hearing. The motion of the husband to modify the decree of divorce was by the court denied "due to stipulation by attorney for defendant as to support at time of trial and due to the fact the Court holds that Order based on such stipulation is not void." The court found defendant able to pay $60 per month, as provided in the decree of divorce, also found that failure of husband to pay was deliberate and that therefore he was guilty of contempt, and imposed sentence of five days in the county jail.

Petitioner upon petition for writ of review to this court contends that the court acted in excess of its jurisdiction when it granted alimony to the wife in view of the fact that the husband was granted the divorce for the fault of the wife.

Respondents, on the other hand, maintain that the interlocutory decree of divorce was based upon a contract of property settlement.

At the time of trial of the divorce action, the following proceeding took place:

"The Court: Let us proceed in the case of Marrs against Marrs. Mr. Stoner: We are prepared to enter into a stipulation, your Honor. If your Honor please, in this case, we desire to enter into a stipulation. I am representing the plaintiff, Elizabeth R. Marrs, and Mr. Hamilton represents the defendant, William Lester Marrs, and let the record show that William Lester Marrs is in the courtroom at the time I make this statement or this stipulation. It is stipulated between the parties that the defendant may proceed with his cross-complaint and in the event that it appears to the court he has a cause of action for divorce and the divorce will be granted, subject to the payment of alimony in the sum of $60.00 a month to the plaintiff, Elizabeth R. Marrs, and that the defendant also pay the sum of $40.00 for attorney's fees and $15.00 costs, which was the order of the court on December 19, 1932, by Judge Dudley L. Valentine.

"Mr. Hamilton: It is so stipulated, your Honor."

[1] The making of an allowance for the support and maintenance of a guilty wife is beyond the jurisdiction of a superior court, unless based upon a contract of property set-

tlement. Johnson v. Superior Court of Fresno County, 128 Cal. App. 584, 590, 17 P.(2d) 1055, 1058, and cases there cited. In the cited case it appeared from the first paragraph of the interlocutory decree of divorce in favor of the husband that the parties had mutually effected a settlement of their property rights, with a fairly full description of the terms of their settlement, which contained no reference to the permanent support of the wife, and the second paragraph contained the usual recitals that the husband was entitled to a divorce on the ground of extreme cruelty and concluded with a finding that the wife was physically incapable of earning a livelihood and decreed that the husband pay to her "as and for alimony" a stated sum per month, and the third paragraph confirmed and approved the division and settlement of the property rights. But the court there held that, in spite of this showing, "it sufficiently appears from the decree that the award of permanent support to the wife was not based on the contract settling the property rights of the parties," and refused a writ of mandate to compel the trial court to order the issuance of an execution against the property of the husband for unpaid installments of the monthly allowance.

[2] In the case now before us, it appears that the interlocutory decree of divorce provided that the husband pay to the wife the sum of $60 per month for her support and maintenance, and that this provision was directly based upon the stipulation of the parties providing for the payment of alimony. The trial court, in its order finding petitioner guilty of contempt of court said: "Motion to modify Interlocutory Decree filed on October 14, 1933, is denied, due to stipulation by attorney for defendant as to support at time of trial and due to the fact the Court holds that Order based on such stipulation is not void." At no place in the record does it appear that the parties entered into an agreement settling their property rights.

We are convinced that the provision awarding alimony to the wife of petitioner was void. Therefore the order adjudging the petitioner guilty of contempt and sentencing him to imprisonment as punishment therefor is annulled.

We concur: CONREY, P. J.; HOUSER, J.

137 Cal.App. 533

PEOPLE v. SHAW.

Cr. 163.

District Court of Appeal, Fourth District, California.
March 23, 1934.

1. Indictment and Information 🔑114.

Charge in information alleging prior conviction of receiving stolen property, not alleging that accused was imprisoned therefor, *held* insufficient for consideration in determining whether accused was habitual criminal (Pen. Code, § 644).

2. Indictment and Information 🔑114.

Where information charging crime of possessing concealable firearm by ex-convict alleged prior convictions but did not allege that accused was imprisoned therefor, allegation would be construed as referring to accused's status as ex-convict rather than alleging prior convictions to bring accused under Habitual Criminal Act (Pen. Code, § 644).

3. Indictment and Information 🔑114.

Allegation in information of previous conviction of obtaining property by false pretenses in Oregon, not stating that property was worth more than $200 so as to be considered felony in determining punishment under Habitual Criminal Act, *held* sufficient to support finding of prior conviction of felony where accused admitted allegation in plea and record did not show that value of property was less than $200 (Pen. Code, §§ 644, 668, 1025).

4. Criminal law 🔑1188.

Where judgment of conviction recited that accused was previously convicted and imprisoned three times for felony, but accused had in fact suffered only two prior convictions, conviction would be affirmed and accused returned to trial court for resentence (Pen. Code, § 644).

Appeal from Superior Court, Fresno County; Arthur Allyn, Judge.

Horace E. Shaw was convicted of the possession by an ex-convict of a concealable firearm, and he appeals.

Affirmed in part and reversed in part, with instructions.

Thomas Okawara, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

MARKS, Justice.

Defendant was accused by an information filed by the district attorney of Fresno county of the ownership and possession by an ex-convict of a firearm capable of being concealed upon his person, with appropriate allegations of prior convictions of felonies. Upon arraignment he entered a plea of not guilty to the charge and admitted three prior convictions. Fifteen days later he again appeared in court with his counsel, withdrew his plea of not guilty to the charge, and entered his plea of guilty thereto. Thereupon the court pronounced judgment, finding him an habitual criminal and sentencing him to life imprisonment in the penitentiary at Folsom.

The sole point for determination on this appeal is presented by the judgment contained in the clerk's transcript in which it was found and determined that defendant had suffered three prior convictions. It appears from the stenographic report of the proceedings at the time of sentence that the trial judge did not specifically find that defendant had suffered three prior convictions of felonies with confinements in the penitentiaries resulting therefrom.

The information contains allegations of four prior convictions. The first was on March 11, 1922, in the superior court of Merced county, Cal., for the crime of receiving stolen property. There is no allegation that defendant served a term in any prison or penitentiary in punishment of this offense.

The second conviction occurred on August 1, 1925, in Klamath county, Or., for the offense of obtaining property by false pretenses. It was alleged that he served a term in a state prison therefor.

The third conviction was alleged to have occurred October 10, 1926, in the superior court of San Joaquin county, Cal., when he was convicted of a felony, described as passing fictitious checks. It is alleged that he served a term in the state's prison as punishment for this offense.

The fourth conviction occurred on May 11, 1932, in Pierce county, Wash., where he was convicted of forgery. He served a term in the state's prison for this offense.

[1, 2] When defendant first entered his plea, he admitted having suffered three prior convictions charged in the information. Owing to the fact that four are alleged there might have been some confusion as to the convictions admitted were it not for the fact that it appears that all parties agreed in the trial court that the convictions admitted by defendant were (1) that of August 1, 1925, in Klamath county, Or.; (2) that of October 10, 1926, in San Joaquin county, Cal.; and (3) that of May 11, 1932, in Pierce county, Wash., in each of which it is alleged and admitted that defendant was punished by imprisonment in a state's prison. The allegation of the conviction of receiving stolen property on March 11, 1922, does not contain an allegation that defendant was imprisoned for his offense. This renders this charge insufficient to be considered in determining him an habitual criminal. People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Arnest (Cal. App.) 23 P.(2d) 812; People v. Vaile (Cal. App.) 25 P.(2d) 993; Ex parte Fontino (Cal. App.) 27 P.(2d) 413. However, this allegation was attached to and made a part of that portion of the information in which defendant was accused of being an ex-convict and it may be fairly construed as an attempt to allege his status as an ex-convict rather than to allege a prior conviction and imprisonment to bring him under the terms of the Habitual Criminal Act. Section 644, Pen. Code. With this interpretation the information alleged three prior convictions with resulting terms served in state prisons or penitentiaries.

[3] Appellant urges that the conviction of the offense of obtaining property by false pretenses in Klamath county, Or., was not necessarily a felony and cannot be considered in determining that he was an habitual criminal. He maintains that under the Oregon statute the offense of obtaining property of a value less than $200 by false pretenses is made a felony, while in California this offense involving property of a value of less than such sum would amount to a misdemeanor only. Under the provisions of section 668 of the Penal Code, where a defendant has been convicted under the laws of another state, the effect of such a conviction on the question of his being an habitual criminal must be measured by the punishment to be imposed in California for the offense. If it appeared from the record that the value of the property obtained in Oregon was less than $200, the offense would have to be regarded as a misdemeanor in determining whether or not defendant was an habitual criminal. There is nothing in the record to support the assumption that the value of the property obtained in Oregon was less than $200 and we are not authorized to go outside of the record to determine the question. Defendant was charged in the information with having been "on or about August 1, 1925, in a court of competent jurisdiction in Klamath County, Oregon, convicted of a fel-

ony, to-wit: Obtaining property by false pretenses, and served a term in a state prison therefor." He admitted these allegations in his plea and under the provisions of section 1025 of the Penal Code this is sufficient to support the finding and judgment of the trial court that in this instance he had suffered the conviction of a felony under the terms of section 668 of the Penal Code and had served a term in the state's prison.

[4] It was admitted in the trial court, and is conceded by the Attorney General, that the crime of passing fictitious checks is not one of the offenses described in section 644 of the Penal Code upon which a judgment finding the defendant an habitual criminal can be based. Eliminating this offense it leaves defendant with two prior convictions of offenses which are described in section 644 of the Penal Code upon which a judgment of being an habitual criminal can be based. Where the defendant has suffered but two prior convictions with resulting terms served in a state prison or penitentiary, the term of imprisonment is for his natural life with no right of parole for twelve years. Where there are three such prior convictions, the punishment fixed is imprisonment for life without the right of parole. The judgment appearing in the clerk's transcript recites that defendant had suffered three prior convictions, which if enforced would require him to remain in the penitentiary for the remainder of his life without right of parole. This portion of the judgment is erroneous as it is apparent that defendant suffered but two prior convictions and imprisonments which can be considered and that defendant should be entitled to apply for parole after having served twelve years. Under authority of People v. Arnest, supra, and People v. Vaile, supra, that portion of the judgment finding defendant an habitual criminal with three prior convictions should be reversed and the balance of the judgment should be affirmed. Under the authority of the cases just cited defendant must be returned to the superior court of Fresno county and resentenced. The judgment should find that he is an habitual criminal who had suffered two prior convictions of felonies with resulting terms in state prisons or penitentiaries.

That portion of the judgment finding defendant guilty as charged in the information is affirmed.

That portion of the judgment finding that defendant had suffered three prior convictions of felonies with terms served in state prisons or penitentiaries on each is reversed with instructions to the trial court to have defendant returned to that court and thereupon have judgment pronounced upon him in accordance with the views herein expressed.

We concur: BARNARD, P. J.; JENNINGS, J.

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137 Cal.App. 510

STEPHANI v. ABBOTT et al.

Civ. 4602.

District Court of Appeal, Third District, California.
March 23, 1934.

Rehearing Denied April 21, 1934.

1. Judgment 🔑713(1).

Theory upon which action was tried could not be questioned in subsequent action wherein plaintiff claimed that former judgment was res judicata of defense raised by defendants.

2. Judgment 🔑713(2).

Defendants were bound to set forth defense of prescriptive easement in action for wrongfully flowing water upon plaintiff's land or be estopped from doing so in subsequent action against them by same plaintiff for such further trespasses to same land.

3. Judgment 🔑713(2).

Defendant must set up all of his defenses to action or be thereafter estopped.

4. Pleading 🔑276.

Permission to file supplemental complaint rests in trial court's discretion, provided it is in furtherance of and consistent with original complaint and is not new or independent cause of action (Code Civ. Proc. § 464).

5. Pleading 🔑279(3).

Permitting plaintiff to file supplemental complaint reciting further instances of trespass of nature similar to acts alleged in original complaint for wrongfully flowing water upon plaintiff's land *held* not error (Code Civ. Proc. § 464).

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Lulu M. Stephani against Myrtle C. Abbott and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellants.

G. P. Hurst, Elmer W. Armfield and Arthur B. Eddy, all of Woodland, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment awarding plaintiff and respondent damages, and a preliminary injunction which restrained appellants from turning waste or irrigation water over the lands of plaintiff. The properties here involved were owned originally by Thomas W. Guthrie, who divided his holdings in parcels and conveyed a portion thereof to his daughters, among whom were the respondent and the appellant herein. Appellant Abbott is the owner of a tract immediately south of respondent, and another sister is the owner of a tract immediately to the north of respondent; the property faces the county road, and running through the property is an old drainage ditch.

The complaint is in two counts. In the first cause of action it is alleged that appellants wrongfully turned large quantities of waste water from their irrigated lands across the fields of plaintiff, thereby overflowing portions of the lands of plaintiff to her damage, and that appellants threatened to continue such action until the same had ripened into a right. In the second cause of action it is alleged that at a subsequent date respondent suffered damage by similar acts on the part of appellants.

Appellants filed an answer denying the acts alleged in the complaint and asserting their right to turn irrigation water through what is called the "drainage ditch," and pleaded a prescriptive right so to do. Thereafter, over the objection of appellants, respondent was allowed to file a supplemental complaint setting forth in nine separate counts various items of damage caused by flooding on specific later dates, and also sought an injunction and pleaded a judgment in a former action between the parties hereto as a bar. Upon the issues thus framed the case was tried, but the court declined to permit the introduction of any testimony on the issue of a prescriptive right to drain the surplus waters into or through the drainage ditch on the theory that the judgment in the former action was res adjudicata as to the existence of any such prescriptive right or easement.

One of the first questions to be determined, therefore, is whether such former judgment is a bar or estoppel to the claim of a prescriptive easement here set up by defendants, and to determine that question we must examine the issues determined in the first action.

In 1917 Lulu M. Stephani filed an action in the justice's court against Myrtle C. Abbott and Lawrence Abbott, her husband, wherein she alleged ownership in herself of a particular piece of property and that defendant therein, Myrtle Abbott, owned a tract adjoining and immediately south of her property, and that defendants in October, 1916, unlawfully and willfully entered upon the premises of plaintiff and cut the levee which she had constructed on the south side of her lands and caused water to flow upon the lands of plaintiff; and as a second and third cause of action plaintiff alleged that on specific subsequent dates defendants caused irrigation water to flow from their land upon the lands of plaintiff, causing damage. To this complaint defendants entered a general denial and by way of affirmative defense averred: "That all the matters and transactions alleged, damage and negligence in said complaint alleged, have been done and caused by a certain drainage ditch running through the lands of plaintiff, defendants and other parties, and which drainage ditch was built and constructed by the grantors of the plaintiff and defendant Myrtle C. Abbott, for the purpose of the drainage of surface water and waste water from irrigation of the lands of the parties hereto; and that the damage, if any, was caused by the plaintiff herein obstructing said drainage canal through and upon her own lands; that said drainage canal has been used and operated by the parties hereto constantly for more than twenty years, and the plaintiff herein caused said drainage canal along and across and over her said lands to be destroyed in such a way as to prevent the drainage water and waste water from irrigation passing along, across and over her said lands, through said ditch."

It is further alleged by defendants that the relief sought related to, depended upon, and necessarily involved, the title and possession of the real property described in the complaint. On the filing of this answer the cause was certified to the superior court on the theory it involved the title to real property and that the justice's court had no jurisdiction. The trial was thereupon had in the superior court and judgment and findings were entered in favor of plaintiff. The court found the above-quoted allegation in the answer to be untrue.

Appellants now assert that the allegations of that part of the answer filed in the justice's court and quoted above did not allege prescriptive right in the drainage ditch, but only affirmatively alleged that the damage of which plaintiff complained was not caused by defendants, but was caused by the obstructing of the drainage canal and for the purpose of locating and identifying the drainage canal it was described as that canal used by the parties for more than twenty years.

We believe, however, a reading of the paragraph referred to discloses the allegations as to the use and operation for a period of more than twenty years were not alleged for the purpose of description, but was an allegation of an easement or prescriptive right to the drainage ditch.

[1] Appellant also urges that the action in the justice's court was an action for trespass and as such did not involve the title to real property, the plaintiff being only required to prove possession and not ownership to sustain the action. As against this contention, however, we have the direct allegation of defendants in their pleading that both title and possession of the real property were directly involved, and defendants having directly raised that issue, with the result of ousting the justice's court of jurisdiction, and having tried the case without objection, cannot now be heard to question that fact.

From the evidence introduced in the first trial it appears that appellants turned their surplus irrigation water from their lands northward until it reached an embankment on the south side of plaintiff's irrigation ditch. There the water accumulated until defendant Abbott cut plaintiff's irrigation ditch embankment, permitting the waters to pass through the cut northward over plaintiff's lands.

Prior thereto plaintiff had placed two bulkheads in the drainage canal, one at the division line of plaintiff's and appellants' property and the other a short distance to the north. When appellants irrigated their lands and drained the water into the drainage ditch these waters were intercepted by the bulkheads and were forced easterly across plaintiff's fields. To avoid this appellants cut the bulkheads placed in the drainage ditch by plaintiff on her land, thus permitting the water to flow unobstructed in the drainage canal about halfway across plaintiff's property where it spread across plaintiff's lands, causing the damage complained of.

With this situation in mind it is apparent that what appellants referred to, when they alleged in their affirmative defense in the justice's court action quoted above "that the damage of plaintiff, if any, was caused by plaintiff * * * obstructing said drainage canal through and upon her own lands," was the drainage canal or old drainage ditch, which is an issue in the present action. It is also apparent from the record in the first action that it was the contention of defendants herein that a drainage ditch for the purpose of carrying water from irrigation drainage when the land was subdivided and transferred to the grantor's children, having existed across the Guthrie tract at that time, and for many years prior thereto the right to so drain such waters through this drainage ditch across the smaller tracts conveyed to each child continued to exist and the right passed with the lands.

However, the judgment of the court in the first suit was a rejection of this contention. Still, it is very clear that a drainage ditch was thus involved in litigation, and it is obvious the drainage ditch here involved and the drainage canal or old drainage ditch there involved are one and the same. So, too, the act of cutting the bulkheads and reopening the drainage canal by defendants was an attempt to assert a right to an easement in the drainage ditch. The awarding of the judgment by the trial court is a finding, however, that this right did not exist in favor of defendants, and that plaintiff was entitled to damages not only from injuries caused by drainage waters through the drainage canal, but from other waters also which flowed over the lands of plaintiff by way of the irrigation ditch along the south line of her lands.

[2] In the action filed in the justice's court and in the action here on appeal, the plaintiff and defendants are the same as are also the respective parcels of land alleged to be owned by each. In each case the plaintiff alleged that defendants were wrongfully flowing water upon her lands, interfering with her use to the right thereof. Therefore, if defendants at the time of the trial in the first suit had any right of any kind or character to flow water upon the lands of plaintiff, or any part thereof, they were bound at that time to set forth that right or be foreclosed from doing so. This principle was announced as early as Gray v. Dougherty, 25 Cal. 266, and has been consistently reaffirmed. Price v. Sixth District Agricultural Association, 201 Cal. 502, 258 P. 387.

[3] So, too, must a defendant be prepared to set up all of his defense or be thereafter estopped. 15 R. C. L. § 446.

In Bingham v. Kearney, 136 Cal. 175, 68 P. 597, it is said: "It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated. Neither will the law allow the parties to trifle with the courts by piecemeal litigation. When plaintiff was brought into court by defendant in the former case, she certainly knew her rights. If she wished to rescind the contract, or if she had rescinded it, as she said in her answer she had done, then and there was the time to present her pleadings and evidence, and insist upon all rights to which she was entitled under the law. If she could not get the award of the law upon the facts in the lower court, she could have appealed. She did not do so. She is now met by the presumption that all the facts and matters in controversy were disposed of in the former suit, and the further presumption that the judgment in the former suit is correct. If she failed to assert her claim properly, or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary."

This rule is repeated and upheld in Dickey v. Kuhn, 85 Cal. App. 8, 259 P. 93; Little v. Smith, 47 Cal. App. 8, 189 P. 1059, and Quirk v. Rooney, 130 Cal. 505, 62 P. 825.

[4, 5] Appellants also complain of the supplemental complaint filed by plaintiff over objection, contending that the original complaint sued not for a continuing trespass, but for a separate and distinct invasion of her property right. Permission to file a supplemental complaint is in the discretion of the trial court, section 464, Code Civ. Proc.; Harding v. Minear, 54 Cal. 504; Greenwood v. Adams, 80 Cal. 77, 21 P. 1134, provided it is in furtherance of and consistent with the original complaint and is not a new or independent cause of action. In this case plaintiff sued for damages for injury to her lands, reciting specific instances thereof, and then alleges generally: "That the said defendants have heretofore threatened, and now threaten, to continue so to turn waste and irrigation water from defendants' said premises upon the said lands of this plaintiff, and to cause such waters to flow over, upon and across plaintiff's said premises to the detriment and injury of this plaintiff," and thereupon prayed for an injunction.

The supplemental complaint recited further instances of trespass of a nature similar to the acts alleged in the original complaint, both the original and supplemental complaints showing an invasion of plaintiff's right to the use of her property without interference from defendants, the damages being incidental thereto. It cannot be said, therefore, the court abused its discretion in permitting the supplemental complaint to be filed.

Appellants also claim the court erred in holding that appellants did not acquire an easement in the old drainage ditch by a deed from their grantor, but that being a matter before the court in the original action filed in the justice's court, it cannot again be litigated and is res adjudicata.

There are other points urged for reversal, such as the claim that if any damage were suffered by respondent it was because of the act of an independent tort-feasor who discharged waters in the same way as appellants and flooded the same lands. We do not believe the record bears out this contention, and as is stated in Reclamation District No. 833 v. American Farms Company, 209 Cal. 74, 285 P. 688, 690: "It is well settled that one who contributes to a damage cannot escape liability because his proportional contribution to the result may not be accurately measured. Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; People v. Gold Run D. & M. Co., 66 Cal. 138, 56 Am. Rep. 80, 4 P. 1152."

It is also claimed that the award of damages included the overflowing of lands not described in the complaint. That also does not appear to be sustained by the record.

For the foregoing reasons we believe the judgment should be affirmed. It is so ordered.

We concur: PLUMMER, J.; THOMPSON, J.

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